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# Recent Criminal Cases

# RECENT CRIMINAL CASES

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## THE CONSTITUTIONAL RIGHT OF AN ACCUSED TO BE HEARD BY COUNSEL

In *Commonwealth ex rel. McGlinn v. Smith, Warden*,[1] the relator, Charles McGlinn, held up the operator of a one-man trolley and was arrested two or three blocks from the scene of the holdup. He was indicted and tried on two charges: (a) being armed to rob, and (b) robbery. The defendant pleaded not guilty, took the witness stand in his own defense, and testified freely on his own behalf. The jury found him guilty as charged. Thereupon he was sentenced to the penitentiary.

The defendant petitioned for a writ of *habeas corpus*. The petition set forth that he was "unlawfully restrained and deprived of his liberty" because he at his trial "did not have counsel; was not represented by counsel, was not informed of his right to have counsel, did not have counsel appointed by the court, and did nothing that would waive his constitutional right to be represented by counsel." The Supreme Court of Pennsylvania denied the writ.[2]

In its decision the Pennsylvania Supreme Court reviewed four United States Supreme Court decisions relied upon by the defendant for release from imprisonment by the writ of *habeas corpus*.[3] After reviewing the cases relied upon by the petitioner the court found that none of the cases would require the court to grant the petitioner a hearing or to release him from imprisonment. The petitioner was held to have made no showing of a denial of the due process of law guaranteed by the Fourteenth Amendment.[4] The court was of the opinion that the particular facts and circumstances surrounding the cases relied upon by the defendant did not include the background, experience and conduct of the accused.[5]

The court indicated that the defendant, with his penitentiary "background" and his "experience" in the criminal courts must have known that professional assistance would have been given him upon request and therefore he must be deemed to have intelligently waived his "right to be heard by counsel."[6] The court concluded that an accused in a criminal case who is not ignorant of the procedure in the criminal courts when the charge is other than a capital offense is not deprived of a constitutional right if he is not informed in advance of his trial that counsel will be assigned him upon request.[7]

The case presents two interesting problems, viz: (a) How do the courts interpolate the meaning of the constitutional "right to be heard by counsel"; (b) Under what circumstances will the accused be deemed to have "competently and intelligently" waived the constitutional "right to be heard by counsel"?[8]

It is now generally the law in the United States both under the Federal Constitution and under most State Constitutions, often supplemented by statutes, that the accused in a criminal case has, and, in the absence of waiver, cannot be denied the right to have the assistance of, and to be heard by, counsel in his defense, whether such assistance or hearing is requested or not, and even though he be without necessary means to employ and compensate an attorney.[9] When the accused is unable to employ counsel it is a

duty imposed on the courts to assign counsel to defend one accused of a crime; but the exercise of this right may be regulated by reasonable rules and regulations. It is the usual practice, and frequently a statutory duty for the court to inform the accused of this right.[10] In some jurisdictions the right is conferred in capital cases only, though generally it applies in all criminal cases including misdemeanors. The right includes a fair opportunity to secure counsel of one's own choice and failure to give the accused a reasonable time and opportunity to secure counsel prior to trial constitutes a denial of due process of law.[11] It is a general rule that a reasonable time for the preparation of a defendant's case must be allowed.[12]

The court in several jurisdictions, in construing the constitutional or statutory provisions, guaranteeing to an accused the right to assistance of counsel, have taken the view that an accused person is entitled to the benefit of counsel at every stage of a criminal prosecution and to private consultation with counsel.[13] It has been said in a few cases that the constitutional right of an accused to be represented by counsel has reference to the trial only, and that in the absence of a statute, a person accused of an offense is not entitled as of right to representation by counsel in preliminary proceedings before a committing magistrate.[14] However, the rule which now prevails in most if not all the states is that an accused is entitled, as a matter of constitutional right, to the services of counsel upon his preliminary examination.[15]

It appears to be well established that the constitutional right of an accused in a criminal case to have the assistance of counsel may be waived, provided it is waived intelligently, understandingly, and in a competent manner.[16] But what constitutes waiver is difficult to determine. Whether one accused of crime has waived his right to the assistance of counsel for his defense must depend in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.[17] It is submitted that the cases may be recapitulated as follows: In cases where the defendant was a minor convicted of a capital offense without having been advised of his constitutional privilege to be represented by counsel, the conviction has been set aside;[18] a voluntary plea of guilty constitutes a waiver of the right, but not when the defendant has been coerced into the plea and was ignorant of his right to legal advice;[19] failure to demand an attorney when one is aware or told of the right by the court is also a waiver;[20] a request to try the case one's self is a waiver.[21] Of course the right must be intelligently relinquished. Where the defendant is foreign, illiterate, feeble-minded or is mentally so deficient as to be incapable of intelligent waiver, or where his sanity is doubtful, the court must appoint counsel.[22] A waiver is deemed to have been intelligently made when the accused has had experience in the procedure of the criminal courts.[23] It is not necessary that there be a formal waiver. A waiver will ordinarily be implied where the accused appears without counsel and fails to request or indicate in any manner a desire that counsel be assigned to him.[24]

Obviously, no general rule can be stated categorically. When, however, all the surrounding circumstances of each case are examined, it appears that there are several chief factors which may influence the courts. They are: (1) the gravity of the offense, (2) background, experience, and conduct of the accused, (3) the knowledge of the law and legal procedure by the accused, (4) the procedure in the trial court, (5) mental capacity of the accused, and (6) the age factor.

In view of the previous decisions it seems that the present case was correctly decided.[25] Certainly the courts should be vigilant and zealous in the protection of the rights of every individual accused of a crime to see that he is given a speedy and public trial and opportunity to avail himself of the

right to be heard by counsel.[26] But if the accused competently and intelligently waives this privilege granted to him, the judgment should not be reversed and a new trial granted on this basis alone.

KENNETH L. HECHT.

[1] 24 Atl. (2d) 1 (Penn. 1942).

[2] On *habeas corpus* proceedings two contrary doctrines seem to have developed in the federal and state courts. One is that the right is so vital and fundamental that the courts will not imply a waiver, and the other is that if the defendant appears without counsel and does not request appointment of counsel, it is impliedly waived. It is clear that the courts have a great deal of leeway since each case is to be decided on its own facts and circumstances and the intelligence and background of the accused.

[3] The four cases are: (1) *Powell v. Alabama,* 287 U. S. 45 (1932). (The court was careful to restrict the application of the due process clause of the Fourteenth Amendment to a "capital" case. The cautious language of the court was as follows: "All that is necessary now to decide, as we do decide, is that a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."); (2) *Johnson v. Zerbst,* 304 U. S. 458 (1938). (The petitioner had no lawyer present at the trial, and no relatives, friends, or acquaintances within the state in which he was convicted. He had little education and was without funds, and had never been guilty of nor charged with any offense before.); (3) *Walker v. Johnson, Warden;* 312 U. S. 275 (1941). (The court found that the petition supported a conclusion that the petitioner desired the aid of counsel, and so informed the District Attorney, was ignorant of his right to such aid, and that, by the conduct of the District Attorney, he was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course.); (4) *Smith v. O'Grady,* 312 U. S. 329 (1941). (The accused was told orally that the charge was burglary but discovered he had been duped and inveigled into entering a plea of guilty to a charge of burglary with explosives.)

[4] "Realistically speaking, 'Due process means what the judiciary interprets it to mean, if counsel can persuade accordingly.'" Albertsworth, Constitutional Casuistry, (1932), 27 Ill. L. Rev. 264.

[5] The accused previously had been convicted for three separate felonious offenses for which he had been sentenced to prison.

[6] *Berry v. State,* 61 Ga. App. 315, 6 S.E. (2d) 148 (1939). (Where accused who had many times before been tried in the same court without any request for counsel announced ready for trial, failure to appoint counsel to represent him was not a denial of his constitutional right to benefit of counsel.)

[7] "When the fundamental rights of life, or personal liberty of a citizen are at stake, especially of indigent persons, it is the duty of the court, not only not to mislead but to inform the accused positively and fully of his basic rights." 121 F. (2d) 865 (C. C. A. Dist. of Col. 1941).

[8] For an excellent annotation on both problems see: 84 Law. Ed. 383, 396.

[9] Const. of the U. S. (1787) Am. Art. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The first ten amendments to the United States Constitution are a check upon the federal government in the exercise of its powers. The Fourteenth Amendment is a prohibition upon the powers of the States.

[10] Mo. Rev. Stat. (1939) § 4834. The State of Missouri makes it a misdemeanor, punishable by fine and imprisonment, for a judge to receive the plea of guilty without giving the defendant a reasonable time to talk with a friend and an attorney.

[11] See 84 A.L.R. 544, for brevity of time between assignment of counsel and trial as affecting question whether accused is denied right to assistance of counsel.

[12] *People v. Blumenfeld,* 330 Ill. 474, 161 N.E. 857 (1928). (Constitutional right to assistance of counsel includes reasonable time for counsel to prepare defense.)

[13] In England it is held that a criminal case cannot be conducted at the same time both by counsel and by the defendant himself, but a defendant may conduct his case as to matters of fact with the private suggestion of counsel, and as soon as any point of law arises, his counsel may argue it to the court. *Rex v. White,* 170 Eng. Reprints, 1387 (1811).

[14] For an illuminating discussion of the common-law background of the duty of the judge to inform accused indigent of his rights see: (1941), 27 Iowa Law Review 133-7.

[15] Though every person's security against being deprived by state action of life, liberty, or property without due process of law is under national protection since the adoption of the Fourteenth Amendment, the Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies.

[16] *Jones v. State,* 57 Ga. App. 344, 195 S.E. 316 (1938). (Acceptance of law students, appointed by the court does not constitute waiver of accused's right to counsel where he did not know that they were not entitled to practice law.)

[17] The cases embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life, or liberty, wherein the prosecution is presented by experience and learned counsel.

[18] *Gardner v. The People,* 106 Ill. 76 (1883); *State v. Oberst,* 127 Kan. 412, 273 P. 490 (1929); But see: *People v. Crandell,* 270 Mich. 124, 258 N.W. 224 (1935). (Vigorous dissenting opinion accompanied with extensive authorities.)

[19] *Chambers v. Florida,* 309 U. S. 227 (1940); *Brown v. Mississippi,* 297 U. S. 278 (1936). (Confession extorted by torture of the accused); *People v. Harris,* 266 Mich. 317, 253 N.W. 312 (1934).

[20] *In re Connor,* 16 Cal. (2d) 16, 108 P. (2d) 10 (1940); *Smyth v. State,* 124 Neb. 267, 246 N.W. 461 (1933).

[21] *Sahlinger v. The People,* 102 Ill. 241 (1882); *Cutts v. State,* 34 Fla. 21, 45 So. 491 (1907); *People v. Russell,* 156 Cal. 450, 105 P. 416 (1909); *Dietz v. State,* 149 Wis. 462, 136 N.W. 166 (1912); *Phillips v. State,* 162 Ark. 541, 258 S.W. 403 (1924).

[22] *Ex Parte Meadows,* 70 Okl. Cr. 304, 106 P. (2d) 139 (1940); *People v. Wilson,* 29 N.Y.S. (2d) 809, 176 Misc. 1042 (1941); *People v. Parcora,* 358 Ill. 448, 193 N.E. 477 (1934); *Lloyd v. State,* 206 Ind. 359, 189 N.E. 406 (1934); *People v. Salas,* 80 Cal. App. 318, 250 P. 526 (1926).

[23] *Ex Parte Vanderburg,* 117 P. (2d) 550 (Okl. Cr. 1941). (Accused had been before various courts forty times).

[24] *People v. Harris,* 302 Ill. 590, 135 N.E. 75 (1922).

[25] The cases relied upon by the defendant laid down a rule which has been the law of Pennsylvania for two hundred and twenty-four years. By the Act of May 31, 1718, 1 Sm. L. 105, sec. 4, 19 P.S. § 783 it was required that "learned counsel" be assigned to the prisoners "upon all trials" of "capital crimes." By the Constitution of the Commonwealth of Pennsylvania (1874) Art. 1 § 9: "In all criminal prosecutions the accused hath a right to be heard by himself and counsel . . ."

[26] *State v. Weloon,* 91 S.C. 29, 74 S.E. 43 (1912). (Where the spectators were permitted to so crowd the court room the counsel could not see the jury or witnesses).

## QUESTIONS AND ANSWERS

*Question:* Has a superior officer the authority to dismiss a case where an arrest has been made by a subordinate?

*Answer:*

No superior officer should dismiss a case for certainly he has no right to do so. However, a superior officer is privileged to ask for the dismissal of a case after a complaint has been filed.

Actually, only a state's attorney or the attorney or counsel of a municipality may recommend that a case be dismissed. Suppose, however that an arrest has been made but that no complaint is filed? In such circumstances a superior officer might be privileged to dismiss the case. But this is a practice that should not be indulged except in extraordinary circumstances. Even then the better practice is to advise the state's attorney or municipal attorney. It should be noted, too, that where an arrest has been made in good faith and a complaint does not follow the officer might be liable for damages on the ground of false arrest or of false imprisonment.

For a brief discussion of the principles governing *nolle prosequi* and supporting decisions see Bouvier's *Law Dictionary,* Rawle's 3rd revision, Vol. III, p. 2352.—John I. Howe.