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Constitutional Law -- Waiver of Right to Counsel

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dant in the exercise of a right, which by inference, the defendant in *Grey* did not have. It is in this sense that failure to warn of an indigent's right to appointed counsel, when the officers do not know the financial status of a suspect, is not as effective as giving the warning. Whether the defendant is prejudiced or not is unimportant as the clear holding of *Miranda* is that the fourfold warning or an equally effective procedure is an *absolute* prerequisite to the admissibility of statements made during custodial interrogation.[49]

In *Grey,* the court also held it was relevant to the federal constitutional standard that the confession was made voluntarily. It is clear, however, that under *Miranda,* voluntariness is not at issue.[50] As to voluntariness under state evidentiary standards, the court seems to be indicating that in addition to *Miranda* requirements, state standards impose the requirement of voluntariness. This is consistent with the principle that federal constitutional guarantees establish only minimum protective standards, which the states are free to enlarge, but not diminish.

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Constitutional Law—Waiver of Right to Counsel

An accused may waive his right to counsel, guaranteed to him by the sixth amendment.[1] The courts, however, have been charged with a protective duty to assure that such waiver is "intelligent and competent."[2] As an accused's right to counsel has now been extended to state criminal proceedings,[3] the problem of waiver may well become very important.

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[49] *Id.* at 479.

[50] See note 3 *supra.*

[1] "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." FED. R. CRIM. P. 44. "[T]he Constitution does not force a lawyer upon a defendant. He may waive his constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." Adams v. United States *ex. rel.* McCann, 317 U.S. 269, 279 (1942).

[2] Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

[3] See Gideon v. Wainwright, 372 U.S. 335 (1963). See also Miranda v. Arizona, 384 U.S. 436 (1966), extending the right of counsel to any suspect whose freedom has been curtailed "in any significant way." *Id.* at 444.

The issue in *Butler v. Burke*[4] was whether a Wisconsin court had fulfilled its protective duty and the defendant's waiver had been "intelligent and competent." The trial court had informed Butler that he was charged with enticing a child for criminal purposes and that the maximum penalty for this offense was ten years imprisonment, but no reference was made to the possibility of commitment as a deviate under the Wisconsin Sexual Psychopath Act.[5] Butler, who had been fined forty dollars three weeks previously for a similar act,[6] waived counsel and pleaded guilty. The court committed him as a deviate needing rehabilitation under the Psychopath Act. A writ of habeas corpus was denied by the district court[7] and the Court of Appeals for the Seventh Circuit affirmed.[8] The majority ruled that Butler had intelligently waived his rights because there had been no misrepresentation with regard to the maximum length of detention. Petitioner could not complain that his commitment was rehabilitative rather than punitive as long as the period of confinement was the same.[9] The court distinguished a case[10] in which conviction was reversed because the period of commitment exceeded the maximum sentence under the criminal charge, pointing out that such was not the situation in this case.

In dissent, Circuit Judge Kiley pointed out that in light of Butler's recent experience of a forty dollar fine for a related offense, unless he was advised of the possibility of commitment as a sex deviate he could not intelligently waive counsel. He cited a report

[4] 360 F.2d 118 (7th Cir. 1966), *cert. denied,* 35 U.S.L. WEEK 3116 (U.S. Oct. 11, 1966). The sole issue in the district court was waiver at trial; however, on appeal petitioner included allegations regarding waiver at preliminary hearing and his plea of guilty. This note is directed only to the first issue.

[5] WIS. STAT. ANN. § 959.15(2) (1958) allows commitment under the act if the court finds "that the defendant was probably directly motivated by a desire for sexual excitement in the commission of the crime."

[6] Butler v. Burke, 250 F. Supp. 178, 181 (E.D. Wis. 1965).

[7] *Id.* at 183.

[8] Butler v. Burke, 360 F.2d 118 (7th Cir. 1966).

[9] Every person committed . . . *unless the department has . . . made an order directing that he remain subject to its control for a longer period* and has applied to the committing court for a review of said order . . . shall be discharged at the expiration of the maximum term prescribed by law for the offense for which he was convicted . . . .
WIS. STAT. ANN. § 959.15(12) (1958). (Emphasis added.)
The majority realized that Butler could be detained beyond ten years if he was "still considered dangerous" but spoke as if the absolute maximum term of commitment was ten years. 360 F.2d at 123.

[10] Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963).

that indicated the success of attorneys in resisting civil commitment of their clients[11] and referred to the standards established in the leading cases with regard to waiver of counsel.

The Supreme Court first spoke definitively of waiver in *Johnson v. Zerbst*[12] when it stated:

> The determination of whether there has been an intelligent waiver of right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.[13]

The Court went on to point out that the trial court has a "protecting duty [that] imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."[14] The clearest delineation of this duty to assure an intelligent waiver came ten years later in *Von Moltke v. Gillies*:[15]

> The fact that an accused may tell him [the judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, *the range of allowable punishments thereunder,* possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.[16]

Recent cases rely on the standards in either or both of these decisions when resolving or reviewing whether an accused has intelligently waived his right to counsel.[17] These standards are equally applicable to proceedings in state courts.[18]

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[11] 360 F.2d at 125 n.3.
[12] 304 U.S. 458 (1938).
[13] *Id.* at 464.
[14] *Id.* at 465.
[15] 332 U.S. 708 (1948).
[16] *Id.* at 724. (Emphasis added.)
[17] Westbrook v. Arizona, 384 U.S. 150 (1966); Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964); Carnley v. Cochran, 369 U.S. 506, 515-16 (1962); Aiken v. United States, 296 F.2d 604, 606-07 (4th Cir. 1961).
[18] "We have held the principles declared in *Johnson v. Zerbst* equally applicable to asserted waivers of the right to counsel in state criminal proceedings." Carnley v. Cochran, *supra* note 17, at 515. The opinion goes on to distinguish two cases that might have indicated a contrary conclusion. See also Miranda v. Arizona, 384 U.S. 436 (1966). "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." *Id.* at 491.

Butler was not advised of the possibility of commitment as a sex deviate. Failure to advise a defendant of the possibility of confinement under a rehabilitative law has recently been held, by a district court, to nullify waiver of counsel.[19] Butler's past experience had been a small fine. Without knowledge of possible confinement as a deviate he, "understandably, was under a misapprehension as to what faced him."[20]

In the last decade historic Supreme Court decisions have changed the complexion of criminal procedure. In the most recent of these landmark decisions, *Miranda v. Arizona*,[21] the Court requires that a suspect be advised of his right to counsel and against self incrimination, but it recognizes that the suspect may waive these rights "provided the waiver is made voluntarily, knowingly, and intelligently."[22] The burden of proving such waiver with regard to pretrial interrogation is placed upon the prosecution.[23] *Miranda* indicates that this burden will be met by showing, in the absence of any coercion, that a suspect was clearly advised of these rights.[24]

The right to counsel at trial and before arraignment now applies to both state and federal criminal proceedings. The court itself must protect this right at trial.[25] Thus it is now charged with the dual duty of reviewing any alleged waiver of counsel in pre-trial procedures following the standards enunciated in *Miranda* and of ascertaining that any waiver upon trial meets the standards prescribed in *Johnson* and *Von Moltke*. Because *Von Moltke* establishes a more specific standard than *Johnson*, a clarification of the court's protective duty appears to be in order.

The court must assure itself that a defendant's waiver has been intelligent. As the Supreme Court has suggested, "the background, experience, and conduct of the accused" must be taken into account

[19] Williams v. United States, 231 F. Supp. 382, 384 (E.D. Ky. 1964).
[20] 360 F.2d at 126 (dissent).
[21] 384 U.S. 436 (1966); see 45 N.C.L. REV. 206 (1966).
[22] 384 U.S. at 444.
[23] "But unless and until such warning and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him [the accused]." *Id.* at 479. Note that violation of pre-trial rights affects the admissibility of evidence, whereas denial of the right to counsel upon trial results in vacating any conviction obtained.
[24] Miranda would not seem to require more than this. The police "must make known to him [the suspect] that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation." *Id.* at 474.
[25] See text accompanying note 13 *supra*.

by the trial judge.[26] Thus a technical explanation may well fulfill the court's duty to a well-educated defendant; while to an uneducated defendant a simple, clear explanation in easily understandable terms would seem desirable. The accused should have a broad understanding of the matter. This could require advising an accused that an attorney might be able to present a defense for him. Arguably, though, the judge himself should not advise of any defenses as this would pre-empt the function of the lawyer to whom the defendant has a right.[27] As a minimum in all cases, three of the criteria stated in *Von Moltke* would appear necessary to assure a voluntary waiver of counsel: apprehension of (1) the nature of the charges, (2) the statutory offenses included within the charges, and (3) the range[28] of allowable punishments for these offenses.[29]

Regardless of any possible clarification that may be forthcoming with regard to the doctrine of intelligent waiver, it appears that the dissenting opinion in *Butler,* by applying the circumstances of the case to the standards set out in both *Johnson* and *Von Moltke,* reaches the correct conclusion.

GEORGE CARSON II

Contracts—Employment—Remedies For Wrongful Breach

In 1966 the North Carolina Supreme Court re-examined its prior decisions concerning the remedies available to an employee who has been wrongfully discharged during the term of his contract. In so doing it took a significant step toward realigning itself

[26] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[27] Two circuits have reached this conclusion since the requirement of advice concerning defenses was first set out in Von Moltke. In United States v. McGee, 242 F.2d 520 (7th Cir. 1957), *vacated,* 355 U.S. 17 (1957), the court reasoned: "The innumerable factual situations that might possibly afford an accused a defense to the crime charged reveals the absurdity of the assertion that to be valid the waiver of counsel . . . may be accepted only after the trial judge had made known to the accused every conceivable defense that may be available . . . ." *Id.* at 524. In Michener v. United States, 181 F.2d 911 (8th Cir. 1950) the court declares: "Nor is it the duty of the trial court judge to explain and set out for an accused the possible defenses he might adduce to the charges against him . . . . [I]t is not the duty or the responsibility of the trial judge to give legal advice to an accused, or to any party . . . ." *Id.* at 918.

[28] WEBSTER, NEW COLLEGIATE DICTIONARY (1960), defines *range* as: "The limits of a series of actual or possible variations; as, a *range* of choice."

[29] 332 U.S. at 724.