WestVirginiaUniversity
THE RESEARCH REPOSITORY @ WVU

Volume 69 | Issue 1 Article 7

December 1966

Constitutional Law--Duty to Warn Accused of Rights on Arrest

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a court in Illinois, against a West Virginia resident, where in personam jurisdiction was obtained through the Illinois' "long arm" statute. The West Virginia Court recognized that the purpose of the Illinois statute is to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause of the United States Constitution. The court then stated that he purpose of West Virginia's "long arm" statute is in harmony with the purpose evidenced by the Illinois statute. Another indication that the court may give this section of the statute a liberal construction is the decision in *State ex rel. Coral Pools, Inc. v. Knapp.*[23] Here, the court construed the portion of West Virginia's "long arm" statute that provides for in personam jurisdiction over a foreign corporation "if such corporation makes a contract to be performed, in whole or in part, by any party thereto in this State".[24] In this case, an Ohio corporation entered into a parol contract with a West Virginia citizen by telephone to be performed in West Virginia. The Ohio corporation was not qualified to do business in West Virginia, and none of its officers or agents came within West Virginia in connection with the making or execution of the oral agreement. The court, noting the clear trend toward expanding the permissible scope of state jurisdiction over foreign corporations, nevertheless ruled that it would not be inconsistent with the traditional notion of fair play and substantial justice to subject the Ohio corporation to in personam jurisdiction in West Virginia.

In light of this decision and the statement made by the court in the *Gavenda* case, it is conceivable that the *Mann* case would be decided differently if it were relitigated today.

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Constitutional Law—Duty to Warn Accused of Rights on Arrest

D was arrested at his home by city police officers, was taken into custody, was interrogated for two hours at the police station, and signed a confession involving him in kidnapping and rape. *D* was not informed at the time by police or others that he had a right to counsel, either retained or appointed. At the trial, in which the

[23] 147 W. Va. 704, 131 S.E.2d 81 (1963).
[24] W. VA. CODE ch. 31, art 1, § 71 (Michie 1966).

confession was admitted in evidence, *D* was found guilty of kidnapping and rape. The Supreme Court of Arizona affirmed. *Held,* reversed. It is a constitutional prerequisite to the admissibility of such statements that the suspect must, in the absence of a clear, intelligent waiver of the constitutional rights, be warned prior to questioning that he has a right to remain silent, and that any statement he does make will be used against him. *Miranda v. Arizona,* 384 U.S. 436 (1966).

In addition to the *Miranda* case, the Court considered three similar cases, two from California and one from New York. Chief Justice Warren, writing the majority opinion, concluded that, when a person is deprived of his freedom and subjected to questioning by the authorities,[1] the privilege against self-incrimination is jeopardized; that such a person must be informed in clear and unequivocal terms that he has a right to remain silent; that anything he says can be used against him in a court of law; that the person must be informed of his right to counsel,[2] and that, if he is an indigent person, a lawyer will be appointed for him; and that if the person manifests in any manner prior to or during questioning he wishes to remain silent, the interrogation must cease.[3]

The principal case is the latest and most definitive in a long line of cases in which the Court has dealt with the confession problem.[4] The purpose of this comment is not to review those cases, but rather to assess *Miranda's* effect on West Virginia law and law enforcement practices; to consider the decision's effect on the waiver of constitutional rights; and, finally, to note the "new" constitutional basis for the decision. This consideration will warrant a brief description of the *Miranda* setting.

In 1964 the Supreme Court in *Escobedo v. Illinois*[5] held that the accused could not be deprived of the assistance of counsel during the interrogation stage. The Court did not there define

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[1] The Court stated that this was what was meant in *Escobedo* when they spoke of an investigation focusing on the accused. Miranda v. Arizona, 86 S. Ct. 1602, 1612 n.4 (1966).

[2] The Court stated that the fifth amendment privilege of counsel "comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." Miranda v. Arizona, *supra* note 1, at 1626.

[3] Miranda v. Arizona, 86 S. Ct. 1602 (1966).

[4] See Spano v. New York, 360 U.S. 315, 321 n.2 (1959).

[5] 378 U.S. 478 (1964).

what the interrogation stage involved. Conflicting interpretations[6] in various state and federal courts in assessing the implication of *Escobedo* gave rise to *Miranda* and its related cases. Thus the Court's stated purpose was to explore the problems that had been exposed in applying the fifth amendment privilege against self-incrimination to incustody interrogation in an effort to give "concrete constitutional guidelines for law enforcement agencies and courts to follow."[7]

Recent West Virginia legislation,[8] obviously enacted in response to the *Escobedo* decision, appears to meet the *Miranda* requirements except in two particulars: (1) the statute does not specifically provide that the accused is to be told of his right to appointed counsel, (2) nor does it provide, as *Miranda* did, that if the accused manifests in any manner that he wishes to remain silent, the interrogation must cease. Effective recognition could be given to these additional requirements in one of several ways. It could be accomplished by new legislation, or by promulgation of court rules, as is the case in Pennsylvania,[9] or by practical application on the local level. In any event the record of the investigation must reflect the satisfaction of the several requirements of *Miranda*. It seems relatively unimportant in what manner the court's required interrogation principles are applied and effected so long as they are satisfied. Also those who apply them in the first instance must manifest understanding of the nature and scope of the rights involved. A recent case, *State v. Fortner*,[10] decided one week before *Miranda*, indicates lack of application of these principles in West Virginia. This case brings home the urgent need for educating law enforcement officers as to the proper procedures to be followed in incustody interrogation. In *Fortner* a sheriff and his deputy interrogated the accused and obtained a confession without first informing the accused of his right to remain silent or his right to counsel. At defendant's trial the confession was admitted in evidence and he was convicted. The Supreme Court of Appeals of West Virginia reversed the judgment of conviction, primarily on rights guaranteed by the West Virginia Constitution, noted to be substantially the same as pro-

[6] Miranda v. Arizona, 86 S. Ct. 1602, 1610 (1966).
[7] *Id.* at 1611.
[8] W. VA. CODE ch. 62, art. 1, § 6 (Michie 1966).
[9] PENN. R. CRIM. PROC. 116, 119, 323, 324 (1966).
[10] 148 S.E.2d 669 (W. Va. 1966).

visions of the United States Constitution. To eliminate chances of other incidents as in the *Fortner* case, prompt and effective action should be directed toward promulgation of carefully worded instructions and guide lines for all law enforcement officers to follow in their incustody interrogation. It might be noted that the Department of Public Safety and some other law enforcement agencies have already taken steps to implement the Supreme Court's decision by promulgation of such instructions.

Another aspect of the *Miranda* case which has an indirect effect on West Virginia law, as well as the law of all states, dealt with the waiver of the aforementioned constitutional rights. In *Miranda* the Court undertook for the first time since *Johnson v. Zerbst*[11] to consider, at least to any substantial extent, waivers of constitutional privileges. The Court observed that "if the interrogation continues without the presence of an attorney and a statement is taken, a *heavy burden* rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[12] The Court did not attempt, however, to explain how law enforcement officials were to ascertain whether a defendant was knowingly and intelligently waiving his rights. The Court did set forth three instances where a waiver of constitutional rights would not be presumed: (1) "a valid waiver would not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained"; (2) nor is the privilege "waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated," and (3) "lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights."[13] The Court's position was that it was simply reasserting the high standards of proof that

[11] 304 U.S. 458 (1938).

[12] Miranda v. Arizona, 86 S. Ct. 1602, 1628 (1966). (Emphasis added.) The Court's use of words "heavy burden" leads to some speculation as to why the Court chose to use these words rather than the word "burden." Recent cases (*e.g.* People v. Brooks, 410 P.2d 383, 388 (Cal. 1966); Oakley v. State, 207 A.2d 472 (Md. 1965) which dealt with this problem simply stated that the burden of proof is on the state to prove the accused has waived his rights. *Quaere* as to *Miranda's* effect on these and similar cases. The use of the words "heavy burden" seems to lend weight to Justice White's arguments that the Court was not simply reasserting the standards that had always been demanded. See note 14 *infra* and accompanying text.

[13] Miranda v. Arizona, 86 S. Ct. 1602, 1628 (1966).

had always been demanded to prove waivers of constitutional rights. On the other hand, a review of Mr. Justice White's dissent leads one to believe that he considered the Court to have drastically altered the waiver standards. If fact, it would appear that he felt the standards were so altered that, if it is claimed that an accused had waived his constitutional rights, "the State faces a severe, if not impossible, burden of proof."[14]

This comment need not make a commitment on whether the Court has raised the waiver standards, but need only to point out that extra precaution is to be taken when an accused wishes to waive his constitutional rights. If a person wishes to waive such rights, it is incumbent on the interrogating officers to explain the nature and meaning of this waiver and its possible consequences. Moreover, the interrogating officers should attempt to ascertain whether the accused is capable of knowingly and intelligently waiving his rights.

An interesting aspect of the *Miranda* decision, not directly concerned with interrogation procedures, is the purported "new constitutional basis for that decision." In *Miranda* the Court based its decision on the fifth amendment privilege against self-incrimination, rather than the sixth amendment right to counsel, as was the case in *Escobedo*. Mr. Justice Harlan referred to this switch as a *trompe l'oeil*.[15] He was of the opinion that "historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions"[16] and that the amendment "should properly have no bearing on police interrogation."[17] The Court's change had been foreshadowed in recent years by several authors and students who, in writing on incustody interrogation, had suggested that the fifth amendment privilege against self-incrimination was the basic liberty which the Court was seeking to protect.[18] These writers were of the opinion that, in essence, police interrogation inevitably involved the privilege against self-incrimination since the primary object of police interrogation is to obtain incriminating statements from the accused.

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[14] *Id.* at 1660 (1966).

[15] *Id.* at 1646. *Trompe l'oeil* is defined as "window dressing, a piece of bluff, or camouflage." MANSION, HEATH'S STANDARD FRENCH AND ENGLISH DICTIONARY (1962).

[16] Miranda v. Arizona, 86 S. Ct. 1602, 1646 (1966).

[17] *Ibid.*

[18] SELVINGS, ESSAYS ON CRIMINAL PROCEDURE 269 (1964). See generally Fink, *The Privilege Against Self-Incrimination*, 16 W. RES. L. REV. 725, 727 (1965).

It can only be speculated as to how far the principal cases go towards resolving the troublesome problems involved in incustody interrogation. It would appear that the decision should go far in that respect, in that, outside the area of waivers of constitutional privileges, the Court's guide lines are fairly narrow and should not be unnecessarily hard to apply. In the coming months *Miranda* and its antecedents will provide fuel for heated discussion on the respective rights of the community, the accused, and the police. Hopefully, after these discussions have quieted, there will be implanted in our criminal jurisprudence a fair and workable balance of the rights of the community, the accused, and the police, all within the meaning and intent of the constitutional provisions.

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Constitutional Law—Establishing Student's Domicile For Voting Purposes

A student at the University of Virginia applied for registration to vote, alleging that he had resided in Virginia beyond the statutory period and that he was no longer registered to vote in Florida. When the application was denied by the county registrar, the student filed a petition in the circuit court to have his right to vote determined. The circuit court ruled that the applicant was entitled to vote. *Held,* reversed. Although the Constitution of Virginia provides that a student is not deemed to have gained or lost his right to vote because of his status as a student, he must satisfy the dual domiciliary requirements of presence and intention to be entitled to vote in Virginia. The voter must show an intention to abandon the old domicile and a corresponding intent to remain in the new domicile for an indefinite period of time. That the applicant did not have such intention was indicated by his testimony that he had no definite plans to remain in Virginia, his payment of out-of-state tuition and his failure to show that he was no longer registered in Florida. *Kegley v. Johnson,* 147 S.E.2d 735 (Va. 1966).

In order to vote in a new election district, the prospective voter must establish a domicile in the election district in which he