

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GREGORY JOHN WILSON,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

No. M-2013-1049

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 26 2015

SUMMARY OPINION

LEWIS, JUDGE:

MICHAEL S. RICHIE
CLERK

On September 13, 2012, Appellant Wilson was charged with Domestic Abuse Assault and Battery in Marshall County Case No. CM-2013-157. On February 28, 2013, after a non-jury trial, Wilson was found guilty of the charged offense. The District Court of Marshall County, the Honorable Gregory L. Johnson, Associate District Judge, sentenced Wilson to one year in the county jail with all but the first thirty days suspended and fined him \$500.00. From this judgment and sentence, Wilson appeals and raises the following issues:

1. Insufficiency of the evidence;
2. There is no waiver of jury trial in the record, accordingly the conviction must be vacated and the case remanded for a new jury trial;
3. Ineffective assistance of trial counsel; and
4. Ineffective assistance of counsel appearing on Appellant's behalf at the motion for new trial.

We find merit in Appellant's second proposition of error which renders the remaining propositions of error moot. The judgment and sentence is **REVERSED** and the matter is **REMANDED** for a new trial.

Appellant argues that he proceeded to non-jury trial without knowing the importance of a jury trial, or knowing the consequences of waiving his right to a jury trial. There is no written waiver of his right to jury trial in the record, nor is there any transcript in the record reflecting such a waiver. Appellant argues failure to secure a knowing and intelligent waiver of his right to jury trial is fundamental error requiring reversal. The State alleges that Appellant's actions throughout the trial proceedings support a finding that Appellant competently, knowingly and intelligently waived his right to a jury trial.

In *Hinsley v. State*, 2012 OK CR 11, ¶ 5, 280 P.3d 354, this Court affirmed its previous holdings regarding the necessity of a valid jury trial waiver. A defendant may waive his right to a jury trial, but there must be a clear showing that the waiver was competent, knowing and intelligent. *Long v. State*, 2003 OK CR 14, ¶ 3, 74 P.3d 105, 107; *Valega v. City of Oklahoma City*, 1988 OK CR 101, ¶ 5, 755 P.2d 118, 119; *Bench v. State*, 1987 OK CR 191, ¶ 6, 743 P.2d 140, 142; *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 277, 63 S.Ct. 236, 241, 87 L.Ed. 268 (1943). Waiver of a fundamental right (jury trial) cannot be presumed from a silent record. *Valega* at ¶ 5. It is incumbent upon the trial court to make a record of a waiver of a fundamental right and all doubts concerning the waiver must be resolved in favor of the accused. *Id.* The record in this case contains no valid waiver of Appellant's right to a jury trial, and we will not presume that he waived that right.

DECISION

Appellant's misdemeanor conviction in Marshall County District Court Case No. CM-2013-157 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. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MARSHALL COUNTY
THE HONORABLE GREGORY L. JOHNSON, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

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COUNSEL FOR THE STATE

OPINION BY: LEWIS, J.:

SMITH, P.J.: Concurs
LUMPKIN, V.P.J.: Dissents
JOHNSON, J.: Concurs
HUDSON, J.: Concurs

RA/F

APPEARANCES ON APPEAL

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LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

I respectfully dissent. The record before the Court is sufficient to show that Appellant knowingly and intelligently waived his right to jury trial.

This Court has found a knowing and voluntary waiver of the right to jury trial where the record reveals that the defendant was informed of his right to a jury trial and voluntarily elected to proceed to a bench trial. *Hinsley v. State*, 280 P.3d 2012 OK CR 11, ¶ 5, 280 P.3d 354, 355; *Braun v. State*, 1995 OK CR 42, ¶ 12, 909 P.2d 783, 788 (holding whether there has been a valid waiver of Constitutional right is to be determined from the total circumstances of the individual case); *Hayes v. State*, 1975 OK CR 193, ¶¶ 7-9, 541 P.2d 210, 211 (setting forth requirements for “conclusive” record). *See also Hinsley v. State*, 2012 OK CR 11, ¶ 6, 280 P.3d 354, 356 (Appellant’s signed waiver of jury trial rights form, combined with the hearing on Appellant’s request to waive jury trial is more than sufficient to meet the “minimum requirement for a waiver of jury trial.”)

In the present case, the trial court advised Appellant as to his rights, specifically including his right to jury trial, at arraignment. (O.R. 8). Appellant had the advice of retained counsel and on August 9, 2013, personally elected a bench trial when he signed the Order Setting Case which set the matter for non-jury trial. (O.R. 10-11, 13, 15). As the record clearly shows that Appellant was advised of his right to jury trial and personally elected a bench trial, there was a valid waiver of jury trial in the present case.

None of Appellant's remaining claims of errors merit relief. Appellant is not entitled to a hearing on his Application for Evidentiary Hearing. *Simpson v. State*, 2010 OK CR 6, ¶¶ 53-54, 230 P.3d 888, 905-906. Therefore, I would affirm the Judgment and Sentence of the District Court of Marshall County.