

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

---

**NO. 09-11-00384-CV**

---

**IN RE JAMES STEPHEN RICHARD**

---

---

**Original Proceeding**

---

---

**MEMORANDUM OPINION**

James Stephen Richard petitioned for habeas relief from the trial court's judgment of contempt committing Richard to eleven consecutive twenty-day periods of incarceration for twenty-two separate acts of contempt for failure to pay child support. On July 14, 2011, we ordered Richard's release on bond pending the resolution of his petition. Upon consideration of the issues raised in the petition for writ of habeas corpus and the response filed by the child support obligee, we hold that relator's confinement is illegal because Richard's statutory right to counsel has been violated. We grant habeas relief and order that the relator be released from the bond set by this Court, and order his release from the custody of the sheriff of Montgomery County.

The Family Code provides a procedure for appointment of counsel for the respondent on a motion for enforcement of an order for child support. *See* Tex. Fam.

Code Ann. § 157.163 (West 2008). The court must first determine whether incarceration of the respondent is a possible result of the proceedings. *Id.* at § 157.063(a). If incarceration may result from the proceedings, the trial court must inform a respondent who is not represented by an attorney of the right to be represented by an attorney and, if the respondent is indigent, of the right to the appointment of an attorney. *Id.* at § 157.063(b). The trial court may require an indigent respondent to appear without counsel if the trial court determines that the respondent will not be incarcerated as a result of the proceedings. *Id.* at § 157.163(c). If the respondent claims indigency and requests the appointment of an attorney, the trial court must obtain the respondent's affidavit of indigency. *Id.* at § 157.163(d). If incarceration is a possibility, the trial court must appoint counsel if the trial court determines that the respondent is indigent. *Id.* at § 157.063(e).

The trial court asked Richard if he had an attorney. Richard replied that he did not have an attorney. The trial court admonished Richard as follows: "You're entitled to an attorney. And if you're too poor to afford an attorney, I decide that you're indigent and have one appointed to represent you." The trial court stated that they were going to take a break and informed the parties that the motion for enforcement would be taken up before a motion for protective order that was also before the trial court. Without inquiring about Richard's ability to employ counsel, the trial court instructed Richard to sit down and instructed the bailiff not to let Richard leave.

After a brief recess, the movant testified that Richard had been ordered to pay \$600 per month in child support and \$300 per month on an arrearage judgment, but that Richard had not paid from July 1, 2010 through April 1, 2011. The trial court placed Richard under oath. Richard admitted that “I have fallen far behind on my child support payments[,] for the last year and a half or more I’ve been either unemployed or underemployed.” Richard stated that “It’s not an act of defiance. I’m not standing here trying to prove a point to anybody. I just simply can’t afford it. And then to be put further and further back with all these court proceedings. *That’s why I’m here representing myself, Your Honor. I cannot simply afford even that.*” (Emphasis added).

On cross-examination, counsel for the movant asked Richard if he was currently employed and asked whether he filed income tax. Richard testified that he was not employed and stated that “I haven’t been employed in pushing close to two years. So I’ve had nothing to file.” Richards admitted that he had made no child support payments beginning July 1, 2010. The trial court found that Richard was not indigent and noted that “[y]ou have not presented any testimony sufficient to indicate to me that you do not have resources in which [the arrearage] cannot be paid.”

The child support obligee argues that Richard failed to establish a violation of due process because Richard did not request that an attorney be appointed when the trial court advised Richard of his right to appointed counsel. Although Richard did not expressly request appointed counsel, the record shows that the trial court directed Richard to be

seated without providing an opportunity for Richard to respond to the admonishments. When Richard had an opportunity to speak, he informed the trial court that he was appearing before the trial court without counsel because he could not afford to hire a lawyer. Under these circumstances, Section 157.163(d) required the trial court to obtain Richard's affidavit of indigency. *See* Tex. Fam. Code Ann. § 157.163(d).

The contempt judgment recites that Richard waived his right to counsel. Based upon the totality of the circumstances, the record does not support the recitation. Richard informed the trial court that he was appearing without counsel because he could not afford counsel, but the trial court failed to obtain an affidavit of indigency as required by Section 157.163(d) of the Texas Family Code. *Id.* Thus, the record does not show a knowing and intelligent waiver of the right to counsel. *See In re Rokus*, No. 2-07-269-CV, 2007 WL 2693839, \*2 (Tex. App.—Fort Worth Sep. 13, 2007, orig. proceeding) (mem. op.) (Alleged waiver of counsel was invalid absent an admonishment of the right to counsel and a determination of indigence.). A person cannot be lawfully incarcerated for non-payment of child support in the absence of compliance with the obligor's statutory right to counsel. *See In re Pass*, No. 2-05-457-CV, 2006 WL 668744, \*3 (Tex. App.—Fort Worth Mar. 16, 2006, orig. proceeding) (mem. op.). Accordingly, the trial court's judgment of contempt and order of commitment is void. *See Ex parte Acker*, 949 S.W.2d 314, 316 (Tex. 1997).

Because our ruling on the first issue is dispositive of the petition, we do not consider Richard's remaining issues. We grant the petition for writ of habeas corpus, order that any bond posted by relator or on his behalf in connection with this habeas proceeding be discharged, and order that James Stephen Richard be released from the custody of the sheriff of Montgomery County.

PETITION CONDITIONALLY GRANTED.

PER CURIAM

Submitted on July 25, 2011  
Opinion Delivered August 11, 2011

Before McKeithen, C.J., Kreger and Horton, JJ.