

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD ALLEN HOUSE II,
Appellant,

-vs.-

THE STATE OF OKLAHOMA,
Appellee.

NOT FOR PUBLICATION

No. M-2012-416

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 11 2014

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

At the conclusion of a non-jury trial before the Honorable Norman L. Grey, Special Judge, in the District Court of Garfield County, Case No. CM-2011-492, Appellant, Richard Allen House II, was found guilty of Unlawful Possession of Drug Paraphernalia, a misdemeanor, in violation of 63 O.S.2011, § 2-405. On May 4, 2012, Judge Grey sentenced Appellant to a fine of \$250.00 and to a term of one (1) year in the county jail, with all but the first sixty (60) days of that term conditionally suspended on written rules of probation. Appellant was thereupon admitted to bail pending appeal of this Judgment and Sentence, and he has timely perfected that appeal in this Court.

The appeal record reveals that early on in Appellant's case, he applied for court-appointed counsel, and that the District Court granted that request. But on August 24, 2011, his assigned counsel, appointed under contract with the Oklahoma Indigent Defense System (OIDS), moved the District Court to review its determination of indigence. In support of that motion, counsel alleged that Appellant had posted bail in his matter, was employed, and that he had hired private counsel with payments totaling \$7,500.00. Counsel's motion, however, did not reveal Appellant's payments were for retention of counsel in his

misdemeanor case for possessing drug paraphernalia or were instead to retain counsel for other purposes, as Appellant had at least one other pending criminal case in the District Court charging him with Negligent Homicide.

A docket entry dated November 30, 2011, reveals Appellant and OIDS counsel appeared before Judge Grey on counsel's motion and that counsel was permitted to withdraw. This docket entry provides no reason for the trial court's granting of the motion and no waiver by Appellant of his right to counsel. Nevertheless, from that point on, through all subsequent pre-trial proceedings, trial, and sentencing, Appellant appeared *pro se*, and the record remains void of any expressed waiver by Appellant of his right to representation or of the making of those disclosures and warnings to Appellant that are necessary for a valid waiver of counsel.

Ten days after his trial and sentencing, Appellant appeared before Judge Grey to request appointment of counsel for purposes of appeal. During that proceeding, Judge Grey acknowledged having appointed counsel for Appellant in the negligent homicide matter, and recalled that he had thereafter denied an appointment of counsel in the case at hand once he learned Appellant had "posted a high appeal bond" and had "come up with extensive costs for a transcript in that [negligent homicide] case." (5-14-12 Tr. 4-5.) Judge Grey, however, failed to elaborate further concerning this prior denial of counsel, and the May 14th hearing concluded with Judge Grey denying Appellant the appointment of appellate counsel for the current appeal.

In Proposition II of the *pro se* brief Appellant has filed in this appeal, he urges that error occurred when his court-appointed counsel was permitted to withdraw and no record of any valid waiver of his right to legal representation was ever obtained. In its Answer Brief, the State concedes Proposition II has

merit and expresses a belief that a further record cannot be obtained concerning what transpired when counsel withdrew and Appellant began to represent himself. Both parties contend reversal of the conviction is the proper remedy on this issue. Although Appellant ends there, the State contends that on reversal this matter should be remanded for further proceedings before the District Court requiring it to make a new determination of indigence on the record, and if finding Appellant indigent, appoint trial counsel for Appellant or alternatively procure a valid on-the-record waiver from Appellant of his right to counsel.¹

In *Smith v. State*, 2007 OK CR 6, ¶ 6, 155 P.3d 793, 795, the trial court appointed counsel for two defendants, but the mother of one of the defendant's posted bond for both. On the making of bond, the trial court permitted court-appointed counsel to withdraw without further consideration of the defendants' claims of indigence. *Id.* On appeal, the defendants contended their indigence prevented them from hiring counsel and that the District Court had forced them to proceed to trial *pro se* in violation of their right to counsel. *Id.* ¶ 5, 155 P.3d at 795. In reversing and remanding for further proceedings, this Court held:

In order to insure that a defendant is not improperly denied counsel to which he or she is constitutionally entitled, the district court must make a record inquiring about the defendant's financial status and reflecting that the defendant understands that the presumption of non-indigency created by the posting of bond is rebuttable and that he or she may still be entitled to court appointed counsel upon sufficient proof of indigent status.

¹ Appellant raises two additional propositions of error in this appeal: Proposition I claiming the admission of a piece of physical evidence was improper because of defects in the chain of custody; and Proposition III arguing error in the State refusing to disclose evidence that Appellant believed would be exculpatory, and error in the trial court refusing to compel disclosure. The Court finds both of these propositions of error are made moot by the Court's granting of relief under Proposition II.

Id. ¶ 6, 155 P.3d at 795. This Court further noted that the posting of bond by a defendant, or by another on a defendant's behalf, creates only a rebuttable presumption of non-indigence.

In the case of *Bench v. State*, this Court was required to reverse a misdemeanor conviction for lack of any adequate record revealing a knowing and intelligent waiver of the right to jury trial and a knowing, intelligent, and voluntary waiver to the right of counsel. There the Court held:

A person charged with a misdemeanor in a state court has an unconditional and absolute right to a lawyer. This right may be waived if done knowingly, and intelligently. However, waiver will not be "lightly presumed" and the trial judge must indulge every reasonable presumption against waiver. We have held that the record must show, or there must be an allegation and evidence which shows that an accused was offered counsel but intelligently and understandingly rejected the offer. This record is mandatory and anything else is not waiver.

Bench v. State, 1987 OK CR 191, ¶ 4, 743 P.2d 140, 141 (citations omitted). We **FIND** the foregoing precedent to be controlling in Appellant's matter and requiring relief as stated below.

DECISION

The Judgment and Sentence imposed against Appellant, Richard Allen House II, on May 4, 2012, in the District Court of Garfield County, Case No. CM-2011-492, is **REVERSED AND REMANDED** for further proceedings consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY,
THE HONORABLE NORMAN L. GREY, SPECIAL JUDGE**

APPEARANCES AT TRIAL

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OPINION BY: LEWIS, P.J.
Smith, V.P.J.: Concurs
Lumpkin, J.: Concurs
C. Johnson, J.: Concurs
A. Johnson, J.: Concurs

RC