

SEP - 1 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

JASON LEE DAVIS,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

No. M 2005-0404

SUMMARY OPINION

A. JOHNSON, JUDGE:

Appellant was found guilty following a trial by jury in Caddo County District Court Case No. CM-2004-0809 of Count 1 – Possession of Controlled Substance and Count 2 – Unlawful Possession of Drug Paraphernalia. Appellant was sentenced April 13, 2005, to one year on each count and a \$1,000.00 fine. The sentences were ordered to run consecutively by the Honorable David A. Stephens, Special Judge. Appellant appeals from the Judgment and Sentence imposed.

On appeal Appellant raised the following propositions of error:

1. Appellant did not knowingly, intelligently, and voluntarily waive his right to counsel.
2. Appellant contends that the trial court committed plain (fundamental) error in failing to provide him with counsel.
3. Appellant contends that the trial court committed plain (fundamental) error by commenting directly to Appellant, and in the presence of the jury, of Appellant's failure to testify in his own defense.
4. Comments on Appellant's pre-trial silence by the prosecutor and State's witness merit reversal.

5. Misconduct of the prosecuting attorney occurring at pre-trial, trial and post-trial.
 - a. The prosecutor raised the societal alarm argument during State's *voir dire* and closing argument.
 - b. Prosecutor attempts to define "reasonable doubt" during State's *voir dire*.
 - c. The prosecuting attorney placed into evidence that the Appellant was on probation and/or parole and introduced proof of other crimes in violation of *Burks* case and 12 O.S. § 2404(B).
 - d. The prosecuting attorney was allowed to cross-examine the Appellant in violation of the Appellant's First Amendment right to the United States Constitution.
 - e. The prosecuting attorney delivered his opinion as to the guilt of Appellant to the jury.
 - f. The prosecuting attorney conducted improper *voir dire* which is error.
6. Error of the trial court in failing to consider Appellant for either concurrent sentences in Counts 1 and 2 or in the alternative a suspended sentence in Counts 1 and 2.
7. Misconduct of the prosecuting attorney and errors committed by the trial court resulted in the Appellant being denied a fair trial.

Appellant's first two propositions of error challenge his appearance *pro se* at trial. The record contains a written waiver of counsel executed by Appellant and a finding by the Honorable David A. Stephens that Appellant "intelligently, knowingly and voluntarily waived counsel and was competent to do so." However, the totality of the record is insufficient to conclude Appellant knowingly, voluntarily and intelligently waived his right to counsel.

The State maintains that it is clear the trial court discussed Appellant's rights with him at the time the Waiver of Counsel form was executed. However, this discussion is not on the record.

A waiver will not be lightly presumed. The trial judge must indulge every reasonable presumption against waiver. *Bench v. State*, 1987 OK CR 191, ¶ 4,

743 P.2d 140. In the present case, as in *Bench*, the record is silent as to whether the trial court ensured that Appellant was made aware of the hazards of representing himself. See *Dunnum v. State*, 1982 OK CR 87, ¶ 5, 646 P.2d 613; *Nave v. State*, 1991 OK CR 42, ¶ 16, 808 P.2d 991. From this record we cannot find Appellant knowingly, voluntarily and intelligently waived his right to counsel.

As Appellant's first proposition of error requires reversal, the remaining propositions of error are rendered moot.

DECISION

The Judgment and Sentence of the trial court is **REVERSED** and **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

APPEARANCES AT TRIAL

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PRO SE**

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OPINION BY: A. JOHNSON, J.

CHAPEL, P.J.: Concur

LUMPKIN, V.P.J.: Dissents

C. JOHNSON, J.: Concur

LEWIS, J.: Dissents

RC

LUMPKIN, V.P.J.: DISSENT

I dissent to the decision to reverse and remand this case based solely upon the Court's finding that "the totality of the record is insufficient to conclude Appellant knowingly, voluntarily and intelligently waived his right to counsel." I trust the trial judge on such matters more than I do an appellate court's reading of a cold record. We presume the trial judge knew and followed the law, absent clear proof to the contrary. That clear proof is not present in this case, in my opinion.

Here, Appellant signed a waiver of counsel form, which stated that "I understand that there are disadvantages in such a waiver, including my lack of knowledge and skills as to the rules of evidence, procedure, and criminal law." Also, the record indicates that the trial judge questioned Appellant on these matters before determining that the waiver was knowingly, intelligently, and voluntarily entered. Indeed, Appellant was informed that he would be held to the same standard as an attorney before he signed the waiver. He engaged in discussions with his own counsel at this time, and it seems almost certain that he received further counsel in that regard.

I therefore believe that the Court's decision on the issue of waiver is not **fairly supported by the record**. This isn't one of those cases where we are wholly in the dark about whether or not Appellant was apprised of the pros and cons of his actions, because he was.

Nevertheless, issues raised regarding prosecutorial misconduct lead me to conclude that sentencing may have been affected. Therefore, I would agree to run the sentences concurrently, in order to correct the error.