No. 119PA21 DISTRICT TWENTY-TWO (A)

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Iredell County
	)	
MADERKIS DEYAWN ROLLINSON	)	

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DEFENDANT-APPELLANT'S NEW REPLY BRIEF

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DEFENDANT-APPELLANT'S NEW BRIEF

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I. The State asks this Court to expand *State v. Hamer* to apply to *all* violations of N.C.G.S. §1201(d)(1). *Hamer* forecloses the State's request.

According to the State, *State v. Hamer*, 2021-NCSC-67 held that all violations of N.C.G.S. § 15A-1201(d)(1) are purely statutory, requiring a defendant to establish prejudice. Appellee's New Brief p 32. A careful reading of *Hamer* refutes the State's argument.

Hamer did not say *all* violations of the statute were *purely* statutory. Indeed, the *Hamer* Court recognized some statutory violations, like the failure to hold the statutorily required colloquy, constitute a violation of the right to a jury trial sufficient to compel a mistrial without showing prejudice. *Hamer*, 2021-NCSC-67, ¶ 24 (defendant had the right to compel a mistrial where the

trial court failed to engage defendant in the colloquy required before trial). The State never discusses *Hamer*'s recognition of the right to compel a mistrial where the trial court fails to engage in the statutorily required colloquy. Instead, the State focuses exclusively on a single sentence taken out of its broader context: "While the deprivation of a properly functioning jury may be a constitutional violation, the failure of the trial court to conduct an inquiry pursuant to the procedures set forth in N.C.G.S. § 15A-1201(d) is a statutory violation." *Id.* ¶ 16, Appellee's New Brief p 33. The State reads too much into this Court's statement. Given our state constitution charges the General Assembly with promulgating the procedures for trial courts to evaluate and accept valid waivers of the right to a jury trial, all violations of that procedure are *at least* statutory in nature. *See* N.C. Const. art. I, § 24 (A defendant may waive the right to a jury trial "subject to procedures prescribed by the General Assembly.").

The facts of *Hamer* show that the State is overreading *Hamer*. In *Hamer*, like here, the trial court failed to conduct an otherwise appropriate colloquy before the trial began. *Hamer*, 2021-NCSC-67, ¶ 6. Like in this case, defense counsel spoke on Hamer's behalf. Nevertheless, the *Hamer* Court noted that, had the defendant not affirmed his waiver after the otherwise appropriate colloquy, "the defendant had the unique authority to compel the trial court to declare a mistrial." *Id.* ¶ 24. Thus, without an adequate colloquy and

affirmation, there would have been a fundamental error affecting the very nature of the proceedings such that the defendant could have demanded a new trial.

Mr. Rollinson's case is in a similar posture as *Hamer*'s before the trial court conducted the belated colloquy. The key distinction between the two cases is that an otherwise appropriate colloquy happened late in *Hamer*, and never happened here. So, although a timing violation may be a "technical" violation, *Id.* ¶ 18, requiring a defendant to show prejudice, the trial court's failure to personally engage Mr. Rollinson and ensure he fully understood and appreciated the consequences of his waiver of his right to a jury trial constituted "the deprivation of a properly functioning jury." Therefore, consistent with *Hamer*, the trial court's error in this case was structural and/or per se error.

II. The State erroneously argues this Court should consider irrelevant circumstances to analyze this case: where there is no valid colloquy, no other circumstances can save the fatally defective proceeding.

The State seeks to avoid the consequences of the trial court's failure to engage with Mr. Rollinson personally as to his waiver of a jury in the habitual felon proceeding by claiming the colloquy in the earlier proceeding and two written waivers are enough. Appellee's New Brief p 13 (contending this Court should analyze this case based on the "totality of the circumstances in order to

understand the entire context of the case in which the waiver arose."). Although whether a defendant's waiver of his right to a jury trial was knowing and voluntary depends on the "circumstances of each case," *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942), this Court should, in the first instance, limit those circumstances to the adequacy of the habitual felon jury waiver colloquy. Even if this Court considers circumstances beyond the habitual felon colloquy, here those circumstances do not support a knowing and voluntary waiver.

The statute mandates the trial court address "the defendant personally" to determine "whether the defendant fully understands and appreciates" the consequences of the waiver. N.C.G.S. § 15A-1201(d)(1). As discussed in Mr. Rollinson's New Brief, such a personal conversation between the trial court and a defendant is necessary in a variety of contexts for the State to meet its burden of demonstrating a knowing and intelligent waiver of a fundamental right. *See* Appellant's New Brief pp 18-23. The trial court's failure to do so here was fatal to the State's required showing of a knowing and voluntary waiver.

The State relies on the earlier colloquy in a separate proceeding and written waivers to try to save the fatally defective waiver here. These poor substitutes for the required conversation with the defendant cannot carry the weight the State assigns them. Indeed, the State agrees that a signed waiver

form "is not a substitute for the statutory procedures" required by N.C.G.S. § 15A-1201(d)(1). Appellee's New Brief pp 28-29. However, the State resorts to both written waivers time and again to support its argument Mr. Rollinson's habitual felon waiver was knowing and voluntary. Neither the earlier colloquy, the written waivers, nor defense counsel's representations to the court meet the State's burden of showing a valid waiver of Mr. Rollinson's constitutional right.

In *Hamer*, the absence of the mandated colloquy entitled Hamer to compel a mistrial. *Hamer*, 2021-NCSC-67, ¶ 24. *Hamer* did not say that to obtain a mistrial, Hamer would have had to establish his waiver was unknowing or involuntary. Instead, *Hamer* recognized that a waiver through defense counsel was not enough. Until the trial court addressed Hamer personally and determined that he understood and appreciated the consequences of his waiver, Hamer could have compelled a mistrial if he so chose—without needing to show prejudice. In other words, defense counsel's assertion of Hamer's intent to waive the jury trial would not have mattered absent the adequate colloquy and Hamer's affirmation.

Mr. Rollinson stands in the same position as Hamer prior to Hamer's belated colloquy. Under *Hamer*, Mr. Rollinson had the right to compel a mistrial for that same error, without showing prejudice. The structural or per se error recognized implicitly in *Hamer*'s "right to compel a mistrial" language

entitles Mr. Rollinson to a new trial here. While the State argues that the colloquy and waiver in the first proceeding affects the calculus here, it does not. Appellee's New Brief pp 22-23. The circumstances surrounding Mr. Rollinson's waiver of his right to a jury trial on the principal charges should not inform the analysis of his waiver in the habitual felon trial. As the State acknowledges, Appellee's New Brief p 26, and the trial court recognized, (T p 136), the two are separate proceedings. *See* N.C.G.S. § 14-7.5. Further, Mr. Rollinson's written waiver on the principal charges only lists the file numbers for the principal charges. The only waiver form that included the file number for the habitual felon charge was the waiver form Mr. Rollinson signed as part of the habitual felon proceeding. (R pp 52, 61)

Additionally, the circumstances in the habitual felon phase were different than those in the trial on the principal charges. Habitual-felon-status acts as a sentencing enhancement on the principal charges, not as an independent criminal charge. N.C.G.S. §§ 14-7.2, 14-7.6. For the trial court to obtain a valid waiver, it would have had to assure itself that Mr. Rollinson understood the consequences of waiving his right to a jury trial as to the habitual felon indictment. It failed to do so here.

Even if this Court considers the circumstances surrounding Mr. Rollinson's waiver of a jury trial on the principal charges, those circumstances do not establish his habitual felon waiver was knowing and voluntary. Though

Mr. Rollinson did not renew his challenge to the adequacy of the first colloquy in this Court, that colloquy was cursory. During the waiver colloquy for the principal charges, the trial court asked Mr. Rollinson: to stand up, addressing him by name; whether he understood the charges the prosecutor listed; whether he understood he had a right to a jury trial; and if he wished to waive his right to jury trial. (T pp 4-5)

By contrast, in *State v. Rutledge*, the trial court: informed the defendant of the charge and the maximum punishment; advised the defendant he had a right to a trial by a jury of twelve of his peers and to participate in selecting that jury, and that the jury's verdict had to be unanimous; explained that the defendant could waive that right for a bench trial where the trial judge alone would decide the defendant's guilt or innocence; asked if the defendant had consulted with trial counsel regarding the consequences of waiving the right to a jury trial and asked if the defendant had any questions about the right to a jury trial; and, finally, asked if the defendant wanted to waive the right to a jury trial. 267 N.C. App. 91, 93-94 (2019).

Here, the trial court's first colloquy with Mr. Rollinson was not nearly as complete as the colloquy in *Rutledge*. More importantly, any information gleaned by Mr. Rollinson in the first colloquy cannot be used to assess the voluntariness of his separate waiver to the habitual felon proceeding. In *State v. Bullock*, this Court held the trial court could not rely on the defendant's prior

experience or knowledge of the law as a substitute for an adequate colloquy. *State v. Bullock*, 316 N.C. 180, 186 (1986) (the trial judge could not assume even a magistrate, a judicial official, understood his rights). Consequently, the trial court here could not have relied on that first colloquy as a basis for determining whether Mr. Rollinson's habitual felon waiver was knowing and voluntary.

Finally, the State, like the Court of Appeals, uses Mr. Rollinson's failure to allege ineffective assistance of counsel as evidence of a valid waiver. Appellee's New Brief p 24. First, because N.C.G.S. § 15A-1201(d)(1) directs the trial court to engage with a defendant personally to determine whether the defendant appreciates the consequences of waiving the right to a jury trial, any defective performance by trial counsel here is irrelevant. Second, the record is silent as to what Mr. Rollinson and his trial counsel discussed, if anything, before counsel responded. Therefore, an IAC claim would have required an evidentiary hearing and could not have been adequately developed on direct appeal. *State v. Hyman*, 371 N.C. 363, 383 (2018) (recognizing defendants are unlikely to be able to adequately develop many ineffective assistance of counsel claims on direct appeal because such claims often require further investigation and an evidentiary hearing).

III. Even if Mr. Rollinson was required to show prejudice, he did.

The State defends the Court of Appeals' holding that Mr. Rollinson failed to show he was prejudiced by the trial court's error but seeks to limit Mr. Rollinson's arguments demonstrating prejudice. Appellee's New Brief pp 37-38. Contrary to the State's contentions, Mr. Rollinson's prejudice argument, including the confusion engendered by the trial court's failure to conduct a proper colloquy, was preserved.

In his Petition, Mr. Rollinson argued:

> The Court of Appeals erred not only by requiring Mr. Rollinson to establish prejudice, but also by concluding that Mr. Rollinson failed to establish that he was prejudiced by the trial court's failure to comply with N.C.G.S. § 15A-1201(d)(1) and N.C. Const. art. I, § 24.

Defendant's Petition p 29. In his New Brief, Mr. Rollinson argues the trial court's failure to conduct a valid colloquy led to confusion as to the nature of the proceedings. This confusion resulted in prejudice: Mr. Rollinson was prejudiced because, despite the written judgment indicating he had been found guilty of all the charges pursuant to a bench trial, the transcript reveals the trial court convicted Mr. Rollinson of being an habitual felon without a jury trial, a bench trial, or a valid plea. In his Petition, Mr. Rollinson argued the Court of Appeals erred in holding he had not shown prejudice, and he briefed this specific prejudice to support that argument in his New Brief. Therefore, assuming this Court requires Mr. Rollinson to show prejudice, the issue is

properly before this Court, and Mr. Rollinson has shown the trial court's error prejudiced him.

In sum, the trial court failed to talk to Mr. Rollinson personally to determine whether he understood the consequences of waiving a jury trial on his habitual felon indictment. Additionally, the record indicates Mr. Rollinson did not understand a jury trial was the default procedure and instead believed he needed to request a jury trial. None of the State's arguments change these facts, and these facts entitled Mr. Rollinson to a new trial.

CONCLUSION

For all the foregoing reasons and the reasons stated in his New Brief, Mr. Rollinson respectfully asks this Court to reverse the Court of Appeals' decision.

Respectfully submitted, this the 14th day of June, 2022.

Electronic Submission
Brandon Mayes
Assistant Appellate Defender
North Carolina Bar No. 57327
Brandon.B.Mayes@nccourts.org

Glenn Gerding
Appellate Defender
Office of the Appellate Defender
123 West Main Street, Suite 500
Durham, North Carolina 27701
(919) 354-7210

ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the above and foregoing Defendant-Appellant's New Reply Brief was filed by uploading it to the appellate division's electronic filing website in accordance with Rule 26(a)(2).

I further certify that a copy of the foregoing Defendant-Appellant's New Reply Brief was served on John W. Congleton, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, by email addressed to: jcongleton@ncdoj.gov.

This the 14th day of June, 2022.

Electronic Submission
Brandon Mayes
Assistant Appellate Defender