IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

JUAN M. TREJO, Appellant

vs. NO. 86-MCA-1713

STATE OF TEXAS, Appellee

OPINION

Appellant appeals his conviction in Municipal Court.

Appellant's sole contention on appeal is that he did not waive his right to be represented by counsel at his trial.

Appellant relies heavily on this Court's opinion in Preciado v. State, 85-MCA-1651 (Mun.Ct.App. - 1986), in which this Court held that a waiver of the right to counsel must be knowingly and voluntarily made, and cannot be presumed from a silent record. See also Ex Parte Baqueda, 80-23921, (County Court at Law Number Two). To the extent that the opinion of this Court in this case is in conflict with those decisions, they are overruled.

The Court of Criminal Appeals has held that an accused may waive his right to counsel, but before such a waiver is valid, it must be voluntarily and knowingly made, and that he must intelligently choose self-representation, and the only way to make such an intelligent choice is to be made aware of the dangers and disadvantages of self-representation. Warr v. State, 591 S.W.2d 832 (Tex.Cr.App. - 1980). Barbour v. State, 551 S.W.2d 371 (Tex.Cr.App. - 1977).

Judge Odom's dissenting opinion in Barbour, supra, addresses the difficulty imposed on the State to protect itself against being "bushwhacked" by a pro se Defendant's potential claim for the first time on appeal that no such admonishment, warning or waiver was made. This Court believes that such is the case in this particular matter, that is, Appellant evidently appeared before the Trial Court

without seeking the assistance of an attorney, for whatever reason, and then after having been convicted, sought the services of an attorney to assist him after the fact.

However, the common thread which runs through every case where the waiver of a right to an attorney is in issue involves the imposition of a term of imprisonment, whether probated or not, in addition to the imposition of a fine. Warr, Barbour, infra; and Empy, supra.

Relyingon the above, the State contends that since only a fine, and not imprisonment, can be assessed by Municipal Court, that no right to an attorney exists. It further contends that the constitutional rights to be represnted by an attorney forbid imprisonment without representation, they do not forbid trial without representation. Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006, Scott v. Illinois, 440 U.S. 367, 59 L.Ed.2d 838, 99 S.Ct. 526.

In the above cases, it is clear that the Municipal Court has no obligation to appoint an attorney, even though the person is indigent, since the possible punishment for offenses within the jurisdiction of the Municipal Court do not provide for any imprisonment.

The City's argument is even more forceful and pursuasive, in view of the holding in Empy v. State, 571 S.W.2d 526, (Tex.Cr.App. - 1978), which holds that when only a fine is assessed in a misdemeanor case, the judgment is not void even though the Defendant is indigent and not represented by counsel.

It follows then that if no right to an attorney is involved where only a fine is assessed, then the difficult issues relating to whether a knowing or intelligent waiver of such right has occurred need not be addressed. If there is no right in the first instance, then there need be no waiver.

Following the rationale of Argersinger, Scott, and Empy, infra, the only conclusion which can be reached is that cer-

tain constitutional safeguards, including a person's right to counsel, are unavailable unless a term of imprisonment is possible and actually imposed.

This Court reluctantly reaches this decision on the above cited authorities because the right to counsel is ingrained in our teachings and experience and not to be lightly discarded. Therefore, this Court cautions the Municipal Court Judges to allow a person to be represented by an attorney of their choice if such request is made. A denial of that choice would present a very different issue before the one presently before this Court. The Judges of those Courts should therefore give a person a reasonable opportunity to secure the services of an attorney and if they express a desire to retain the services of an attorney, that they be allowed to do so.

Finding no reversible error, the Judgment of the Trial Court is affirmed.

Signed this 21 day of Oct., 1986.

JUDGE

JUDGMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things affirmed, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

Signed this 21 day of Oct, 1986.

JUDGE