Volume 65 | Issue 4 Article 7

June 1963

Constitutional Law--Due Process--Right to Counsel in Sate Non-Capital Cases

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Constitutional Law—Due Process—Right to Counsel in State Non-Capital Cases

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Petitioner was indigent, and requested the court to appoint counsel for him. The court refused to appoint counsel, explaining that under Florida law the court is permitted to so appoint only when a person is charged with a capital offense. At the trial before a jury petitioner presented his defense as well as could be expected from a layman. The jury returned a verdict of guilty, and petitioner was sentenced to the state prison for a term of five years. Petitioner filed a habeas corpus petition in the Florida Supreme Court based on the failure to appoint counsel and all relief was therein denied. The United States Supreme Court granted certiorari. *Held,* reversed and remanded. The Court's decision in *Betts v. Brady,* 316 U.S. 455 (1942), that the failure to appoint counsel under particular facts and circumstances did not amount to a denial of due process, was overruled. It was held that appointment of counsel for an indigent defendant is a fundamental right and essential to a fair trial. *Gideon v. Wainwright,* 83 Sup. Ct. 792 (1963).

This unanimous decision to overrule *Betts v. Brady* appears to have at last laid to rest the controversy which has sharply divided the Court for the past twenty years as to the nature of an indigent defendant's right to appointed counsel in state proceedings. The fundamental problem revolves around the interpretation to be given to the sixth and fourteenth amendments to the United States Constitution. The fourteenth amendment requires that no state shall ". . . deprive any person of life, liberty, or property, without due process of law. . . ." U. S. CONST. amend. XIV, § 1. The sixth amendment states that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. It was determined by the Court many years ago that the first eight amendments are limitations on the authority of the federal government and have no application to the states. *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243 (1833). Thus, although some members of the Court have felt that the fourteenth amendment made the sixth amendment applicable to the states, this view has never been accepted by a majority of the Court. See *Betts v. Brady, supra,* (dissenting opinion). Several rights guaranteed by the first eight amendments, however,

have been held to be absorbed by the due process clause of the fourteenth amendment. See *Wolf v. Colorado,* 338 U.S. 25 (1949); *De Jonge v. Oregon,* 299 U.S. 353 (1937); *Grosjean v. American Press Co.,* 297 U.S. 233 (1936); *Hamilton v. University of California,* 293 U.S. 245 (1934); *Gitlow v. New York,* 268 U.S. 652 (1925). On the other hand certain other rights were held not to be absorbed by the due process clause. See *Palko v. Connecticut,* 302 U.S. 319 (1937); *Twining v. New Jersey,* 211 U.S. 78 (1908); *Maxwell v. Dow,* 176 U.S. 581 (1900); *Hurtado v. California,* 110 U.S. 516 (1884). The question of whether each individual right is made obligatory upon the states by the fourteenth amendment is answered by determining whether each is ". . .of the very essence of a scheme of ordered liberty", and whether to abolish them is to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut, supra* at 325.

Because of the sharp schism which has existed on the Court concerning the fundamental nature of the right to counsel, the cases dealing with this right have followed a meandering course. In *Powell v. Alabama,* 287 U.S. 45, 67 (1932), the Court recognized that the fourteenth amendment absorbed those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." It was held that the right to counsel was of such a fundamental character as to be a necessary requisite of due process of law. The Court, however, limited its holding to the facts of the case, which involved a capital offense. Five years later in *Palko v. Connecticut, supra* at 324, Justice Cardozo recognized by dicta that the right to counsel was of such a fundamental nature as to be protected from state abridgement by the fourteenth amendment. Shortly after the *Palko* case, the Court decided *Johnson v. Zerbst,* 304 U.S. 458 (1938). In this case it was held that the right to counsel was an absolute and fundamental right in federal criminal prosecutions. If the accused were indigent the Court said that counsel must be appointed to represent him, unless he had competently and intelligently waived his right. Four years after the *Zerbst* case had firmly established the federal right to counsel, the United States Supreme Court was faced with the problem of whether or not counsel must be appointed for an indigent accused in state non-capital prosecutions. In *Betts v. Brady,* 316 U.S. 455, 462 (1942), the Court held that the asserted denial of due process because of failure to appoint

counsel was to be tested by ". . . an appraisal of the totality of the facts in a given case." It was held that what was a denial of fundamental fairness in one case might fall short of such a denial in other circumstances. The *Powell* case was distinguished on the grounds that it applied only when capital offenses were in issue. Thus, the constitutionality of the failure to appoint counsel was to be tested by whether, under the circumstances of a given case, the accused was denied a fair trial. The adjudication of the right to counsel was completed when the Court held in *Chandler v. Fretag*, 348 U.S. 3 (1954), that the right to be represented by counsel which an accused himself employs was unqualified.

Thus, the stage was fully set for the decision in the principal case. The Court had held that there was an absolute right to counsel in federal criminal prosecutions. *Johnson v. Zerbst, supra.* The right of one to employ his own counsel was preserved inviolate. *Chandler v. Fretag, supra.* In cases subsequent to the *Powell* case, *supra,* the Court treated the right to counsel in state capital cases as being absolute. Any lingering doubt as to the absolute nature of this right was resolved in favor of the accused by *Hamilton v. Alabama*, 368 U.S. 52 (1961). Thus, it was only logical for the Court in the principal case to forge the final link in the chain of protection of an accused's right to be represented by counsel. By extending this right to state non-capital cases the Court was simply giving official recognition to what had in effect been the rule for many years. As pointed out by the concurring opinion of Mr. Justice Harlan in the principal case, no decision is found after *Quicksall v. Michigan*, 339 U.S. 660 (1950), in which the Court refused the right of counsel to an indigent accused. See *Gideon v. Wainwright, supra* at 800.

In holding that the right to counsel is absolute, the Court does not say that every criminal conviction is void simply because the accused has not been represented by counsel. To the contrary, it has been consistently held that the right to counsel may be waived if such waiver be competently and intelligently made. The following elements are necessary to constitute a competent waiver: (1) waiver must be voluntary, and understandingly made; (2) accused must have known what he was doing when he made the decision; and (3) accused must be competent in terms of maturity and intelligence. Fellman, *The Right to Counsel Under State Law*, 1955 WIS. L. REV. 281, 301. The Court has also held that a necessary prerequisite to an intelligent and understanding waiver is

knowledge that the right exists. *Carnley v. Cochran,* 369 U.S. 506 (1962); *Uveges v. Pennsylvania,* 335 U.S. 437 (1948).

The West Virginia Constitution provides that "In all such trials [crimes and misdemeanors], the accused . . . shall have the assistance of counsel . . . ." W. VA. CONST. art. III, § 14. In *United States v. Adams,* 165 F. Supp. 22 (N.D. W. Va. 1958), the court held that the failure of the circuit court to inform the accused of his right to demand counsel or to appoint counsel for him was not a denial of due process under the fourteenth amendment, and was not a violation of a constitutional right to appointment of counsel under the sixth amendment or the West Virginia Constitution. In so holding the court placed primary emphasis on three West Virginia cases. In *Ward v. Skeen,* 140 W. Va. 565, 85 S.E.2d 845 (1955), the court said that the right to counsel is not an absolute requirement, but only the right to demand counsel and have counsel act pursuant to that demand. It was further held in *State v. Yoes,* 67 W. Va. 546, 68 S.E. 181 (1910), that the right to appointment of counsel is permissive and the record need not show that the prisoner had such assistance in order to make the conviction valid. The *Adams* case and the *Ward* case both cite *State v. Briggs,* 58 W. Va. 291, 52 S.E. 218 (1905), for the proposition that the right can be waived by the silence of the accused and his mere failure to request counsel. In the *Briggs* case, however, the accused actually had the aid of two appointed counsel. The question involved in that case was whether the accused was deprived of his constitutional guaranty when one counsel withdrew without his consent. It is submitted therefore that the language concerning the waiver of counsel is dicta insofar as it is extended beyond the facts of the *Briggs* case. In light of the holding of *Gideon v. Wainwright, supra,* therefore, it appears that the West Virginia courts will henceforth be required to affirmatively apprise the accused of his right to counsel before a competent and intelligent waiver can be made. Anything less than this will constitute a denial of due process under the fourteenth amendment to the United States Constitution.

Several important limitations of the decision in the principal case should be noted as a matter of caution although it is beyond the scope of this comment to discuss them in detail. First, the opinion in the principal case takes no position on the question of what degree of state cases may be included in the prohibition against denial of counsel. Indeed, Mr. Justice Harlan, in a concurring

opinion, states that ". . . whether the rule should extend to all criminal cases need not now be decided." *Gideon v. Wainwright, supra* at 801. A second problem is raised relevant to the stage of the proceedings at which counsel is required to be appointed. Should counsel be appointed to represent an indigent accused at the time of arraignment? There is no definitive answer to this question, but generally the determination depends upon whether or not it is a critical stage of the proceedings. See *Hamilton v. Alabama, supra.* But see 61 W. VA. L REV. 65 (1958).

By means of the decision in the principal case the United States Supreme Court has removed one of the last remnants of discrimination between state and federal defendants insofar as their constitutional rights to the assistance of counsel are concerned. The West Virginia courts appear to exercise a proper respect for the rights of an indigent accused to have the assistance of counsel. It is submitted, however, that those West Virginia courts which have not affirmatively apprised the accused of his right to counsel in the past should change this procedure in order to comply with the dictates of due process. The United States Supreme Court has consistently held that an accused cannot make an intelligent waiver of counsel unless he is fully cognizant of his rights. It should be noted in conclusion that West Virginia was one of the twenty-two states which filed briefs, as friends of the Court, urging the overruling of *Betts v. Brady,* thus lending the official sanction of the State to the holding in the principal case.

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Criminal Law—Common Law Forgery—Oral vs. Written Representation of Authority

D stole a treasury check before it reached the hands of the payee. Upon the promise to pay five dollars from the proceeds and the oral representation that the check belonged to *D's* aunt and that *D* had authority to cash it, *D* persuaded *X,* codefendant, to get the check cashed. *X* took the check to a friend and told him either that the check belonged to *X's* aunt or that it belonged to *D's* aunt and that he had the payee's permission to indorse the check. *X* then indorsed the check with the name of the payee and the check was cashed. *D* and *X* were found guilty of forgery. *Held, affirmed. X,*