

IN THE MUNICIPAL COURT OF APPEALS
OF THE CITY OF EL PASO, TEXAS

DORALINA PRECIADO, Appellant

vs.

NO. 85-MCA-1651

STATE OF TEXAS, Appellee

O P I N I O N

Appellant has filed an Application for Writ of Habeas Corpus with this Court arising out of her conviction in Municipal Court for two offenses on the basis that the Defendant was not represented by counsel at said trial and had not intentionally, knowingly and willingly waived the right to such counsel.

Although a person is not entitled to have counsel appointed to represent them, even though indigent, in cases within the jurisdiction of the Municipal Court since the possible punishment for such offenses do not provide for any jail time, a person is entitled to be represented by counsel of his choosing. Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2009, Scott v. Illinois, 440 U.S. 367, 59 L.Ed.2d 838, 99 S.Ct. 526.

Therefore, both the United States Constitution and the Texas Constitution provide that an accused has a right to the assistance of counsel for his defense in all criminal prosecutions. Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed.2d 799 (1933); Webb v. State, 533 S.W.2d 780, 783 (Tex.Crim.App. - 1976). That constitutional right is applicable to both felony and misdemeanor cases. See Argersinger, Supra.

An accused may waive his right to counsel, but in order for the waiver to be valid, it must be made knowingly and voluntarily. Ex Parte Ross, 522 S.W.2d 214, 220 (Tex.Crim.App.); Parker v. State, 545 S.W.2d 151, 155 (Tex.Crim.App. - 1977). That waiver will not be lightly

inferred; the courts will indulge every reasonable presumption against a waiver of fundamental rights. Id. A heavy burden rests upon the prosecution to demonstrate an intelligent, voluntary and knowing waiver of constitutional rights, particularly as applied to the right to retained or appointed counsel. Ex Parte Bird, 457 S.W.2d 559, 560 (Tex.Crim.App. - 1970). A waiver of the right to counsel will not be presumed from a silent record. See Carnley v. Cochran, 369 U.S. 506, 515-16, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962).

The determination of whether there has been an intelligent waiver of the right to counsel must depend in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. Ex Parte Auten, 458 S.W.2d 466, 469 (Tex.Crim.App. - 1970).

See also Baqueda v. State, 80-23921, County Court at Law Number Two.

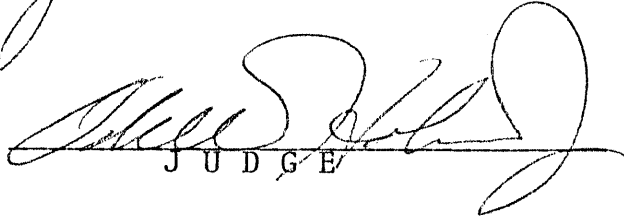
Although the extent of a judge's inquiry into a waiver of counsel in a misdemeanor case within the jurisdiction of the Municipal Courts of El Paso, Texas is not addressed in this Opinion, a judge must investigate and make inquiry as long and as thoroughly as the circumstances of the case before him demand. Pettis v. State, 693 S.W.2d 669 (Tex.App. 7 Dist. 1983).

The record before this Court is at best ambiguous as to whether or not there was in fact a waiver of attorney. In fact, this Court's inclination is to view the record as being silent on this particular point. This Court held oral argument and reviewed the docket entries, and the form docket did not indicate that an attorney was waived. The heavy burden resting upon the prosecution to demonstrate waiver of an attorney is not reflected in the record.

Therefore, the writ is granted, and the conviction of the Appellant under Citation No. 07055069 and 07055059, and

their corresponding docket numbers in Municipal Court are hereby reversed, and the cause is remanded for retrial. Any commitments or warrants issued in connection with those causes are hereby ordered withdrawn and voided.

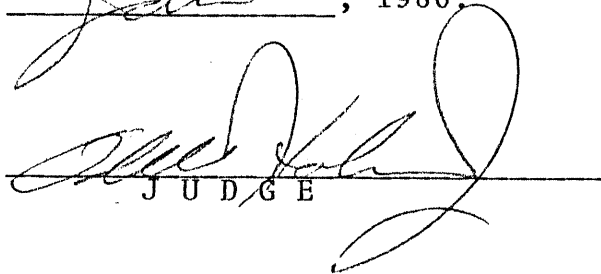
Signed this 16 day of Jan, 1986.


J U D G E

J U D G M E N T

The Judgment of The Trial Court is hereby reversed and the case is remanded for new trial.

Signed this 16 day of Jan, 1986.


J U D G E