

Salvador Romos appeals his conviction for operating a vehicle while intoxicated with a child passenger as a class D felony.¹ Romos raises one issue, which we revise and restate as whether the trial court abused its discretion by failing to appoint counsel because he was indigent. We affirm.

The relevant facts follow. On September 5, 2005, Goshen Police Officer Elva Yoder received a call from dispatch that a male driver of a gold vehicle was consuming alcohol while waiting for his food in a drive through lane at a fast food restaurant. Officer Yoder observed a vehicle matching the description drive off the right side of the road and cross the center line. Officer Yoder attempted to conduct a traffic stop by activating her overhead lights, but Romos continued driving. Officer Yoder turned her siren on, and Romos eventually pulled over six blocks after Officer Yoder had initially turned on her overhead lights.

As soon as Romos stopped his vehicle, he opened his door and began walking toward the back of a building. Officer Yoder walked up to Romos and could smell the odor of alcohol on his breath. Romos's eyes were glassy and bloodshot, and he was swaying as Officer Yoder spoke. Romos submitted to field sobriety tests but failed them. Romos's girlfriend and her three children were in Romos's vehicle.² Officer Yoder

¹ Ind. Code § 9-30-5-3 (2004).

² The children were five years old, six years old, and nine years old.

transported Romos to the Goshen Police Department for a breathalyzer test, and Romos tested 0.22 grams of alcohol per 210 liters of breath.

The State charged Romos with: (1) Count I, operating while intoxicated with a child passenger as a class D felony; and (2) Count II, operating with a breath alcohol content of fifteen hundredths of a gram or more, in the breath with a child passenger as a class D felony.³

On September 16, 2005, the trial court held an initial hearing, at which Romos requested a public defender. The following exchange occurred between the trial court and Romos:

Q Are you currently employed?

A No. I was fired when I was locked up. Oh, no. I was laid off for 15 days.

Q Before you were laid off, how much were you making?

A Ten dollars an hour.

Q How many hours a week?

A Forty.

Q Is there any reason to believe you can't get another job somewhere for that much?

A Yeah, I can look.

³ Ind. Code § 9-30-5-3 (2004).

Q Okay. At this point I will deny your request for an attorney. If for some reason you do not get another job or your next job is significant [sic] less in money, then you can always renew your request for an appointment of a lawyer.

Hearings Transcript at 7-8.

On November 2, 2005, the trial court held an indigency hearing, at which Romos requested an attorney. The following exchange occurred between the trial court and

Romos:

Q What is different today from your circumstances on the 16th of September?

A I understood on the previous court date that he was going to give me a public defender and I went to talk to them and then they told me that it had been denied. I don't understand. I need a public defender or if I can start getting some money together to get my own attorney.

Q Do you still live at 206 Lincoln Apartment B?

A Yes.

Q Where do you work?

A I'm a mechanic but I'm not working right now.

Q When is the last time that you were working?

A When I was arrested I was in jail two days and I lost my job then.

Q Where did you work then?

A In Bristol. I was maintenance in a factory in Bristol.

Q And you've not been employed since then?

A I work as a mechanic at home.

Q How much do you make doing that?

A About three hundred dollars a week.

Q Are you married?

A Yes.

Q And does she live with you?

A No. She's in Mexico.

Q Do you have any children?

A Yes.

Q Are they also in Mexico?

A Yes.

Q Do you live with anyone at 306?

A Inaudible.

Q What debts do you have?

A None.

Q Is there anything else that you think I should know about your financial circumstances?

A No.

THE COURT: With that information Mr. Romos, I can't find that you're indigent, so I can't appoint a lawyer for you. You will have to either hire your own or represent yourself.

Id. at 9-11.

On December 14, 2005, the trial court held a pretrial conference, at which the following exchange occurred:

THE COURT: . . . you'd had previously requested the appointment of counsel and were found not to be indigent. No lawyer has appeared for you yet. Are you planning to represent yourself in this case?

[Romos]: No. I need an attorney.

THE COURT: How long will it take you to get a lawyer?

[Romos]: I arranged to get an attorney, but I got sick. And these are the hospital papers.

THE COURT: So how long will it take you to get a lawyer?

[Romos]: Two months. Two and a half months. Right now I'm not able to work. I get that postponement I would be thankful.

* * * * *

THE COURT: Alright, what I will do Mr. Romos is I will set your case for trial on March 23rd at nine o'clock. That gives you about three months to get the lawyer in the case and get prepared. Otherwise you'll be representing yourself. Any questions about the procedure?

Id. at 13-14.

On March 23, 2006, a jury trial occurred, and Romos failed to appear in person or by counsel. The jury found Romos guilty as charged. The trial court issued a bench warrant, which was served. On July 5, 2006, the Sheriff produced Romos, and the trial court held a presentencing hearing. The following exchange occurred:

[Romos]: Could I get a public defender because I really don't have funds to get an attorney?

* * * * *

THE COURT: When were you picked up on the warrant?

[Romos]: I went to jail to get my wife and they – yeah, --

THE COURT: Your wife was in jail?

[Romos]: Well it's my girlfriend. We live together.

THE COURT: So you were picked up on Saturday?

[Romos]: Yes.

THE COURT: What was your employment when you were arrested?

[Romos]: No I was not working.

THE COURT: How were you supporting yourself?

[Romos]: Oh, yeah I was working at San Marcos. Is that the only way
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THE COURT: What is your address, sir?

[Romos]: I changed from Lincoln to Madison. 212 Madison.
Inaudible. I don't know if it's east or west. I lived on
Lincoln Street.

THE COURT: You're now at 212 Madison?

[Romos]: Yes.

THE COURT: You live with anyone?

[Romos]: I live with my girlfriend.

THE COURT: Is she employed?

[Romos]: Right now she's not. I'm the only one that's working.

THE COURT: How much do you make at San Marcos?

[Romos]: About three hundred, three fifty and I support the children. Her children.

THE COURT: So how much money do you have available to you right now?

[Romos]: I don't have anything now.

THE COURT: Do you expect to receive money from any source in the next 45 days?

[Romos]: No. I don't know because we're – I don't know. I'm not working, how can I support her children?

THE COURT: I will appoint the public defender to represent you. You may be required to pay for their services, but at least you'll have a lawyer for sentencing.

Id. at 16-18.

At the sentencing hearing, the trial court stated that Count II merged into Count I. The trial court's order stated that Count II had been dismissed and the trial court's abstract of judgment only listed Count I. The trial court sentenced Romos to serve two years and recommended that the time be served in the work release program.

The sole issue is whether the trial court abused its discretion by failing to appoint counsel. Romos argues that the trial court failed to adequately review his financial status to determine whether he was indigent. Romos also argues that his financial situation did not drastically change between the time when he first requested counsel and when the trial court appointed counsel. The State argues that "based on the totality of the information provided to the trial court prior to the trial it was reasonable for the trial court

to conclude that requiring [Romos] to hire an attorney would not constitute a *substantial* burden on [Romos] and his family.” Appellee’s Brief at 8. The State also argues that Romos “made no claim to the court that he provided support to his girlfriend’s children until the hearing held *after* his jury trial.” Id.

A defendant charged with a crime is guaranteed the right to be represented by counsel by Article I, § 13 of the Indiana Constitution and by the Sixth and Fourteenth Amendments to the United States Constitution. Spinks v. State, 437 N.E.2d 963, 966 (Ind. 1982). A failure to permit any defendant to have counsel represents a deprivation of that defendant’s constitutional right to due process. Id. This guarantee of the right to be represented includes the right for an indigent defendant in a criminal trial to have counsel provided at State expense. Id. It is a judicial function, however, to determine whether counsel should be appointed at public cost, and this determination is within the discretion of the trial judge. Id.

“[I]t is not possible to set specific monetary guidelines which would determine a defendant’s indigency.” Moore v. State, 273 Ind. 3, 7, 401 N.E.2d 676, 678 (1980). A defendant “does not have to be totally without means to be entitled to counsel.” Id. If the defendant “legitimately lacks the financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him.” Id. “The determination as to the defendant’s indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant’s total financial picture as is practical.” Id.

at 7, 401 N.E.2d at 679. “The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant’s disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations.” Id. Because “we are dealing with such a fundamental constitutional right, the record in each case must show that careful consideration commensurate with the right at stake has been given to the defendant.” Id. at 7, 401 N.E.2d at 678.

Romos relies on Moore to argue that the trial court failed to properly inquire into his financial status and failed to inquire as to the financial hardship that he would have faced if required to obtain private counsel.⁴ In Moore, the defendant asked to have counsel appointed and testified that he had no more money to pay his attorneys. Moore, 273 Ind. at 8, 401 N.E.2d at 679. The trial court inquired as to whether the defendant was employed and whether or not he owned property. Id. However, the record did not show “any detailed inquiry by the trial court as to the amount of defendant’s income, the amount of any indebtedness on his property or car, the amount of any other outstanding obligations, or even the actual amount of the equity defendant allegedly owned in his home and the drilling equipment.” Id. The Indiana Supreme Court concluded that the record did not show an “adequate determination of the factual question of defendant’s

⁴ Romos does not argue that the trial court erred because he was absent from the trial or that the trial court erred by failing to inform him of the disadvantages of representing oneself. Rather, Romos limits his argument to whether the trial court abused its discretion by failing to make a proper inquiry into

ability to afford counsel prior to trial” and that nothing in the record showed a “balancing of defendant’s assets against his liabilities and a consideration of the amount of defendant’s disposable income or other resources reasonably available to him.” Id.

Here, unlike in Moore, the trial court asked Romos whether he was employed, how much he earned, how many hours he worked, whether he could find another job, whether he was married, whether his wife lived with him, whether he lived with anyone, whether he had any debts, and whether the trial court should know anything else about his financial circumstances. Further, Romos admitted that he worked as a mechanic from home, earned approximately \$300.00 a week, and had no debts. Based on the exchanges between the trial court and Romos, we conclude that the trial court conducted a sufficient examination. Further, we cannot say that the trial court abused its discretion by failing to appoint counsel to Romos.

For the foregoing reasons, we affirm Romos’s conviction for operating a vehicle while intoxicated with a child passenger as a class D felony.

Affirmed.

SULLIVAN, J. and CRONE, J. concur