

APR 28 2003

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

DAVID DEAN WICHITA,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2002-323

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant, David Dean Wichita, was convicted in the District Court of Noble County of Lewd Molestation (Count I) and Forcible Oral Sodomy (Count II) in Case No. CF-99-95. The case was tried in a non-jury trial before the Honorable Leslie D. Page. Appellant was sentenced to ten years imprisonment on each count with the sentences to run concurrently.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse. In reaching our decision, we considered the following proposition of error and determined this result to be required under the law and the evidence:

- I. The trial court committed reversible error by enforcing Appellant's alleged waiver of jury trial absent record evidence of a personal, knowing and intelligent waiver of this constitutional right.

DECISION

Appellant asserts in his first proposition that the record does not show he entered a competent, knowing and intelligent waiver of his right to a jury trial. The State concedes this error and agrees that relief is required. We find merit in this proposition and accordingly, decline to address Appellant's remaining allegations of error.

As Appellant points out and the State agrees, the only record of the waiver is an August 18, court minute docket sheet entry which does not indicate that Appellant was present when his right to jury trial was waived. This Court has held that an accused may waive his constitutional right to a jury trial, but only if there is a clear showing that the waiver was personally made and that such waiver was competently, knowingly and intelligently given. *Kerr v. State*, 738 P.2d 1370, 1372 (Okl.Cr.1987); *Hayes v. State*, 541 P.2d 210, 212 (Okl.Cr.1975). Waiver of a fundamental right cannot be presumed from a silent record. *Valega v. City of Oklahoma City*, 755 P.2d 118, 119 (Okl.Cr.1988). Further, 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. *Id.* At no point in the record is it reflected that the trial judge inquired of Appellant to assure that the right to a jury trial was expressly and intelligently waived. In fact, there is no indication from the

record that Appellant's waiver was competently, knowingly and intelligently given. Thus, the record does not show a valid waiver, and this case must be reversed and remanded for a new trial.

The Judgment and Sentence of the trial court is **REVERSED** and **REMANDED** for a **NEW TRIAL**.

APPEARANCES AT TRIAL

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OPINION BY: STRUBHAR, J.
JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
CHAPEL, J.: CONCUR

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