Supreme Court of the United States

October Term, 1968

In the Matter of:

TOMMIE E. L. WILLIAMS,

Petitioner;

vs.

CITY OF OKLAHOMA CITY, et al.,

Respondents.

Docket No. 841

Pt. 1

Place Washington, D. C.

Date April 1, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner;

vs. No. 841

CITY OF OKLAHOMA CITY, et al.,

Respondents.

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The above-entitled matter came on for argument at 1:55 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

JON F. GRAY, ESQ.
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Legal Aid Society of
Oklahoma County, Inc.
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Oklahoma City, Oklahoma
Counsel for Petitioner

APPEARANCES (Cont.):

GILES K. RATKLIFFE, ESQ.
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Counsel for Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE MARSHALL: No. 841, Tommie E. L. Williams, Petitioner; versus City of Oklahoma City, et al.

Mr. Gray, you may proceed with your argument.

ARGUMENT OF JON F. GRAY, ESQ.

ON BEHALF OF PETITIONER

MR. GRAY: Mr. Chief Justice, may it please the Court.

The petitioner below has been completely barred from his statutory right to appeal the criminal conviction against him and this bar has been solely upon the basis of his poverty.

We, therefore, contend that the case before Your Honors today is on all fours where even a stronger case than that presented to this Court, in the case of Griffin versus Illinois and the following cases in which this Court has held for a decade that the State may not withdraw a right of appeal from a person upon any invidious discrimination, such as poverty.

The respondents raise two points. Their first point is that there is some adequate alternative method of appeal open to us and the second point is that the Griffin rule should not apply since the offense convicted in this case and appealed from is a petty offense with which we disagree.

In Oklahoma, as was the situation in Illinois at the

time of the Griffin case, there are two methods of appeal.

There is a short form of appeal, which is the clerk's transcript and contains barely the few papers of record. It is conceded in respondents' brief at Page 8, and it was so held by the trial court that this method of appeal is inadequate in this case.

The second method of appeal available in Oklahoma is the long form which we call a case-made, and which respondents agree in their brief at Page 4 is the method in which the court reporter's transcript of all of the evidence and all the proceedings and all the instruments are made up and presented to the appellate court.

Now, turning to their first point that there is an adequate alternative method, the respondents assert that the defendant should have made up a statement of the evidence from memory in narrative form and submitted it, and I quote from Page 8 of their brief, "in lieu of the case-made" and that, therefore, we would have an alternative method of appeal.

Q Just where did that word "case-made" come from?

A Your Honor, the statutes, as far as I can tell, states that the parties shall make up a case and I think that is where it comes from.

Q Which statute? It is in the appendix to your brief and ---

A Yes, it is.

Q --- you have so many I am having a little trouble finding it. I am not being critical. It is a very thorough brief.

A It is on Page 39.

Q Top of Page 39.

A Right.

Q "Case-Made in Criminal Cases".

A Now, the facts of this case which we say brings this case within Griffin rule is that the defendant, who has conceded in this case of being indigant. He was a hospital janitor making about $55 a week and supporting living children. The defendant was convicted in the Municipal Court of Oklahoma City after a trial -- and this is important -- a trial by a 12-man jury, was convicted of the crime of driving -- and this is also critical -- driving under the influence, not drunk-driving because everybody knows what drunk-driving is, but driving under the influence.

He was sentenced to serve 90 days in jail and pay a fine of $50 under a statute in which the maximum sentence is 90 days in jail and $100.

Q Is there a distinction between drunk-driving and driving under the influence?

A I think it is a matter of degree, Your Honor.

Q I know. But is there a legal difference between the two? You said you know what drunk-driving is but this is

something different.

A I think if he was charged with drunk-driving -- and I know of nothing on the statutes that sets out that charge but I understand that some States have them -- that the prosecution would have to prove that the defendant was drunk.

In this case the prosecution only has to prove that the defendant had enough alcohol to influence his driving to some degree which would render him incapable of safely driving.

Q You just have this single offense in your State; right?

A Right.

Q You don't have the two.

A No, as far as I know, there is no drunk-driving statute in Oklahoma, just driving under the influence.

The defendant filed his motion for a new trial and attached, thereto, the sworn affidavit that the person who was driving the car at the time of the so-called alleged accident, but that motion for a new trial was overruled and he requested a case-made.

It is recognized by the trial court that the petitioner, in this case, would have an absolute right to appeal if he would pay for the court reporter's notes.

The respondents have attached, as an exhibit, to their first brief in this case a transcript of the hearing and the trial conceded this point.

Q Mr. Gray, do I correctly understand that the question here is not whether he has a right to appeal, that he can appeal ---

A Right.

Q --- and on that appeal he would get the transcript which you refer -- what do you refer to it as?

A The case-made, yes.

Q No, no.

A The court reporter's transcript?

Q The reporter's transcript. He would get that without paying for it; is that right?

A That is correct.

Q So, the only question here is, not his right of appeal, but it is whether he can have a right, as you would put it I suppose, of effective appeal in the sense that he can't obtain, without paying for it, the stenographic report of what transpired at his trial.

A That is very well put. It was conceded by and expressly stated by both courts that if he had been convicted of a felony in District Court he would have been given this transcript without cause.

Now, it is interesting to note that at the hearing, on our request for a court reporter's transcript, the trial court held several findings of fact which are lengthy but briefly the important ones are -- and it is for this reason that

we contended this case is stronger than Griffin -- the trial court held that we have the legal need for the long form of appeal and that the short form is inadequate.

The second important point that the trial court found is that our appeal is not without merit, which is similar to a Federal Court finding that the appeal is not frivolous.

The third point that strikes right at the heart of the respondents' first contention is that the defendant -- neither the defendant nor his attorney could compile from memory an adequate narrative statement, an adequate transcript.

Q Why not?

A The trial court, Your Honor, heard the pre-trial hearing and they had pre-trials in this court, and heard the trial and heard our motions and our arguments and, of course, taking all that into consideration, I assume, he felt it not unreasonable that we couldn't remember all the important points in the case.

Q How long did the trial take?

A It took approximately one day.

Q How short would it have to be so memory would suffice?

A Your Honor, the only thing that I can respond to in that regard is this Court's holding in the Gardner case which was rendered at the time my brief was turned in so it is not in my brief but this Court pointed out that certainly a

lawyer would be lost without a transcript in even preparing a petition for review and that is the position in this Court today. I don't know how short a hearing would have to be ---

Q How many witnesses were there?

A I think there were approximately four.

Q And it took a whole day?

A Yes, sir, that is my memory.

Q Don't some States have this as a regular procedure, where the defense counsel presents a statement of the facts on appeal and it is settled by the Court after consultation with counsel?

A Yes, they do, Your Honor. We admit that Oklahoma could establish such a procedure.

Q You have such a procedure?

A No, I say we admit that they could and that would be a reasonable alternative.

Q What do they have?

A Your Honor, the two methods of appeal are the clerk's transcript, which contains only the bare pleadings in the case, the information, the minutes and the judgment and the case-made that we have discussed.

Q Those are the only two?

A Yes.

Q There is no provision at all for counsel getting together and presenting a statement of the facts to the Court

and have it approved and used as a record on appeal?

A There is none that I have found and if there is it is a point that has escaped, also, defense and the trial court because this has all been discussed in the hearing.

Q Why did the trial court make the finding that the party couldn't remember what went on?

A Well, he ---

Q What if he could have? What could he have done?

A What if he could have?

Q Yes.

A Your Honor, I don't know.

Q He could have made his case.

A Well, there are many cases in Oklahoma that set out the requirement for a pre-case-made and one of them is that neither the parties nor their attorney can make up a transcript from memory and we have requested that the trial court rule on this issue and he did so.

He ruled that it would not be reasonable to require us to make up a transcript from memory.

Q What if you could remember it?

A That is a good question, Your Honor.

Q It is relevant here that ---

A It is relevant but it is not one that this Court need get to.

Q Let us assume you thought you could remember --

you had made plenty of notes, like most lawyers do in Court and you made up a running account of what happened at the trial, what the testimony was, do you think that that would be acceptable as a case-made in Oklahoma?

A I tried that, Your Honor, and in a case in this same court ---

Q What happened to you in the State Court?

A In the State Court the Oklahoma Court of Criminal Appeals ruled that the petition for Writ of Mandamus was denied for the same reason that it was denied in this case and because the defendant there was employed and I think there was one other situation that went to his earnings.

Q There was a question as to whether or not he was an indigent, as I remember it.

A Right.

Q That is the petition for certiorari pending here.

A Right, in other words, the Court of Criminal Appeals in Oklahoma did not rule in that case that we couldn't have a case-made because we could remember the testimony. I think it is unfortunate that they didn't speak to that point.

Q Does this all come down to this, Mr. Gray, that you are saying to us that whatever Oklahoma might adopt in the way of some substitute practice, the present practice permits an appeal only on short form or on case-made.

This case is inappropriate for short form and you are

denied case-made because you can't afford to pay for the transcript. Therefore, this practice, in no circumstances, is unconstitutional?

A That is correct, Your Honor.

Q But part of it is that you must have a transcript to make a case?

A That is correct.

Q That goes for all traffic violations?

A Well, we believe that goes for all -- all we are asking this Court to get to is that that goes for all serious criminal convictions and I ---

Q Are there any cases in Oklahoma where a trial record has been made by counsel and approved by the court and used by the court on appeal?

A I have not seen any.

Q May I ask this: This is from the Municipal Criminal Court of Oklahoma?

A Right. It is a court of record.

Q Does this mean that there always is a court reporter?

A That is correct.

Q He is sitting there, taking down, transcribing the evidence?

A That is correct, Your Honor. The statutes have given the same court reporter to the Municipal Criminal Court

of record in Oklahoma City as they have given the District Court, which is the court of general jurisdiction.

Q And he or she is paid out of public funds?

A That is correct.

Q So, this isn't a question of one party or the other needing to arrange in advance and hire a court reporter to come into the courtroom.

A The statute on the court reporter's salary is set out in our brief. But briefly they are that the court reporter is paid a salary and then he may charge the individual appellant for copy.

Q But now do you go directly up to an appellate court from this municipal court or is there an appeal to the District Court for de novo trial?

A Prior to the inception of this court in 1965 the appeals of this type of case went to the District Court. Then they instituted this court and the appeals are exactly as in the District Court, straight to the Court of Criminal Appeals in the State of Oklahoma.

Q Is the trial de novo in the District Court?

A No, Your Honor, there is one trial in the municipal court and then you appeal that finding to the appellate court in the State.

So, the point I would like to make is that the trial court has negated the first point. There is no alternative

record and the only basis for their argument is the 1918 Harris case which was adopted at a time when the court reporter took down all the testimony in long-hand and the judge implying that the attorneys might as well do it.

There is no need to remand this case, therefore, as the respondents request since those courts have ruled upon the issue and have stated the issue to be a lack of statutory authority. That was expressly the trial court's ruling and the Court of Criminal Appeals denied the petition expressly because the U. S. Supreme Court had not intimated that a person convicted of a quasi crime or a petty offense could get an appeal by a case-made.

Now, the issue of quasi crime, which was briefed well in the court below, has apparently been abandoned by respondents and I will submit it on my third argument in my brief. It covers quasi crimes. I think it is clear that there is no quasi crime that is relevant in this case.

Q This man received a sentence of 90 days ---

A Right.

Q imprisonment and a $50 fine?

A That is correct.

Q Was it the 90 days that was the maximum?

A That is the maximum under the city ordinance, right.

Q I take it -- I gather from your brief you think

you are arguing not only about a transcript but about counsel here.

A That turns to the issue of the petty offense, Your Honor, and the short answer is, yes.

Q You think whatever we decide here also decides the counsel issue?

A Yes, Your Honor. This is why: Because our contention is that this is a serious crime. There are, as Your Honor is well aware in this discussion of petty-serious crimes, there are two elements ---

Q What has that got to do with it in this area, serious or petty?

A Well, usually the past determination of whether it is serious or petty has come from the type of penalty and the type of crime. But we think it goes deeper than that.

Q Who has made that distinction concerning questions of counsel or transcript? Who has made that distinction between serious and petty crimes?

A Most of ---

Q Do the States have ---

A No, most of the cases involving petty-serious distinction have been jury trial issues and I think that there has been one or two cases involving the right to counsel?

Q There has? In the Federal Court?

A I am under that impression, Your Honor. I can't

cite you one right now.

Q You don't mean in this Court?

A No.

Q I gather that this Court has refused to review some instances of offenses which carry no more punishment than 90 days. We have refused to review refusals to provide counsel.

A I think thatis correct, Your Honor.

Q Do you think we have to reach that question?

A Well, no, Your Honor, I don't.

Q I wouldn't think so. I suppose you suggest it is incongruous if you prevail on the right to transcript but it wouldn't necessarily follow you are also entitled to counsel?

A We believe that in a serious crime -- that is why we think the right to counsel is important. If this was a petty crime, possibly, we wouldn't have a right to counsel. But it is a serious crime and since it is a serious crime, we have a right to a fair jury trial, including the right to counsel, a fair preliminary hearing and a fair appellate procedure.

The right to a jury trial without counsel would be half a loaf and in this case -- there have been no Oklahoma cases cited to this Court in which the Court said that this situation is a petty offense.

So, turning to the case of Duncan versus Louisiana, for example, as a guide, this Court said that if we look to the laws of the localities as a gauge of the social and ethical

judgments, we see that the crime in this case is serious for the singular reason that for 50 years the State of Oklahoma has given a right to a jury trial based upon due process and that, in all cases in which there is any incarceration, the Oklahoma courts have held that due process requires a jury trial.

For instance ---

Q Even for 15 days?

A Yes, sir, even for one day.

Q Is this a matter of Oklahoma Constitution?

A Well settled Oklahoma Constitutional law and Oklahoma case law based upon the Federal Constitution.

Q Haven't we held that up to six months is a petty offense here ---

A Yes, sir.

Q --- for purposes of jury trial questions?

A Yes, sir.

Q Do you think we should have a different view of it on counsel or transcript?

A No, sir; we concede the fact that there is some-place a petty offense. But this Court need not re-examine the roots of the peety-serious offense distinction because in this case it is a serious crime. It is a serious crime because Oklahoma has always construed this type of crime to be a serious offense.

Did that answer Your Honor's question?

Q I wonder if it does. Am I wrong about this, Mr. Gray, to the extent we have dealt at all with the distinction between petty and serious, or petty and non-petty, whichever way you want to put it, we have indicated, have we not, that there are certain of the guaranties, notably jury trial, which do not apply if the offense, however serious, carries with a punishment not exceeding six months; haven't we?

A Yes, Your Honor. In the Duncan case you implied that if the punishment was under six months there would be no right to a jury trial. We think ---

Q But we draw the distinction on the time, or rather length of imprisonment which the offense may carry.

A Right.

Q We haven't drawn the line based on whether the offense is serious or non-serious; have we?

A No, Your Honor, it is my reading of the cases that the six-month line is a result of findings, as I understand it, that under six months it is not serious and over six months it is serious.

We will argue that there are more considerations than the mere six-month penalty. Your Honor knows well that there has long been discussed that there are two elements, the length of the penalty as well as the seriousness of the crime and in the Oklahoma Court and other cases cited in our brief at Pages 17

and Pages 28; for example, in 1918 Franks versus City of Muskogee.

It gets to the point that when a defendant is convicted of an offense carrying a maximum offense of a $25 fine, as a maximum penalty, this Court held -- the Oklahoma Court held that in any, with regard to ordinance violations, any crime which carries any imprisonment is an essential part of the tribunal and in this case, that I am mentioning to you, the defendant could be jailed for failing to pay a fine, which emphasizes my point that if there is one day of imprisonment in Oklahoma, that is a serious crime.

Ex Parte Monroe, also pointed out, it is another Oklahoma case cited in our brief, that it was never contemplated that a police court, which is not a court of record, could try crimes involving incarceration.

Now, there are precedents in this Court. Callan versus Wilson was a $25 fine and a 30-day imprisonment penalty and in 1888 this Court held that was serious. In the case of the District of Columbia versus Colts, the charge was reckless driving, which we think to be a lesser offense, and the Court held that that was indictable at common law. It was shocking to the general moral sense and State cases have since continued that evaluation of the charge of reckless driving to be a serious offense.

Our contention is that in deciding whether a crime is serious or not, there are other legal indicia besides length

of ---

Q Well, now, is this a submission that on this business of extension of right to counsel, if that is what it is to be, the determination should be made on the basis of a criterion called "seriousness of the offense" rather than by focusing primarily on the punishment that the offense carries? Is that what you are asking?

A We believe that the right to counsel is part of the baggage of the jury trial. I don't know if that answers your question but I submit that the right to counsel shouldn't depend upon an arbitrary imprisonment, a time of imprisonment. It should depend on whether the crime is serious or not and in the past this Court has said there are two considerations.

We are arguing today that there are many considerations about whether a crime is serious. The right to counsel that you are speaking of is extended in Oklahoma by statute and by State constitution; as I mentioned, it is an essential part of the jury trial and also the City of Oklahoma City has an attorney -- and it certainly would be a violation of due process and equal protection, we contend, to try a man with a jury trial when the City of Oklahoma City has an attorney ---

Q Incidentally, did this petitioner have an attorney at the trial?

A Yes, sir. I was the attorney in the trial court.

Q Well, how does this issue, "right to counsel",

come up?

A Well, we are indicating that since there is a right to counsel, that is another indication of the seriousness of the crime.

Q But you say there is a right to counsel in any case in Oklahoma, or did I misunderstand you?

A I think that is a correct position.

Q Then, in Oklahoma, every offense is a serious crime under that definition, even a parking violation.

A I see what you mean, Your Honor.

I think this Court need not get to that point, but I think you are right.

Q That is where your argument leads.

A That is correct.

Q Mr. Gray, as I remember your brief, the points that you rely on to show that Griffin ought to be applied in this case -- that is to say that the State ought to be required to furnish, without cost, to an indigent such transcript as is necessary for effective appeal. That is what you are trying to get us to hold, isn't it?

A Yes, sir.

Q And in order to support the argument that this is the kind of case in that category, you point out that this is a case in which the jury trial is required, that is Point 1; is that right?

A A case in which the jury trial is required and given.

Q Sir?

A Yes, that is right, it is required but ---

Q And the second thing, as I remember, you say that this regarded,that driving while under the influence of an intoxicating liquor, is regarded as malum in se under your cases?

A That is right. In our cases and in this Court.

Q Sir?

A In our cases and in this Court.

Q And in this Court. Then you point out that -- isn't there some provision in the Oklahoma constitution to which you refer us with respect to the definition of a serious offense?

A No, Your Honor. The definition of a serious offense, we contend, comes from the old Oklahoma cases cited in our brief which construe the due process laws to mean that any crime which ---

Q That you have to have a jury trial.

A That is right.

Q I see. What is the limit in your constitution?

A For a jury trial?

Q Yes.

A The limit that applies to this case is anything

over a $20 fine or any imprisonment.

Q Or any imprisonment?

A Right.

Q Since then the Oklahoma constitution has been amended.

A But in the amendment they have left the imprisonment requirement. If there is, still, any imprisonment, it is a serious crime.

Q And in this case the penalty did include imprisonment and the prison term was actually imposed, was it?

A No. It was stayed, pending this appeal.

Q No, I mean to say the judgment included a term of imprisonment.

A Yes, 90 days, a maximum of 90 days incarceration.

Of course, this Court is a court of record and on your question as to the right to a jury trial, our position is that since we do have a right to a jury trial, that is the indication of the seriousness of the crime.

But the other indications, which we submit that this Court may consider, are the serious is a relative term and should be related to something other than a length of punishment. For example, a $50 fine given to a wealthy man would certainly not be serious, but given to a man earning $50 a week and supporting 11 children is serious. I think that is a proper consideration.

There are other gauges of social and ethical judgments of the locality which some authors have termed "extra-legal consequences", such as the loss of a job, or, for example, if a school teacher were given a three-month jail term, wrongfully, that would be a serious offense.

So, we think that this Court, or any court, need not stop just at the penalty, whether it be three months or six months, and look at the seriousness of the crime.

It is interesting that in the Duncan versus Louisiana case, the State level was two years. That was the level at which it was being attacked, whereas the Federal level was six months.

In this case the State level is any imprisonment and in the Duncan case they were asking this Court to improve the individual protections and bring it down to the Federal level. In this case we are asking to improve the individual protection by leaving the dividing line where it is in Oklahoma, that is, any imprisonment ---

Q Is that the dividing line for trial by jury?

A Right.

Q And also for the right to appoint a counsel if you are an indigent?

A Right, and a court reporter.

Q And a court reporter?

A In this particular court, right.

Q And the dividing line is whether or not it can possibly be punished upon conviction by imprisonment?

A That is correct.

Q What is the municipal criminal court?

A The municipal criminal court is a city court of record, established especially by statute,and all of the statutes which regard its procedure are set out in a special section separate from the ---

Q Is there a statute in each county?

A No, just in Oklahoma City. There are ---

Q Oklahoma City only?

A Right.

Q Does it take the place of the recorders court?

A Yes, Your Honor. That is essentially correct. In other counties there are county courts except that in 1960 we had a constitutional revision and the laws are changed. But it doesn't affect this case because the new laws specifically on appeal, at least ---

Q Do they have stenographers there regularly?

A In Oklahoma City.

Q In the municipal criminal ---

A Yes, sir, every day.

Q That is part of the law?

A Yes, sir.

Thank you.

MR. CHIEF JUSTICE MARSHALL: Mr. Ratcliffe.

ARGUMENT OF GILES K. RATCLIFFE, ESQ.

ON BEHALF OF RESPONDENTS

MR. RATCLIFFE: Mr. Chief Justice, if Your Honors please.

The respondents have urged two positions here. One isthat the Court's ruling in the Griffin case should not be extended to this type case for the reason that the relief that the petitioners have sought was denied by the appellate court below on the grounds that this was a quasi criminal, in the language of the Court, or a petty offense.

Now, I think this is where we got into the discussion of serious offense or petty offense. The Court just said that it had reviewed Your Honors' decisions in these matters and had found no case where this Court had said that a transcript must be furnished in a case involving, what they call, a quasi criminal or a petty offense.

Now, clearly, if this were one in which a felony was involved, it would not be tried in this city court. Consequently, this problem wouldn't have arose.

Q What is the jurisdiction of this city court?

A $100 fine, 90 days maximum sentence.

Q The court has no jurisdiction with anything punishable with a more serious offense.

A No, that is true. These are city ordinances

only. That is all they try.

Q Where are their cases appealed to? What is the next level?

A Well, this court that we are dealing with now has only been in existence for two or three years. Prior to that time we had, what we called, the police court where the maximum fine was $20. The appeal from there was to the common plea court where it was tried de novo. Then an appeal from that went to the court of criminal appeals which would be treated as a county matter, transcript would have been furnished under the State law and, as I say, this problem didn't arise until just the last couple of years.

Q But in answer to Justice Black's question, where is the appeal?

A Directly to the court of criminal appeals, just as it was before from the court of common plea.

In other words, this ---

Q Which one has the jury?

A Yes, sir.

Q Which one has the jury?

A Well, both, now.

Q Both?

A The city court of record has a jury.

Q The municipal court?

A Yes. And from that court you appeal directly to

the court of criminal appeals.

Q Trial de novo?

A No, it is tried there jury ---

Q Do you agree with Mr. Gray to the effect that there is no other way that his indigent client can have an appeal on the record, on the evidence, other than to have a case-made by the stenographer at his own expense?

A No, sir, I don't agree with that.

Q That is what I want to know.

A I can't quote you any cases where this has been done. However, in the hearing before the trial court, he, on his motion for a free case-made -- the transcript, a copy of it, is attached to our brief in opposition to the certiorari -- he alleged that it was necessary for him to have the testimony of the three city witnesses, the testimony of the defendant, and he needed to present some additional evidence by way of affidavit, which has been made a part of this record in the last week or so.

Now, clearly, he could not complete his case-made if he just took the reporter's transcript, because the two affidavits or three affidavits that he has acquired -- these people did not testify in court. Those were attached to his motion for a new trial.

So, if the court had said, yes, he can have a case-made, part of his transcript would have had to have been in

narrative form because these people did not testify in the case in the trial court. The reporter could not have included that in the case-made. So, if he can present his case to the court of criminal appeals on a partial reporter's transcript, a partial narrative statement of evidence by way of affidavits, we don't think he would be prejudiced by presenting it all.

This was not a complicated case in which ---

Q That isn't exactly my question. My question was: Is it in the power of the court to make any kind of a record that will enable him to appeal on the evidence in his case other than by a case-made, paid by him?

A I can't quote you where this has been done, Your Honor. I believe that it can be. I believe that the court, the petitioner's attorney, or the attorney for the city, or anyone who could or had the information available could sit down and prepare, in narrative form, a statement of the testimony of these witnesses and that the court of criminal appeals would consider that.

Q Is that done, as a matter of practice?

A As far as I know it has not been done.

Q Do you have any authority to the effect that it can be done?

A No; I have no authority where it can. However, I have quoted a case, it is an old Oklahoma case, it is Harris versus State, in which the court of criminal appeals had this

to say: "If, for any reason, stenographer's notes cannot be obtained, then it is the duty of such lawyer's to use their best exertion to make up a case-made from memory and if they fail to do so the defendant would be held responsible for this neglect of duty on their part." See also Dobbs versus State.

The writer of this opinion practiced law for many years in Texas before court stenographers were known to that State and when under the law the evidence had to be written out as a matter of memory by the attorneys and filed in court within 10 days from the adjournment of the term of court.

The writer never had the least difficulty in preparing his statement for the evidence in his cases and he knows from personal experience that it can easily be done. In fact he seriously doubts if the employment of court stenographers is at all necessary, either in the administration of justice or to the development of lawyers.

It had a tendency to breed carelessness on their part, but, be that as it may, the trial court has a discretion as to when to order the stenographer's notes to be extended without expense to the defendant.

MR. CHIEF JUSTICE MARSHALL: We will recess now.

(Whereupon, at 2:30 p.m. the argument in the above-entitled matter recessed, to reconvene at 10 a.m., Wednesday, April 2, 1969.)