Michigan Law Review

Volume 47 | Issue 5

1949

CONSTITUTIONAL LAW-DUE PROCESS-FEDERAL RIGHT TO COUNSEL IN NON-CAPITAL CASES IN STATE COURTS

J. D. McLeod
University of Michigan Law School

CONSTITUTIONAL LAW—DUE PROCESS—FEDERAL RIGHT TO COUNSEL IN NON-CAPITAL CASES IN STATE COURTS—Petitioner was convicted in Illinois on pleas of guilty to two indictments charging him with a non-capital offense. On writ of error to the Supreme Court of Illinois, petitioner alleged that the trial court had not inquired into his desire or ability to have counsel and that he had been convicted without having had assistance of counsel. His contention that the circumstances alleged constituted a violation of the State and Federal Constitutions was overruled, and the judgments of the lower court affirmed.[1] On certiorari to the United States Supreme Court, *held* affirmed. The due process clause of the Fourteenth Amendment does not necesarily embody the rights assured by the Sixth Amendment. The procedure in the trial court was not a denial of due process. Four justices dissented. *Bute v. Illinois*, 333 U.S. 640, 68 S.Ct. 763 (1948).

In federal criminal cases, the Sixth Amendment requires the court to make inquiry into desire for counsel and to appoint counsel in the absence of an intelli-

[1] 396 Ill. 588, 72 N.E. (2d) 813 (1947).

gent waiver.[2] Although the standard of the Sixth Amendment has been ruled inapplicable to state criminal cases,[3] the Fourteenth Amendment imposes on state actions certain constitutional restrictions based upon "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[4] When the accused is charged with a capital offense, appointment of counsel is required in the absence of competent waiver,[5] and in neither capital nor non-capital cases is a plea of guilty an absolute waiver.[6] When the accused is charged with a non-capital offense, a request for appointment of counsel may be denied in the absence of prejudice to the accused, under the rule of *Betts v. Brady*,[7] the leading case in this field. Later cases have qualified the rule by requiring the appointment of counsel in cases of defendant's incapacity through ignorance[8] or youthfulness.[9] In the absence of these elements, a logical deduction from the rule of *Betts v. Brady* is that no inquiry need be made into the desire or ability of the accused to have counsel. The present case is but an application of the *Betts v. Brady* rule. There is sound basis for objection to the Court's interpretation in these cases of the "fundamental principles" test. Persons able to employ counsel must be given time to arrange such employment,[10] and are entitled to effective assistance of such counsel.[11] Hence, in the absence of a showing of prejudice or incapacity by the accused, ability to pay is alone the standard for invocation of this federal right.[12] In addition, when counsel has been appointed by the court, effective assistance of that counsel is required.[13] This plainly tends to produce a discrepancy between the federal rights of persons accused in states requiring appointment of counsel, and those accused in states not making such a requirement.[14] Further, since the rule of *Betts v. Brady* incorporates the uncertain standard of "prejudice," the rights of the accused are determined by the potentially fluctuating

[2] Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938); Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574 (1941). 18 U.S.C., §687, Rule 44 (1946).

[3] Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149 (1937); Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672 (1947).

[4] Hebert v. Louisiana, 272 U.S. 312 at 316, 47 S.Ct. 103 (1926).

[5] Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932); Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363 (1945); Tomkins v. Missouri, 323 U.S. 485, 65 S.Ct. 370 (1945). See principal case at 676.

[6] Rice v. Olson, 324 U.S. 786, 65 S.Ct. 989 (1945). But see Carter v. Illinois, 329 U.S. 173, 67 S.Ct. 216 (1946); also 42 COL. L. REV. 277 (1942).

[7] 316 U.S. 455, 62 S.Ct. 1252 (1942).

[8] Rice v. Olson, 324 U.S. 786, 65 S.Ct. 989 (1945).

[9] De Meerleer v. Michigan, 329 U.S. 663, 67 S.Ct. 596 (1947); Wade v. Mayo, 334 U.S. 672, 68 S.Ct. 1270 (1948); Uveges v. Pennsylvania, 334 U.S. 836, 69 S.Ct. 184 (1948).

[10] Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932).

[11] House v. Mayo, 324 U.S. 42, 65 S.Ct. 517 (1945).

[12] Id. at 46: "We need not consider whether the state would have been required to appoint counsel for petitioner on the facts alleged in the petition. . . . It is enough that petitioner had his own attorney and was not afforded a reasonable opportunity to consult with him."

[13] White v. Ragen, 324 U.S. 760, 65 S.Ct. 978 (1945).

[14] See listing of various state requirements of due process in appendix to Betts v. Brady, 316 U.S. 455 at 477, 62 S.Ct. 1252 (1942).

views of a majority of the Supreme Court.[15] In addition, the distinction drawn between capital and non-capital cases is poor, since it overlooks the basic need for counsel in both instances. It would seem clearly the better policy to eliminate the discrepancies and difficulties of application by imposing on state procedure the same standards applied to federal cases.[16]

J. D. McLeod

[15] See Canizio v. New York, 327 U.S. 82, 66 S.Ct. 452 (1946); Foster v. Illinois, 332 U.S. 134, 67 S.Ct. 1716 (1947); Gayes v. New York, 332 U.S. 145, 67 S.Ct. 1711 (1947), for examples of difficulties involved in applying standards of the majority in the principal case. Cf. Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252 (1948) and Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256 (1948).

[16] Boskey & Pickering, "Federal Restrictions on State Criminal Procedure," 13 UNIV. CHI. L. REV. 266 (1946); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 417-428 (1947). See Justice Black's dissent in Adamson v. California, 332 U.S. 46 at 68, 67 S.Ct. 1672 (1947). Cf. Wade v. Mayo, 334 U.S. 672, 68 S.Ct. 1270 (1948), decided after the principal case, in which the Court, speaking through Justice Murphy, seems to indicate a liberal application of the rule of Betts v. Brady which may presage a reappraisal of the basis of the right to counsel in state cases, along the line suggested in Justice Black's dissent in the Adamson case.