

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-149247-001 DT

05/03/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

ANDREA L KEVER

v.

MUIKAM HO (001)

DAVID ROSCOE

REMAND DESK-LCA-CCC
SAN TAN JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number JC 2011-149247.

Defendant-Appellant Muikam Ho (Defendant) was convicted in the San Tan Justice Court of prostitution. Defendant contends the trial court erred in informing her of her appellate rights before the trial started. For the following reasons, this Court reverses the judgment and vacates the sentence imposed.

I. FACTUAL BACKGROUND.

On September 26, 2011, Defendant was charged in the San Tan Justice Court with prostitution. Trial began on May 10, 2012. Defendant said she spoke English “so-so” and understood English “sometimes so-so.” (R.T. of May 10, 2012, at 22.) Prior to the start of trial, the trial court made the following statement, and the following exchange took place:

JUDGE: Is—Ms. Ho here? Okay. All right. We can—we can go ahead and proceed into the next trial.

RYBARSYK: We need an interpreter, we have one here.

JUDGE: Okay. Yeah. We—we have one here. I—what I do need to have—have you sir, if you would bring Ms. Ho up to the front here. We have a notice of right to appeal. I need to have that notice signed prior to trial. And if—you may have already explained to her the appeal process in the justice court; she needs to come up and sign though.

RYBARSYK: Who does?

JUDGE: Your client? Ms. Ho.

RYBARSYK: She hasn't been convicted yet, why would she want an appeal?

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JUDGE: Because the rules require us to inform before we proceed with the trial; the notice and the steps of a right to appeal. You know, I—I agree with you on that one, it's kind of backwards, but they're telling us that these are required prior to the hearing.

RYBARSYK: Okay. She's [the interpreter is] going to explain that you have some papers to sign, and you have the right to appeal.

JUDGE: Okay. Ma'am [the interpreter], what I need her to do is to sign here and date it and then I'm going to give her a copy. . . .

(R.T. of May 10, 2012, at 1.)

After presentation of the evidence and the arguments of counsel, the trial court found Defendant guilty. (R.T. of May 10, 2012, at 68.) The trial court then imposed sentence. (*Id.* at 69.) On May 23, 2012, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES.

A. *By informing Defendant, before the trial started, what she would be able to do upon her conviction of the charge, did the trial court deny her due process and negate the appearance of a fair trial.*

Defendant contends the action of the trial court in informing her, before the trial even started, what she would be able to do upon her conviction of the charge, denied her due process and negated the appearance of a fair trial. The United States Supreme Court has stated:

Every procedure . . . which might lead [the trial court] not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927). The document the trial court had Defendant sign prior to trial was entitled Defendant's Notice of Rights To Appeal—Criminal. It advised Defendant of her rights to appeal "from an order or final judgment." It informed her that "[e]xecution of any sentence requiring incarceration will be stayed." Defendant only spoke and understood English "so-so." This Court concludes informing Defendant, prior to the start of the trial, of her rights once she was convicted of the charge, denied her due process and negated the appearance of a fair trial. This Court must therefore reverse the judgment of guilt and the sentence imposed and remand the matter for a new trial.

The trial court was apparently unaware of the following rule:

Rule 26.11. Duty of the court after pronouncing sentence.

After trial, the court shall, in pronouncing judgment and sentence:

a. Inform the defendant of his or her right to appeal from the judgment, sentence or both and advise the defendant that failure to file a timely appeal will result in the loss of the right to appeal.

. . . .

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c. Hand the defendant a written notice of these rights and the procedures the defendant must follow to exercise them, receipt of which shall be shown affirmatively in the record.

Rule 26.11(a) & (c), ARIZ. R. CRIM. P. If the trial court had followed that rule of criminal procedure, or if the prosecutor had advised the trial court of that rule, this problem would have been avoided. The trial court did say “they’re telling us that these are required prior to the hearing.” (R.T. of May 10, 2012, at 1.) The trial court did not state who “they” were, and this Court is unaware of any rule of procedure that requires a trial court to inform a defendant, prior to trial, what the defendant should do once the defendant is convicted.

B. *Was Defendant entitled to a jury trial.*

In her Memorandum, Defendant had contended she was entitled to a trial by jury. At oral argument, Defendant’s attorney withdrew that argument. Because this Court is remanding this matter for a new trial, this Court will address that issue to provide guidance for future cases.

Defendant had contended the trial court erred in denying her request for a jury trial because (1) prostitution has a common-law antecedent that required a jury trial, and (2) the potential mandatory minimum sentence of 15 days in jail is a severe consequence. A review of the authorities shows the trial court correctly denied Defendant’s request for a jury trial.

Under Arizona law, a defendant is entitled to a jury trial if the offense was the same as or similar to an offense under common law for which the defendant was entitled to a jury trial. *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147, ¶¶ 9–10, 36–37, 40 (2005). Prostitution was not, however, an indictable offense at common law. *Bailey v. United States*, 98 F.2d 306, 308 (D.C. Cir. 1938); *accord*, *State v. Lindsey*, 77 Hawaii 162, 166, 883 P.2d 83, 87 (1994); *Matthews v. State*, 68 Md. App. 282, 298, 511 A.2d 548, 556 (1986). *See also State v. Allen*, 2 Conn. Cir. Ct. 594, 597, 203 A.2d 248, 249 (1964); *Prout v. State*, 311 Md. 348, 365 n.8, 535 A.2d 445, 453 n.8 (Ct. App. 1988); *People v. Bailey*, 105 Misc. 2d 772, 773, 432 N.Y.S.2d 789, 791 (N.Y. Crim. Ct. 1980); *State v. Custer*, 65 N.C. 339, 339 (1871); *State v. Grimes*, 88 Or. App. 159, 163 n.5, 735 P.2d 1277, 1279 n.5 (1987); *Commonwealth v. Lavery*, 247 Pa. 139, 143, 93 A. 276, 278 (1915). Because prostitution was not an indictable offense at common law, Defendant was not entitled to a jury trial for that offense under this part of the test.

Defendant contends: (1) this offense is similar to keeping a house of prostitution; (2) keeping a house of prostitution (or keeping a bawdy house) was a common-law offense for which a defendant was entitled to a jury trial prior to statehood; thus (3) Defendant was entitled to a jury trial. This Court concludes Defendant is incorrect in this analysis. As noted above, a defendant is entitled to a jury trial if the charged offense is the same as, or is similar to, a **common-law** offense for which a defendant was entitled to a jury trial before statehood. But the jury trial rights provided for crimes under the **territorial penal code** prior to statehood were not preserved by the Arizona Constitution, thus the fact that a defendant had the right to a jury trial for an offense under the territorial penal code does not necessarily mean a defendant is presently entitled to a jury trial. *Abuhl v. Howell*, 212 Ariz. 513, 135 P.3d 68, ¶¶ 10–11 (Ct. App. 2006) (although there

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may have been statutory crime of false reporting to law enforcement agency at time of statehood, there was no common-law crime, thus defendant is not entitled to jury trial under this part of test); *Phoenix City Prosecutor's Office v. Klausner (Buford)*, 211 Ariz. 177, 118 P.3d 1141, ¶¶ 9–10 (Ct. App. 2005) (defendants contended that, prior to statehood, persons charged with misdemeanors were given jury trials on demand, thus he was entitled to jury trial for charge of assault; court held fact that territorial courts granted jury trials in misdemeanor cases in compliance with territorial statutes did not mean defendants were presently entitled to jury trials); *Newkirk v. Nothwehr*, 210 Ariz. 601, 115 P.3d 1264, ¶¶ 10–12 (Ct. App. 2005) (jury trial on allegation of prior conviction was statutory right under territorial penal code, thus allegation of prior conviction had no common-law antecedent that would require jury trial on present allegation of prior conviction). The antecedent for keeping a house of prostitution under A.R.S. § 13–3208 was a statutory offense under the territorial penal code:

It shall be unlawful for any owner or agent of any owner or other person or persons, to keep or reside in any room, apartment or house of ill-fame or ill repute, or house, room or apartment resorted to for the purpose of prostitution or assignation or to let, lease or rent for any length of time whatever to any person of ill fame any house, room or structure situated 400 yards in a direct line of any school house or school room used by any of the schools in the Territory of Arizona, or within 250 yards in a direct line of any county court house, city hall or other public building in the Territory of Arizona Any person violating any of the provisions of this act is guilty of a misdemeanor.

ARIZ. PENAL CODE of 1901 § 275. This section was re-enacted after statehood. ARIZ. PENAL CODE of 1913 § 306; ARIZ. REV. CODE of 1928 § 4661; ARIZ. CODE of 1939 § 43–4407; A.R.S. of 1956 § 13–589. Thus, because keeping a house of ill repute or house of prostitution was a statutory crime under the territorial penal code and not a common-law offense in Arizona, the fact that a defendant may have received a jury trial for that offense prior to statehood does not entitle Defendant to a jury trial for the charge of prostitution.

Defendant contends she would face severe and direct consequences from a conviction because of the mandatory 15 days in jail. To mandate a jury trial, the collateral consequences must approximate in severity the loss of liberty that a prison term entails. *Derendal* at ¶ 24. The minimum prison term in Arizona, which is mitigated term for a Class 6 felony, is 4 months. A.R.S. § 13–702(D). The 15 days of incarceration in jail does not approximate severity that 4 months in prison would entail. Thus, the mandatory 15-day incarceration in jail does not entitle Defendant to a jury trial.

C. *Was failure to place the interpreter under oath a violation of Rule 604.*

In her Appellant's Memorandum, Defendant contends failure to place the interpreter under oath requires reversal of her conviction. The rules provide as follows:

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

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Rule 604, ARIZ. R. EVID. Because this Court has already ruled this matter must be remanded for a new trial, this Court does not need to determine whether this contention would have resulted in a new trial.

Because this Court is remanding this matter for a new trial, this Court must, however, address several points. The record from the trial that resulted in Defendant's conviction shows Defendant's attorney never objected on the basis of administering an oath to the interpreter. If a new trial is held and there is an interpreter involved, Defendant's attorney will have to raise the issue of an oath for the interpreter. If Defendant fails to do so, for three reasons Defendant would face the possibility of waiver on review.

First, if the interpreter is an official court interpreter, that person may have already been placed under oath, thus there would be no need to repeat that administration of the oath at trial. By making an objection, the trial court could determine if the interpreter is already under oath.

Second, if the interpreter is not already under oath, raising the issue would allow the trial court to place the interpreter under oath. By not objecting, Defendant's attorney would be creating an issue that could have been corrected at trial.

Third, if Defendant's attorney does not object, any appellate review would have to be for fundamental error only, which means Defendant would have to establish prejudice in order to obtain relief on appeal. The only way Defendant could establish prejudice would be to show the interpreter did not translate properly, and it would be unlikely the record on its face would show any improper translations. Thus, the only way Defendant could establish prejudice would be to file a petition for post-conviction relief and have the trial court hold a hearing.

III. CONCLUSION.

Based on the foregoing, this Court concludes informing Defendant, prior to the start of the trial, of her rights once she was convicted of the charge, denied her due process and negated the appearance of a fair trial. This Court must therefore reverse the judgment of guilt and the sentence imposed and remand the matter for a new trial.

IT IS THEREFORE ORDERED reversing the judgment and vacating the sentence imposed by the San Tan Justice Court.

IT IS FURTHER ORDERED remanding this matter to the San Tan Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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