

No. 279A20

NO. 279A20

DISTRICT 18

SUPREME COURT OF NORTH CAROLINA

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)	
STATE OF NORTH CAROLINA)	
)	
v.)	From Orange County
)	
DEMON HAMER)	

DEFENDANT APPELLANT'S NEW BRIEF

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ISSUE PRESENTED

- I. DID THE COURT OF APPEALS MAJORITY ERR BY DETERMINING THAT MR. HAMER KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL AND BY AFFIRMING THE TRIAL COURT'S JUDGMENT?

STATEMENT OF THE CASE

Mr. Hamer was charged in a citation with speeding 94 miles per hour in a 65 mile-per-hour speed zone. He was convicted in Orange County District Court on 26 July 2018. He filed a *pro se* notice of appeal on 6 August 2018. (R pp 2 – 4; T p 69).

This matter came on for trial de novo at the 26 November 2018 session of Orange County Superior Court before the Honorable Michael J. O'Foghludha, Judge of Superior Court. Judge O'Foghludha treated Mr. Hamer's notice of appeal as a petition for writ of certiorari and granted the petition. (T p 6).

Mr. Hamer's attorney informed the court that the parties had agreed to a bench trial. (T pp 3 – 4, 7 – 8). Judge O'Foghludha found Mr. Hamer guilty on 29 November 2018 following a bench trial. He was ordered to pay the court costs. (R p 9; T p 73).

Mr. Hamer appealed to the Court of Appeals. (R p 10). On 16 June 2020, a majority of the Court of Appeals affirmed Mr. Hamer's conviction in a published opinion. Chief Judge McGee dissented. *State v. Hamer*, 845 S.E.2d 846 (N.C. Ct. App. 2020).

On 19 June 2020, Defendant filed in this Court a request for temporary stay and petition for writ of supersedeas. The Court allowed the requested

stay on 22 June 2020. On 13 July 2020, Defendant timely file notice of appeal pursuant to N.C.G.S. § 7A-30(2) and N.C. R. App. P. 14(b)(1) based on Chief Judge McGee's dissent. On 14 July 2020, this Court allowed the defendant's petition for writ of supersedeas.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Mr. Hamer appeals of right under N.C.G.S. § 7A-30(2) and N.C. R. App. P. 14(b)(1) based on Chief Judge McGee's dissenting opinion.

STATEMENT OF FACTS

On 12 January 2018, Mr. Hamer was issued a citation alleging that he was speeding 94 miles per hour in a 65 mile-per-hour zone. He was convicted in Orange County District Court on 26 July 2018. (R p 2). On 6 August 2018, he filed a pro se written notice of appeal. (R p 3).

Mr. Hamer's case came on for trial de novo at the 26 November 2018, Criminal Session of Orange County Superior Court before the Honorable Judge Michael J. O'Foghludha. When Mr. Hamer's case was called for trial on 29 November 2018, the following exchange occurred between the court and trial counsel:

[THE STATE]: Your Honor, whenever you are ready, we can address Mr. Demon Hamer which is margin 9. He is charged with speeding 94 in a 65 and reckless driving.

THE COURT: All right. So this is a bench trial; correct?

[THE STATE]: Yes, sir. And I understand it –

[DEFENSE COUNSEL]: Yes, Your Honor.

....

THE COURT: Okay. So first of all, just technically, the defendant is waiving a jury trial?

[DEFENSE COUNSEL]: That's correct, Your Honor.

THE COURT: Okay. And I presume that there is a statute that allows that?

[DEFENSE COUNSEL]: That is correct, Your Honor. We have – the State and I have – the State has consented. We have – there is no disagreement about the bench trial.

THE COURT: Is it the same statute that says that Class I felonies can be waived? Is it under that same statute?

[DEFENSE COUNSEL]: If I'm not mistaken, Your Honor --

THE COURT: I know that one requires the consent of the State.

[DEFENSE COUNSEL]: I apologize.

[THE STATE]: Your Honor, I believe it's controlled by 15A-1201 --

THE COURT: Okay. Which does allow waiver of trial in a misdemeanor?

[THE STATE]: That's correct, Your Honor. Or I believe any charge except a capital offense.

THE COURT: Okay.

[DEFENSE COUNSEL]: It's 15A-1201 subsection (b).

THE COURT: Thank you, sir. So just as a technical matter . . . that's accepted by the Court under that statute since the State consents.

(T pp 3 – 4).

The court and counsel then briefly discussed whether the State intended to try a related charge of reckless driving and whether Mr. Hamer's appeal from district court was timely. The State voluntarily dismissed the reckless driving charge. Judge O'Foghludha treated Mr. Hamer's notice of appeal as a petition for a writ of certiorari and granted the petition. (T pp 4 – 6). The court then returned to the issue of how the case would be tried:

THE COURT: Okay. Now let me just -- before we start, can we -- can we do this without -- and I will do it with any formality you would like -- but can we treat it like a district court trial and simply hear the evidence and have me rule? Is there any objection to that? We don't have to go through any extra procedural hoops?

[THE STATE]: Your Honor, the State would prefer that. [Defense Counsel] has filed a motion for complete recordation, which includes pretrial hearings, motions hearings, bench conferences, opening statements, and closing arguments.

THE COURT: Well, that would be allowed.

[DEFENSE COUNSEL]: That's correct, Your Honor. So in full disclosure, I got this case on appeal from district court.

THE COURT: Yes, sir.

[DEFENSE COUNSEL]: So as long as everyone is okay with that, I will be fine treating this like a district court.

THE COURT: All right, sir. Your motion is allowed.

The State may proceed with the -- would you like to make an opening statement?

[DEFENSE COUNSEL]: No.

THE COURT: All right. The State can proceed with the evidence.

(T pp 7 – 9).

The case then proceeded to trial. The State offered testimony by Highway Patrol Trooper Hussey that on 12 January 2018 he was outside a patrol car monitoring the speed of cars on I-40. He saw a black Jeep he estimated was traveling 94 miles per hour in a 65 mile-per-hour zone. He measured the car's speed with radar at 94 miles per hour. Trooper Hussey advised Trooper Dodson, who was in the patrol car, that the black Jeep was going 94 miles per hour. Trooper Dodson then left to pursue the car. (T pp 15 – 29).

Trooper Dodson testified that he pursued and stopped the Jeep identified by Trooper Hussey. He issued a citation for speeding to Mr. Hamer. (T pp 48 – 51). The State rested its case. The following exchange then occurred between the court and Mr. Hamer:

THE COURT: Okay. Hold on just one second. And we will do that. I was just reading 20-1250 -- I'm sorry -- 15A-1201, we complied completely with that statute with the exception of the fact that I'm supposed to personally address the defendant and ask if he

waives a jury trial and understands the consequences of that. Would you just explain that to your client.

(Pause in proceedings while [Defense Counsel] consulted with the defendant.)

[DEFENSE COUNSEL]: Okay, Your Honor.

THE COURT: Okay. Mister -- is it Hamer or Hamer?

DEFENDANT: Hamer.

THE COURT: Mr. Hamer, I just have to comply with the law and ask you a couple of questions. That statute allows you to waive a jury trial. That's 15A-1201. Your defendant (sic) has waived it on your behalf. The State has consented to that. Do you consent to that also?

DEFENDANT: Yes, sir.

THE COURT: And you understand that the State has dismissed the careless and reckless driving. The only allegation against you is the speeding, and that is a Class III misdemeanor. It does carry a possible fine. And under certain circumstances it does carry possibility of a 20-day jail sentence. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: All right. Is that acceptable to you?

DEFENDANT: Yes, sir. I feel confident it was.

THE COURT: Thank you so much. You may have a seat.

(T pp 57 – 58).

Defense counsel then asked the court to take judicial notice of statutes and regulations concerning the retention of records. Counsel argued that the

Highway Patrol was required to retain dashcam videos in matters reasonably anticipated to be involved in litigation. The court took judicial notice of the statutes and regulations but ruled that they did not require the retention of any video recording in this case.

Mr. Hamer testified that he attempted to obtain the dashcam video and a printout of the radar reading while the case was pending in district court. Each time he requested the video, his case was continued. When he was tried in July 2018, he was told that the video had been deleted. (T pp 66 – 70).

Judge O'Foghludha found Mr. Hamer guilty and ordered him to pay the court costs. (R p 9; T p 73).

Mr. Hamer appealed, arguing that the record did not show a knowing and voluntary waiver of his right to a jury trial. (R p 10). On 16 June 2020, a majority of the Court of Appeals affirmed Mr. Hamer's conviction. Chief Judge McGee dissented.

ARGUMENT

I. THE COURT OF APPEALS' MAJORITY ERRED BY DETERMINING THAT MR. HAMER KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL.

A. *Standard of Review.*

This Court reviews a decision of the Court of Appeals to determine

whether it contains any error of law. *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020) (citations omitted).

This Court reviews cases where constitutional rights are implicated de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). Under de novo review, this Court “considers the matter anew and freely substitutes its own judgment” for that of the Court of Appeals. *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008).

B. *Argument.*

1. *The Opinions in the Court of Appeals.*

Appellant argued in the Court of Appeals that the trial court erred by conducting a bench trial where the record did not show that he made a knowing and voluntary waiver of his right to a jury trial under the North Carolina Constitution.

The majority in the Court of Appeals held that the trial court erred by commencing a bench trial without first personally addressing Mr. Hamer to determine whether he wanted to make a knowing and voluntary waiver of his right to a jury trial as required by N.C.G.S. § 15A-1201(d). However, the majority held that the court sufficiently corrected the error by a colloquy with Mr. Hamer after the State rested its case. The majority further held that Mr.

Hamer would not be entitled to relief in any event because he failed to show he was prejudiced by the court's error.

Chief Judge McGee dissented. She opined that Mr. Hamer and the trial court's failure to follow the statutory procedures for waiver of a jury trial resulted in a violation of Mr. Hamer's right to a trial by a properly constituted jury of twelve. Judge McGee concluded that this violation of the right to a jury trial constituted structural error requiring a new trial. She further opined that the trial court's colloquy with Mr. Hamer after the State rested its case was untimely and insufficient to establish a valid waiver of his constitutional right to a jury trial.

2. *The North Carolina Constitution guarantees the fundamental right to a jury trial but permits a limited, conditional right for a defendant to waive a jury trial with the court's consent.*

Until 2014, Article I, Section 24 of the North Carolina Constitution required a jury trial in every criminal case in superior court. This Court has held, *ex mero motu*, that the right to a trial by a jury of twelve persons not only could not be denied but could not be waived. *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971). The Court has held that a violation of the right to a properly constituted jury of twelve persons was error *per se*, requiring that the verdict be vacated and a new trial granted. *State v.*

Poindexter, 353 N.C. 440, 444, 545 S.E.2d 414, 416 (2001) (citations omitted).

Our Constitution was amended in 2014 to permit a defendant to waive a jury trial if the trial judge consents to the waiver. *See* 2013 N.C. Sess. Laws 300, §§ 4 and 5. (App. p 3). Our Constitution now provides:

No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly.

N.C. Const. art. I, § 24.

Pursuant to art. I, § 24, our General Assembly amended N.C.G.S. § 15A-1201 in 2014 and 2015 to prescribe the procedures to be followed for the trial court to determine whether it should permit a defendant to waive their right to a jury trial. 2013 N.C. Sess. Laws 300, §§ 4 and 5 (App. p. 3); 2015 N.C. Sess. Laws 289, § 1, eff. Oct. 1, 2015) (App. p 5).

The procedures enacted by the General Assembly applicable to this case permit a defendant in a non-capital criminal case in superior court to “knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury.” N.C. Gen. Stat. § 15A-1201(b). The statute mandates the following procedure:

First, the defendant shall give notice of intent to waive a jury trial by

any of the following methods:

(1) Stipulation, which may be conditioned on each party's consent to the trial judge, signed by both the State and the defendant and served on the counsel for any co-defendants.

(2) Filing a written notice of intent to waive a jury trial with the court and serving on the State and counsel for any co-defendants within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).

(3) Giving notice of intent to waive a jury trial on the record in open court by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

N.C. Gen. Stat. § 15A-1201(b) – (c)(1 – 3).

Once a defendant gives notice of intent to waive a jury trial, the statute mandates that “the State shall schedule the matter to be heard in open court to determine whether the judge agrees to hear the case without a jury.” N.C.

Gen. Stat. § 15A-1201(d). At the hearing in open court, the trial judge must:

- (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury;
- (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

Id.

If the trial judge consents to the defendant waiving a jury trial, the defendant then has the right to revoke the waiver one time if they do so in writing to both the State and the judge within ten business days of their initial notice of intent to waive a jury trial. Otherwise, the defendant may only revoke the waiver if the trial judge finds the revocation would not cause unreasonable hardship or delay to the State. Once a revocation has been granted, the decision is final and binding. N.C. Gen. Stat. § 15A-1201(e).

3. *A defendant's waiver of the fundamental constitutional right to a jury trial can be upheld only when the record shows the waiver was the defendant's knowing and voluntary choice.*

As Chief Judge McGee noted in her dissent, the statutory procedures for waiver of a jury trial address both the requirements explicitly set out in the Constitution and the common law requirements for the waiver of a constitutional right. *State v. Hamer*, 845 S.E.2d 846, 857–58 (N.C. Ct. App. 2020) (dissenting opinion).

Without regard to the statutory procedures, the waiver of a constitutional right must be knowing and voluntary.

[T]he waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will.

State v. Thacker, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980) (citation omitted).

4. *The majority erred by holding that the trial court's untimely colloquy with Mr. Hamer after the State rested its case was sufficient to establish a knowing and voluntary waiver of his right to a jury trial.*
 - a. *A constitutionally valid waiver of a jury trial must occur prior to trial.*

Mr. Hamer did not give notice of intent to waive a jury trial in the manner prescribed by N.C.G.S. § 15A-1201(c).¹ The trial court did not address Mr. Hamer or make any inquiry of him at all until after the State rested its case. (T pp 3 – 8, 56 – 58). Although Mr. Hamer's attorney told the court that he and the State had agreed to a bench trial, the right to a jury trial belongs to the defendant, not his lawyer. The trial court must inquire of the defendant about waiver, not the defendant's attorney. *See State v. Pruitt*, 322 N.C. 600,

¹ The majority noted that the record was "unclear" about when and how Mr. Hamer gave notice. *Hamer*, 845 S.E.2d 846, 850 (N.C. Ct. App. 2020). The dissent opined that the court "could, and possibly should, locate and take judicial notice of any relevant documents or other evidence in the lower court's files in order to determine whether Defendant properly gave notice." *Id.* at 860–61 (N.C. Ct. App. 2020)

Appellant filed a Motion to Amend Record on Appeal with this Court on 7 August 2020 in an effort to make it clear that the record does not contain any notice by defendant of an intent to waive jury trial simply because no such notice was ever given. The Court had not ruled on appellant's motion at the time this brief was filed.

604, 369 S.E.2d 590, 593 (1988) (rejecting State’s contention that defense attorney’s advice to defendant about seriousness of waiver of counsel could substitute for an adequate inquiry of defendant by the trial court.)

As Judge McGee noted in her dissent, in the absence of a valid waiver of the right to a jury trial, proceeding with a bench trial results in the trial being conducted without a constitutionally constituted trier of fact. *Hamer*, 845 S.E.2d 846, 854. A verdict resulting from a trial by an improperly constituted trier of fact cannot stand. *State v. Hudson*, 280 N.C. 74, 80, 185 S.E.2d 189, 193 (1971) (trial completed with eleven jurors after a juror became ill resulted in a verdict that was a nullity despite the defendant’s consent).

The Constitution requires that any waiver of a jury trial be made “subject to procedures prescribed by the General Assembly.” N.C. Const. art. I, § 24. The procedures prescribed by the General Assembly provide that notice, trial court consent, and any revocation of a waiver of jury trial must occur before a trial begins. N.C. Gen. Stat. §§ 15A-1201(c) – (e). Nothing in the Constitution or statutory procedure contemplates consent to waiver, or revocation of waiver, occurring after the trial begins.

Our Constitution requires that the trial judge consent to a waiver of the right to a jury trial. N.C. Const. art. I, § 24; N.C. Gen. Stat. § 15A-1201(d).

This requirement is a safeguard both to the defendant's right to a jury trial and the public's interest in the preservation of their constitutional rights and the fair and proper administration of justice.

The trial court cannot properly perform its duty and exercise its discretion about whether to consent to a jury trial waiver where it makes no inquiry of the parties. Here, the trial court simply accepted an agreement by counsel for the State and the defendant. (T pp 3 – 4).

The Court of Appeals' majority held that the trial court's inquiry after the case was partially tried was sufficient. The majority focused solely upon whether the trial court's mid-trial colloquy with Mr. Hamer was sufficient to show a knowing and voluntary waiver of his right to a jury trial. The majority did not discuss or explain how the trial court can properly perform its duty to determine whether it is appropriate to permit a waiver of a bench trial after it has already commenced the trial.

Aside from the fundamental flaw in permitting a trial to begin without a constitutionally constituted trier of fact, determining whether a defendant made a knowing and voluntary waiver of their right to a jury trial *after* the trial is underway presents "difficulties in evaluating the reliability of subsequent expressions of consent." *See U.S. v. Reyes*, 603 F.2d 69, 72 (9th Cir., 1979) (holding under Federal Rules that a defendant's consent to waive a

jury of twelve must be determined when the waiver is made, not at some subsequent stage of the trial). In *Reyes*, the court noted that one concern is that “the defendant's desire not to antagonize the judge who imposes sentence upon him may cause him to agree” to the waiver. *Id.* As the *Reyes* court noted, “[t]his kind of subtle coercion is difficult to detect in an appellate record.” *Id.*

Here, Mr. Hamer was confronted with an accomplished fact — trial by a judge. The State had already presented its evidence. He was told that his lawyer had, on his behalf, agreed to a bench trial. He was asked if he now consented and found this “acceptable.” (T pp 57 – 58). The record does not show that he understood what the right to a jury trial encompasses, but even if it did, for Mr. Logan to object at that point would put him in the position of contradicting the lawyer defending him and perhaps antagonizing the judge who would render the verdict and possible sentence. Moreover, nothing in the record shows that he knew he could have refused to consent at that point in the trial.

- b. *The trial court’s colloquy with Mr. Hamer was not sufficient to show a knowing and voluntary waiver of his right to a trial by jury.*

The trial court told Mr. Hamer that his attorney had waived a jury trial on his behalf and that the State had consented. The judge then asked, “Do you consent to that also?” Mr. Hamer responded, “Yes, sir.” The judge then

told Mr. Hamer that he was charged with speeding, and that carried a possible punishment of a fine and up to twenty days in jail. The judge then asked Mr. Hamer, “Do you understand that?” Mr. Hamer answered, “Yes, sir.” The judge asked, “All right. Is that acceptable to you?” Mr. Hamer gave the somewhat ambiguous response, “Yes, sir. I feel confident it was.”

Nothing in the trial court’s colloquy with Mr. Hamer shows that he understood what the right to a jury trial entails or that he was making a free and voluntary waiver of the right.

“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” *State v. Covington*, 258 N.C. 501, 504, 128 S.E.2d 827, 829 (1963) (citing and quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The right to a jury trial is the right to a trial of twelve persons selected by the parties who must unanimously agree upon a verdict. *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971) (citations omitted). Waiver of that right results in a judge alone rendering a verdict. Further, waiver of the right to a jury trial results in all sentencing factors in N.C.G.S. 20-179 and subsections (a1) and (a3) of N.C.G.S. 15A-1340.16 being decided by the judge rather than a jury. N.C. Gen. Stat. § 15A-1201(b).

Mr. Hamer represented himself and was tried by a judge alone in district court. (T pp 68 – 69). Nothing in the record shows that Mr. Hamer

understood that in superior court, he had an absolute right to participate in the selection of a jury of twelve persons that would have to arrive at a unanimous verdict.

The trial court cannot simply assume that a defendant understands the right to a jury trial. *See State v. Bullock*, 316 N.C. 180, 186, 340 S.E.2d 106, 109 (1986) (holding that the court could not assume a defendant who was a magistrate knew of his rights and that the inquiry concerning waiver of right to counsel was therefore unnecessary); *see also State v. Moore*, 362 N.C. 319, 326, 661 S.E.2d 722, 726 (2008) (defendant's competency and literacy could not have been apparent to trial judge and in any event defendant's determination to proceed pro se did not satisfy constitutional standard that a defendant's waiver of the right to counsel must be knowingly, intelligently, and voluntarily made.)

The majority in the Court of Appeals noted that when the trial court addressed Mr. Hamer after the State rested its case, "the court provided [him] time to confer with his attorney to discuss the consequences of his decision to waive a jury trial." *Hamer*, 845 S.E.2d 846, 852. The trial court cannot delegate its duty to ensure that a defendant understands the consequences of waiving the right to a jury trial to the defendant's attorney. *See State v. Bullock*, 316 N.C. 180, 184, 340 S.E.2d 106, 108 (1986); *State v. Pruitt*, 322

N.C. 600, 604, 369 S.E.2d 590, 593 (1988).

The court must determine whether the defendant's decision to waive the right to a jury trial is voluntary. Defendants may be pressured to waive the right to a jury trial in various ways. Prosecutors may offer concessions in exchange for waiver of the right. Defense attorneys may press a client to waive the right. Judges may, inadvertently, suggest a more favorable outcome if the defendant dispenses with a jury trial. *See State v. Smith*, 825 A.2d 1055, 1077 (2003) (holding that it is permissible for a defendant to elect a bench trial instead of a jury trial in exchange for concessions from the State as long as there are no representations of leniency or harshness by the trial judge); *see also State v. Baxter*, 204 S.W.3d 650, 654 (2006) (holding waiver voluntary where the defendant and the prosecutor struck a bargain for lesser charges in exchange for the waiver).

Here, the trial court's inquiry of Mr. Hamer was not sufficient to determine whether he had been promised anything or coerced in any way to waive his right to a jury trial.

The Court of Appeals' majority erred by holding that the trial court's untimely colloquy was sufficient to show a knowing and voluntary waiver of Mr. Hamer's right to a jury trial.

5. *The Court of Appeals' majority erred by holding that the*

trial court's error in failing to follow the procedure for waiver of a jury trial was subject to harmless error review.

The majority, relying upon the Court of Appeals' prior decision in *State v. Rutledge*, 832 S.E.2d 745 (N.C. Ct. App. 2019), held that Mr. Hamer was required to show that he was prejudiced by the trial court's violation of N.C.G.S. § 15A-1201. The majority assessed the evidence and held, in effect, that there was no reasonable possibility that one of twelve jurors would have reached a different verdict.

Mr. Hamer sought to raise a reasonable doubt about his guilt. He challenged the officer's identification of his car as being the car clocked by the radar. He challenged the accuracy of the speed estimates. He raised the destruction of the dashcam video from the patrol car. (T pp 31 – 45, 47, 51 – 56, 67 – 72). While these matters did not raise a reasonable doubt in the mind of a judge sitting alone, one of twelve ordinary citizens may well have had a reasonable doubt. We live in an age where jurors are accustomed to seeing videos of police actions that sometimes show police claims about an event are not true.

As a practical matter, it is impossible for Mr. Hamer to show with any certainty that at least one of twelve jurors would have reached a different verdict. Prejudice is inherent in the denial of the right to a jury trial.

Moreover, this Court has consistently held that trial by an improperly constituted jury is a structural error requiring a new trial. *State v.*

Poindexter, 353 N.C. 440, 444, 545 S.E.2d 414, 416 (2001); *State v. Bunning*, 346 N.C. 253, 257, 485 S.E.2d 290, 292–93 (1997); *State v. Hudson*, 280 N.C. 74, 80, 185 S.E.2d 189, 193 (1971).

The majority erred by holding that Mr. Hamer was required to show prejudice and failed to do so.

CONCLUSION

The trial court violated Mr. Hamer’s right to a jury trial by conducting a bench trial without first securing a constitutionally valid waiver of his right to a jury trial. He is entitled to a new trial.

Respectfully submitted this 8th day of September 2020.

Electronically Filed
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original of the Defendant-Appellant's Brief has been filed pursuant to Appellate Rule 26(a)(2) by utilizing the Courts' electronic filing site.

I further hereby certify that I served the Defendant-Appellant's Brief upon Robert C. Ennis, Assistant Attorney General, by electronic mail sent to his email address: rennis@ncdoj.gov.

This the 8th day of September 2020.

Electronically Filed
W. Michael Spivey
Attorney for Appellant

APPENDIX

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SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

Article 71.

Right to Trial by Jury.

§ 15A-1201. Right to trial by jury; waiver of jury trial; procedure for waiver.

(a) Right to Jury Trial. – In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous. In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court as provided in G.S. 15A-1431. In superior court all criminal trials in which the defendant enters a plea of not guilty must be tried before a jury, unless the defendant waives the right to a jury trial, as provided in subsection (b) of this section.

(b) Waiver of Right to Jury Trial. – A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact, to include all factors referred to in G.S. 20-179 and subsections (a1) and (a3) of G.S. 15A-1340.16, shall be heard and judgment given by the court. If a motion for joinder of co-defendants is allowed, there shall be a jury trial unless all defendants waive the right to trial by jury, or the court, in its discretion, severs the case.

(c) A defendant seeking to waive the right to trial by jury under subsection (b) of this section shall give notice of intent to waive a jury trial by any of the following methods:

- (1) Stipulation, which may be conditioned on each party's consent to the trial judge, signed by both the State and the defendant and served on the counsel for any co-defendants.
- (2) Filing a written notice of intent to waive a jury trial with the court and serving on the State and counsel for any co-defendants within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).
- (3) Giving notice of intent to waive a jury trial on the record in open court by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

(d) Judicial Consent to Jury Waiver. – Upon notice of waiver by the defense pursuant to subsection (c) of this section, the State shall schedule the matter to be heard in open court to determine whether the judge agrees to hear the case without a jury. The decision to grant or deny the defendant's request for a bench trial shall be made by the judge who will actually preside over the trial. Before consenting to a defendant's waiver of the right to a trial by jury, the trial judge shall do all of the following:

- (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
- (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

(e) Revocation of Waiver. – Once waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of this section, the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice pursuant to subsection (c) of this section if the defendant does so in open court with the State present or in

writing to both the State and the judge. In all other circumstances, the defendant may only revoke the waiver of trial by jury upon the trial judge finding the revocation would not cause unreasonable hardship or delay to the State. Once a revocation has been granted pursuant to this subsection, the decision is final and binding.

(f) Suppression of Evidence. – In the event that a defendant who has waived the right to trial by jury pursuant to this section makes a motion to suppress evidence under Article 53 of this Chapter, the court shall make written findings of fact and conclusions of law. (1977, c. 711, s. 1; 2013-300, s. 4; 2015-289, s. 1.)

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

SESSION LAW 2013-300
SENATE BILL 399

AN ACT TO AMEND THE CONSTITUTION TO PROVIDE THAT A PERSON ACCUSED OF ANY CRIMINAL OFFENSE IN SUPERIOR COURT FOR WHICH THE STATE IS NOT SEEKING A SENTENCE OF DEATH MAY WAIVE THE RIGHT TO TRIAL BY JURY AND INSTEAD BE TRIED BY A JUDGE.

The General Assembly of North Carolina enacts:

SECTION 1. Section 24 of Article I of the North Carolina Constitution reads as rewritten:

"Sec. 24. Right of jury trial in criminal cases.

No person shall be convicted of any crime but by the unanimous verdict of a jury in open ~~court.~~ court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo."

SECTION 2. The amendment set out in Section 1 of this act shall be submitted to the qualified voters of the State at a statewide general election to be held on November 4, 2014, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[] FOR [] AGAINST

Constitutional amendment providing that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in court and with the consent of the trial judge, waive the person's right to a trial by jury."

SECTION 3. If a majority of the votes cast on the question are in favor of the amendment set out in Section 1 of this act, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office. The amendment becomes effective December 1, 2014, and applies to criminal offenses arraigned in superior court on or after that date.

SECTION 4. G.S. 15A-1201 reads as rewritten:

"§ 15A-1201. Right to trial by ~~jury-jury~~; waiver of jury trial.

(a) In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous. In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court as provided in G.S. 15A-1431. In superior court all criminal trials in which the defendant enters a plea of not guilty must be tried before a ~~jury-jury~~, unless the defendant waives the right to a jury trial, as provided in subsection (b) of this section.

(b) A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact shall be heard and judgment given by the court.



SECTION 5. Section 4 of this act is effective only upon approval by the voters of the constitutional amendment proposed in Section 1 of this act. If the constitutional amendment proposed in Section 1 is approved by the voters, Section 4 of this act becomes effective December 1, 2014, and applies to criminal cases arraigned in superior court on or after that date. The remainder of this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 9th day of July, 2013.

s/ Daniel J. Forest
President of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

s/ Pat McCrory
Governor

Approved 6:17 p.m. this 18th day of July, 2013

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2015

SESSION LAW 2015-289
HOUSE BILL 215

AN ACT TO ESTABLISH PROCEDURE FOR WAIVER OF THE RIGHT TO A JURY TRIAL IN CRIMINAL CASES IN SUPERIOR COURT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1201 reads as rewritten:

"§ 15A-1201. **Right to trial by jury; waiver of jury ~~trial~~; procedure for waiver.**

(a) Right to Jury Trial. – In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous. In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court as provided in G.S. 15A-1431. In superior court all criminal trials in which the defendant enters a plea of not guilty must be tried before a jury, unless the defendant waives the right to a jury trial, as provided in subsection (b) of this section.

(b) Waiver of Right to Jury Trial. – A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact, to include all factors referred to in G.S. 20-179 and subsections (a1) and (a3) of G.S. 15A-1340.16, shall be heard and judgment given by the court. If a motion for joinder of co-defendants is allowed, there shall be a jury trial unless all defendants waive the right to trial by jury, or the court, in its discretion, severs the case.

(c) A defendant seeking to waive the right to trial by jury under subsection (b) of this section shall give notice of intent to waive a jury trial by any of the following methods:

- (1) Stipulation, which may be conditioned on each party's consent to the trial judge, signed by both the State and the defendant and served on the counsel for any co-defendants.
- (2) Filing a written notice of intent to waive a jury trial with the court and serving on the State and counsel for any co-defendants within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).
- (3) Giving notice of intent to waive a jury trial on the record in open court by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

(d) Judicial Consent to Jury Waiver. – Upon notice of waiver by the defense pursuant to subsection (c) of this section, the State shall schedule the matter to be heard in open court to determine whether the judge agrees to hear the case without a jury. The decision to grant or deny the defendant's request for a bench trial shall be made by the judge who will actually preside over the trial. Before consenting to a defendant's waiver of the right to a trial by jury, the trial judge shall do all of the following:

- (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
- (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.



(e) Revocation of Waiver. – Once waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of this section, the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice pursuant to subsection (c) of this section if the defendant does so in open court with the State present or in writing to both the State and the judge. In all other circumstances, the defendant may only revoke the waiver of trial by jury upon the trial judge finding the revocation would not cause unreasonable hardship or delay to the State. Once a revocation has been granted pursuant to this subsection, the decision is final and binding.

(f) Suppression of Evidence. – In the event that a defendant who has waived the right to trial by jury pursuant to this section makes a motion to suppress evidence under Article 53 of this Chapter, the court shall make written findings of fact and conclusions of law."

SECTION 2. G.S. 20-179 is amended by adding a new subsection to read:

"(a3) Procedure When Jury Trial Waived. – If a defendant waives the right to a jury trial under G.S. 15A-1201, the trial judge shall make all findings that are conferred upon the jury under the provisions of this section."

SECTION 3. G.S. 15A-1340.16 is amended by adding a new subsection to read:

"(a6) Procedure When Jury Trial Waived. – If a defendant waives the right to a jury trial under G.S. 15A-1201, the trial judge shall make all findings that are conferred upon the jury under the provisions of this section."

SECTION 4. This act becomes effective October 1, 2015, and applies to defendants waiving their right to trial by jury on or after that date.

In the General Assembly read three times and ratified this the 29th day of September, 2015.

s/ Brent Jackson
Presiding Officer of the Senate

s/ David R. Lewis
Presiding Officer of the House of Representatives

s/ Pat McCrory
Governor

Approved 9:30 a.m. this 29th day of October, 2015