

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOSEPH TUNLEY, JR.,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-2017-241

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 15 2018

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant Joseph Tunley, Jr. was convicted in a non-jury trial in the District Court of Oklahoma County, Case No. CF-2011-4648, of Assault and Battery with a Deadly Weapon, in violation of 21 O.S.2011, § 652. The Honorable Bill Graves, District Judge, who presided at trial, found Tunley guilty and sentenced him to twenty-five years imprisonment. From this judgment and sentence Tunley appeals, raising the following issue:

- (1) whether he knowingly and intelligently waived his right to a jury trial.

After a thorough consideration of this proposition and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined it is necessary to reverse the conviction and remand the case to the District Court for a new trial.

In his sole proposition of error Tunley argues that because the record fails to show that he competently, knowingly, and voluntarily waived his right to jury trial his case must be reversed and remanded for a new trial. The State

agrees both that the record does not demonstrate a competent, knowing, and intelligent waiver of the right to a jury trial and that Tunley's case must be reversed and remanded for a new trial.

While an accused may waive his constitutional right to a jury trial there must be a "clear showing that the waiver was competent, knowing and intelligent." *Hinsley v. State*, 2012 OK CR 11, ¶ 5, 280 P.3d 354, 355. A record showing an intelligent, competent, and knowing waiver of a fundamental right is mandatory and anything less is not a waiver. *Valega v. City of Oklahoma City*, 1988 OK CR 101, ¶ 5, 755 P.2d 118, 119. See also *Long v. State*, 2003 OK CR 14, ¶ 3, 74 P.3d 105, 107 (holding that the right to a jury trial can be waived only on clear showing that waiver was competent, knowing, and intelligently given). "It is incumbent upon the trial court to make a record of a waiver of a fundamental right, and all doubts concerning waiver must be resolved in the accused's favor." *Valega*, 1988 OK CR 101, ¶ 5, 755 P.2d at 119.

Review of the record reveals, as Tunley asserts and the State concedes, no evidence that Tunley knowingly and intelligently waived his right to a jury trial. Although there is a court minute notation that a non-jury trial was set by agreement and that the defendant was present, there is nothing in the record reflecting that the trial court inquired to make sure that the waiver was expressly and intelligently made. Because the record does not show a competent, knowing, and intelligent waiver of this constitutional right and

because all doubts must be resolved in Tunley's favor this case must be remanded for a new trial.

DECISION

The Judgment and Sentence of the District 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. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE BILL GRAVES, DISTRICT JUDGE

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OPINION BY: ROWLAND, J.
LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
HUDSON, J.: CONCUR
KUEHN, J.: CONCUR