KIRKWOOD *v.* STATE.

4154 136 S. W. 2d 174

Opinion delivered January 29, 1940.

1. CRIMINAL LAW.—Where the record shows that appellant charged with a misdemeanor had from 1 p. m. to 9 a. m. the next day to employ counsel, his objection that he was forced into trial without having had an opportunity to employ counsel could not be sustained, especially where the record fails to show that he objected at the time.
2. CRIMINAL LAW—ASSIGNMENT OF COUNSEL.—Since appellant was charged with a misdemeanor, there was no duty resting on the court to appoint counsel for him. Section 3877, Pope's Dig.
3. CRIMINAL LAW—DILIGENCE IN SECURING WITNESSES.—Where appellant charged with a misdemeanor knew that his case would be called the next morning, a delay from the time of his arraignment at 1 p. m. until the next morning to secure subpoenas for his witnesses, was a lack of diligence.
4. CRIMINAL LAW.—Questions not reflected by the bill of exceptions and which are raised for the first time in a motion for a new trial cannot be considered.
5. CRIMINAL LAW—SUFFICIENCY OF EVIDENCE.—Where appellant charged with gambling or operating a gambling device introduced no testimony on his behalf, the testimony of witnesses for the state that they had been in appellant's roadhouse, saw a slot machine there in operation and that the machine was a kind of gambling device where you put money in, pulled the crank and got money out, if you are lucky, was sufficient to sustain a verdict of guilty.

Appeal from Cleburne Circuit Court; *Garner Fraser,* Judge; affirmed.

Gordon Armitage, for appellant.

Jack Holt, Attorney General and *Jno. P. Streepey, Asst. Atty. General,* for appellee.

MCHANEY, J. On September 20, 1939, appellant was charged by information with the crime of gambling, committed by operating a gaming device—a slot machine. Court being in session, a bench warrant was issued and he was arrested. The record shows that at 1 p. m. of that date his case was called in court, where he appeared in person and announced that he was not ready for trial; the court advised him the case would be called at 8 a. m. the next morning. At 9 a. m., September 21, his case was called for trial and he again was not ready. He stated that he wanted to get an attorney from Searcy and had just had a subpoena issued for his witnesses. The court held that he had not used diligence, and the case went tc trial, resulting in a verdict of guilty and assessing a fine of $500 and sixty days in jail, on which judgment was entered.

If appellant objected to being forced into trial before he had an opportunity to employ counsel, or if he filed a motion for a continuance because of the absence of his witnesses, the record does not show it. He had from the time he was arrested on the preceding day to 9 a. m. to employ counsel and have subpoenas for his witnesses. This being a misdemeanor charge, there was no duty on the court to appoint him counsel. Section 3877, Pope's Digest. And he showed no diligence in getting witnesses, even had he filed a motion for continuance on that account.

All the other questions raised by appellant, except the sufficiency of the evidence to support the verdict, are not open to question by him, because not reflected by the bill of exceptions and are raised for the first time in his motion for a new trial. He did file a motion for an order *nunc pro tunc,* but it does not appear that it was presented to or ruled on by the court.

The sufficiency of the evidence cannot be doubted. It is not in dispute. He offered no witness and did not testify for himself. Three witnesses testify for the state,

that they had been in appellant's road house, saw a slot machine therein in operation, and one said the machine he saw was a kind of gambling device, where you put money in, pulled a crank and got money out, if you were lucky. This was amply sufficient.

Affirmed.
