

Appellant's suspended sentence in full. Appellant appeals from the revocation of his suspended sentence.

Appellant argues in his first proposition of error that he was deprived of his constitutional right to counsel. He argues there was only a time span of one week between the time he was informed of his right to counsel and his appearance without counsel at the revocation hearing. Appellant alleges that nothing whatsoever indicated his failure to seek counsel was based on any attempt to delay proceedings. Appellant argues that because he was not provided with counsel, prejudice should be presumed.

The State answers that because Appellant failed to file his application for court-appointed counsel by the due date set by the trial court, he effectively waived his right to counsel. Appellant appeared without counsel on May 14, 2009, at which time his right to an attorney was explained to him. He then appeared at the revocation hearing on May 20, 2009, without counsel and without having filled out the application for court-appointed counsel. The trial court proceeded with the revocation hearing. The State argues Appellant's statements that he did not fill out the application for counsel because he did not have the application fee was clearly a delaying tactic on the defendant's part. The State also argues that a defendant's right to counsel at a revocation hearing is not constitutional and instead, the relevant standard is whether the defendant received a fundamentally fair hearing.

Section 991b(D) of Title 22 sets forth that the person whose suspended sentence is being considered for revocation at the hearing shall have the right

to be represented by counsel. Appellant has a statutory right to be represented by counsel at a revocation hearing. See *Painter v. State*, 1988 OK CR 224, ¶ 7, 762 P.2d 990.

In *Painter* the appellant waived this statutory right by his failure to timely secure counsel. The appellant in *Painter* twice requested time to secure the services of a privately retained attorney and both requests for a continuance were granted. Painter next appeared and informed the court that his attorney had not had an opportunity to review or prepare and was presently attending another hearing, but when that attorney was called to the bench, he advised the court that Painter had approached him during the noon recess at which time he had informed Painter that he would take the case if the court granted a continuance. Painter appeared at the final hearing again without counsel and informed the court that he had contacted two attorneys who refused to take his case and tried legal aid but only got a busy signal each time he called. The court questioned Painter and determined he was not indigent. The trial judge concluded the only reason Painter did not have an attorney was because he had not been diligent.

This court reiterated in *Painter* that failure to hire an attorney may constitute a knowing and intelligent waiver of the right to counsel if done to delay the hearing and that the right to assistance of counsel may not be put to service as a means of delaying or trifling with the court. *Id.* At ¶¶10-11. This Court found Painter failed to secure counsel for the purpose of delaying his hearing thereby waiving his statutory right to counsel. See *Colbert v. State*,

1986 OK CR 15, ¶9, 714 P.2d 209, where non-indigent defendant failed to hire an attorney from January 31, 1982, to January 11, 1983, and this Court found the appellant's failure to do so was done to delay the date of his trial, the delay was inexcusable and done solely for dilatory purposes, and under these circumstances it was not error to proceed to trial even though appellant was without counsel.

In the present case the delay was six days. Nothing more. This record does not show the six day delay was done solely for dilatory purposes. A record was not made determining whether Appellant was indigent and this record does not establish a knowing and intelligent waiver of the right to counsel. We, therefore, find merit to Appellant's first proposition of error. It is not necessary to address Appellant's second proposition of error in which he argues the sentence imposed was excessive under the circumstances of this case.

In conjunction with Appellant's first proposition of error, which was exacerbated by Appellant's lack of counsel and attempt at representing himself *pro se*, we cannot ignore the conflicting and troubling testimony in this record elicited from Patrolman Joe Cox and Cherokee Chief of Police Michael Bradford.

The following transpired:

Q ... So what happened next?

A After the evidence was gathered up and put in the car, I stepped out on the porch to place Roxie Smith under arrest, Chief Bradford stepped in and asked me not to arrest her, he asked me to step away. When we walked away from the suspects, Roxie, back to the car, I asked what was going on, he said, "She's tired, she's been drinking," he said, "let her go on back in and go to bed." I said, "What do I do with this?" And at that point in time Chief Bradford looked at me and told me that he wanted me to go back

and file a report saying that Ed Jones was there at the premises and that I found the marijuana on Ed Jones.

Q Did you find the marijuana on Ed Jones?

A No, sir.

(Tr.9-10) Appellant, *pro se*, attempted to cross-examine the Chief of Police. He asked the Chief about the patrolman's testimony – whether the Chief had told the patrolman to leave Roxie Smith alone, to not take her to jail, and to write a report saying the drugs were found on Appellant when Appellant was not found at the scene. The Chief denied telling the patrolman “anything like that”.

(Tr.14) A review of this record reveals no follow up questioning by either the trial judge or the prosecutor. The trial judge did comment in his findings of fact and conclusions of law that the testimony by the officers “gives me some trouble”. We are more than “troubled” by this conflicting testimony and find that it requires clarification. See 21 O.S.2001, § 501.

DECISION

The revocation of Appellant's suspended sentence in Alfalfa County District Court Case No. CF-2006-37 is **REVERSED AND REMANDED** to the District Court for a new hearing on the State's application to revoke with Appellant represented by counsel or a valid waiver in the record. On remand, the trial judge is directed to clarify and/or rectify the questionable implications found in this record. See 21 O.S.2001, § 501. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**REVOCATION APPEAL FROM THE DISTRICT COURT OF ALFALFA
COUNTY, THE HONORABLE LOREN E. ANGLE, ASSOCIATE
DISTRICT JUDGE**

APPEARANCES AT TRIAL

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OPINION BY: LUMPKIN, J.
C. JOHNSON, P.J.: CONCUR
A. JOHNSON, V.P.J.: CONCUR
LEWIS, J.: CONCUR

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