

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHERRY KAY TAYLOR,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

No. M 2011-0870

M 2011-0871

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

MAR - 8 2013

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

MICHAEL S. RICHIE  
CLERK

Appellant, Sherry Kay Taylor, was charged in Bryan County Case No. CM-2010-1111, on December 21, 2010, with Count 1 – Driving a Motor Vehicle While Under the Influence of Alcohol, 47 O.S. § 11-902(A)(2), Count 2 – Driving Without a Driver’s License, 47 O.S. § 6-303(A), and Count 3 – Improper Backing, 47 O.S. § 11-1102a, all misdemeanors. On February 23, 2011, Appellant, represented by counsel, pled no contest and received a six month deferred sentence (until 8/23/2011) on Count 1. She was also fined \$100.00. Counts 2 and 3 were dismissed. On March 28, 2011, the State filed a motion to accelerate Appellant’s deferred sentence alleging that Appellant was charged with a misdemeanor, Driving a Motor Vehicle while Under the Influence of Drugs and Alcohol, as charged in Bryan County Case No. CM-2011-275.

Following an acceleration hearing and appearing *pro se* on September 16, 2011, Judge Sherrill found the evidence sufficient to show Appellant violated

the conditions of probation. He sentenced Appellant to one year in the Bryan County Jail with all but twenty days suspended. This sentence was ordered to run concurrent with Case No. CM-2011-275.

On March 28, 2011, Appellant was charged in Bryan County District Court Case No. CM-2011-275 with Driving A Motor Vehicle While Under the Influence of Alcohol and Drugs, 47 O.S. § 11-902(A)(4), a misdemeanor. Following a non-jury trial and appearing *pro se* on September 16, 2011, Appellant was found guilty. She was sentenced to one year in the Bryan County Jail with all but twenty days suspended, and fined \$250.00. The sentence was ordered to run concurrent with CM-2010-1111.

The non-jury trial for CM-2011-275 and the acceleration hearing for CM-2010-1111 were combined in the District Court and held on September 16, 2011, before the Honorable Trace Sherrill, Special Judge. Appellant appeals from the acceleration of her deferred sentence in CM-2010-1111, Appeal No. M 2011-0871, and from the misdemeanor Judgment and Sentence imposed in CM-2011-275, Appeal No. M 2011-0870.<sup>1</sup> The sole issue raised on appeal in each of these cases is that the trial court erred when it denied Appellant the assistance of counsel for her acceleration hearing in CM-2010-1111 and for her non-jury trial in CM-2011-275 without a knowing and voluntary waiver.

Judge Sherrill found Appellant completed an application for court-appointed counsel for each of these cases and submitted the application to the court ten minutes prior to trial. Judge Sherrill found Appellant had had ample

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<sup>1</sup> The State's motion to cross-reference these appeals was granted in an Order issued July 13, 2012.

time, since March 29, 2011, to obtain counsel. Based upon a review of the court file, he found that Appellant “would have been advised” of her right to counsel and court appointed counsel if indigent on at least three occasions. Judge Sherrill found that Appellant appeared on May 25, 2011, and advised the trial court that she did not want a trial and the case was set for a plea on July 29, 2011. On July 29, 2011, Appellant appeared and advised the trial court that she had changed her mind and wanted a bench trial. Judge Sherrill thus perceived Appellant’s application for court-appointed counsel, submitted on September 16, 2011, as an effort to delay the proceedings. He denied Appellant’s application and ordered the cases to proceed to trial with Appellant representing herself.

Appellant argues that there is nothing in the record of either case to show that she voluntarily and knowingly waived her right to counsel; that there is no record to show that she wanted to represent herself; and that there is no record to show that the court, or anyone else, advised her of the dangers and disadvantages of representing herself. Appellant argues that her submission of an application for appointed counsel on the day of trial indicates that she did not waive her right to counsel, nor did she want to waive such right. She also argues that there is no evidence that she attempted to delay the proceedings, that there is no record showing Appellant requested a continuance to hire an attorney, or for any other reason.

In *Bench v. State*, 1987 OK CR 191, ¶ 4, 743 P.2d 140, we set out that a person charged with a misdemeanor in a state court has an unconditional and

absolute right to a lawyer but that this right may be waived if done knowingly, and intelligently. We held that waiver will not be lightly presumed and that the trial judge must indulge every reasonable presumption against waiver. We also 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.” We held that this record is mandatory and anything else is not waiver. *See also Painter v. State*, 1988 OK CR 224, ¶¶ 7-11762 P.2d 990 (applying these same record requirements for waiver of the right to counsel in revocation hearings). *Braun v. State*, 1995 OK CR 42, ¶ 12, 909 P.2d 783, also directs that a determination of whether there has been a valid waiver of right to counsel is to be determined from the total circumstances of the individual case including background, experience and conduct of the accused.

In these cases, the misdemeanor appeal and the acceleration appeal, there is no record showing Appellant chose to represent herself. There is no express waiver of counsel in the record. There is nothing in the record to show Appellant rejected counsel, or that Appellant was advised of the dangers and disadvantages of self-representation. The record does not support the trial judge’s conclusion that Appellant was attempting to delay her proceedings. The record does not show that Appellant requested a continuance for any reason in either of these cases. Thus, finding the mandatory record required for a waiver of counsel in either of these cases was not made, we conclude that the trial

court abused its discretion by ordering Appellant to proceed *pro se* in her misdemeanor bench trial and in her acceleration hearing.

### **DECISIONS**

The Judgment and Sentence in Bryan County District Court Case No. CM-2011-275, is **REVERSED AND REMANDED** for a new trial. The acceleration of Appellant's deferred sentence in Bryan County District Court Case No. CM-2010-1111 is **REVERSED AND REMANDED** for a new acceleration hearing. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**A MISDEMEANOR APPEAL (M 2011-0870) AND AN ACCELERATION  
APPEAL (M 2011-0871) FROM THE DISTRICT COURT OF BRYAN  
COUNTY, THE HONORABLE TRACE SHERRILL, SPECIAL JUDGE**

**APPEARANCES AT TRIAL**

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APPEARING *PRO SE*

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**OPINION BY: LEWIS, PRESIDING JUDGE**

SMITH, V.P.J.: Concurs  
LUMPKIN, J.: Concurs  
JOHNSON, C., J.: Dissents  
JOHNSON, A., J.: Concurs

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