UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 38 | Number 4 Article 7

6-1-1960

Constitutional Law -- Due Process -- Right to Counsel in Pre-Trial Situations -- When It Arises

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paid out[42] and subsequent replenishment of the account will not defeat that status, once so obtained. It may be argued that the principal case supports this position. If it does so, it repudiates in large measure the strong equitable basis of the charge back rule, *i.e.*, that to the extent that a bank can avoid loss by merely debiting or appropriating a depositor's balance it ought not be regarded as a holder for value and so prevail against a maker or drawer with defenses.

(4) Where there is no right to charge back[43] the bank becomes a holder for value under the first in, first out rule, *i.e.*, after the previous balance and perhaps any simultaneously deposited good funds are paid out. This rule would apparently have no relation to an agent since agency almost certainly implies the right to charge back.

M. S. B.

Constitutional Law—Due Process—Right to Counsel in Pre-Trial Situations—When It Arises

The due process clause of the Fourteenth Amendment to the Constitution of the United States has been interpreted as requiring that every defendant charged with a capital crime be represented by counsel.[1] How soon this right arises, however, is often an extremely difficult question. In *Crooker v. California*[2] the United States Supreme Court in a five-to-four decision held that due process was not violated when the accused who requested counsel shortly after his arrest was denied it for almost thirty hours during which time he made a confession which was admitted in evidence at the trial where he was convicted of murder. The Court stated that "due process does not always require immediate honoring of a request to obtain one's own counsel in the hours after arrest . . . ."[3] Rather, the Court ruled that the accused is entitled to

[42] Universal C. I. T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958) applied this rule without inquiry as to the later state of the depositor's account in a case where the agency relationship was found. This decision, per Wyzanski, D.J., is the best reasoned of recent cases in this area, although in applying Massachusetts law (and influenced by the Uniform Commercial Code, then shortly to become effective in the Commonwealth) it properly ignored what has become so important in North Carolina cases, the right to charge back.

[43] This was the situation in Franklin Nat'l Bank v. Roberts Bros. Co., 168 N.C. 473, 84 S.E. 706 (1915). This assumes an almost non-existent state of affairs today with banks universally inserting stipulations in their dealings not only on deposit slips but on advice forms, etc. Even if one of these forms was not used, as in case of acknowledging receipt of an item by letter, there is the original signature card and the continuous custom to fall back on to support the claimed right.

[1] Powell v. Alabama, 287 U.S. 45 (1932).

[2] 357 U.S. 433 (1958). The majority was composed of Frankfurter, Burton, who since has retired, Clark, who wrote the opinion of the Court, Harlan, and Whittaker, JJ. Douglas, J., with the concurrence of Warren, Ch. J., and Black and Brennan, JJ., dissented.

[3] *Id.* at 441.

counsel soon enough to get a fair trial,[4] and circumstances in each case determine just how soon that is.[5]

The accused in the *Crooker* case sought to have the Court adopt the more definite and liberal rule advocated by the dissent: "[T]he accused who wants a counsel should have one at any time after the moment of arrest."[6] Other courts have urged the application of such a rule. Twenty-five years ago the Criminal Court of Appeals of Oklahoma in *Thurmond v. State*[7] stated that the accused has the right to counsel "from the time he is arrested until the final disposition of the case." Thirteen years later the same court reaffirmed this policy in *Benton v. State*[8] when it stated that the denial of right to counsel "upon arrest" is "a violation of both the State and Federal constitutions." The Supreme Court of Indiana eleven years ago in *Suter v. State*[9] stated that

[4] *Id.* at 439-40.
[5] *Ibid.*
[6] 357 U.S. at 448.
[7] 57 Okla. Crim. 388, 48 P.2d 845 (1935). In this case the court reversed a manslaughter conviction on the ground that the defendant had not been accorded a fair and impartial trial because the prosecuting attorney had prejudiced the minds of the jurors by comments such as, "An innocent man never needs a lawyer," referring to the fact that while detained at the police station the defendant refused to make a statement but instead vainly "asked to see a lawyer and to communicate with his family." The court said: "Under the Constitution and laws of this state, the defendant is entitled to have an opportunity to consult with counsel at all stages of the proceedings, *from the time he is arrested* until the final disposition of the case . . . ." *Id.* at ——, 48 P.2d at 856. (Emphasis added.) This was quoted with approval in Wyatt v. Wolf, —— Okla. Crim. ——, 324 P.2d 548, 550 (1958).
[8] 86 Okla. Crim. 173, 190 P.2d 168 (1948). The court here reversed the murder conviction of one who was arrested without charge and held for twenty days without the aid of counsel or the assistance of friends, although he had requested such aid, and who, because of "inquisitorial grilling and . . . fake demonstration of mob violence designed to break down his physical resistance," made a confession upon which his conviction was predicated. The court said the denial of counsel itself "requires a reversal" because "injury resulted to the accused by reason of the denial of the aid of counsel" and he did not waive that right. The court said: "[T]he defendant was denied the right to counsel in all stages of the proceedings from the date of his arrest . . . to . . . the date the charge of murder was filed against him. Such denial constitutes a *violation of both the State and Federal constitutions.* . . . This constitutional right to counsel clearly imports the right to aid thereof *upon arrest and during the inquisitorial proceedings* when confession was taken. It is not limited to aid of counsel at the time of the preliminary or the trial." *Id.* at ——, 190 P.2d at 177. (Emphasis added.)
[9] 227 Ind. 648, 88 N.E.2d 386 (1949). The court here found that the accused "asked for his attorney . . . as soon as he was brought to headquarters," and the attorney repeatedly requested permission to talk with the accused. For more than two days these requests were denied, and the accused and his attorney were not permitted to confer until after the confession had been made. The court found that there was error in the admission of the confession, and it reversed the first-degree burglary conviction and granted a new trial. The court quoted the state constitutional provision giving the accused the right "to be heard by himself and counsel," and cited cases holding that this right contemplates his right to consult with counsel at "every stage of the proceedings." The court stated: "We think it must be conceded that appellant had a right to have counsel *when he was arrested,* particularly when he immediately requested it, and specified the counsel he desired and apparently was prepared himself to pay for the services which he requested." *Id.* at 658, 88 N.E.2d at 390. (Emphasis added.) The court added that refusal of the police to grant this request and to arrange for the accused to confer confidentially with counsel was error which "must be charged to the state."

the defendant "had a right to have counsel when he was arrested." In each of these state cases the appellate court reversed a criminal conviction partly because the defendant had been denied timely access to counsel. An even more liberal view was taken in *Yung v. Coleman*[10] when twenty-six years ago a federal court in Idaho stated that the right to counsel arises when the accused is taken into custody even before warrant for his arrest has been issued.

Although no cases were cited which had applied the rule advocated in the dissenting opinion of the *Crooker* case, reference was made to several state statutes[11] which provide that the accused should be permitted to confer with counsel upon his arrest. Among the statutes referred to is that of North Carolina, G.S. § 15-47, which provides:

> *Upon the arrest,* detention, or deprivation of the liberties of any person by an officer in this State, with or without warrant, . . . it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends *immediately,* and the right of such persons to communicate with counsel and friends shall not be denied. (Emphasis added.)

Similar statutes of other states contain more qualifications concerning the exercise of this privilege than are found in the North Carolina statute.[12] Only one other state statute refers to immediate communication with counsel and friends as a "right,"[13] and the North Carolina statute alone declares it to be a right which "shall not be denied." Yet, despite this strong wording the North Carolina court has construed the statute very narrowly. In *State v. Exum*[14] the court upheld the actions of a sheriff who refused to allow counsel employed by relatives and friends of the defendant to confer with him until after a writ of habeas

[10] 5 F. Supp. 702 (D. Idaho 1934). In that case three Chinese were held in custody by a county sheriff although warrant for their arrest for first degree murder had not been issued. Their attorney was permitted to talk with the accused only when he consented to let a representative of the sheriff listen to the conversation. "This," the court said, "he did not have to concede, as the Constitution gave to the petitioners the right to consult with their attorney alone." The court directed the sheriff "to at once allow the petitioners the right to secure and talk alone with their counsel . . . ." It further was stated that "it is within the intendments of the 'due process of law' clause of the Fourteenth Amendment that one accused of an offense shall be entitled to the assistance of counsel *at all times.*" *Id.* at 703. (Emphasis added.)

[11] See footnote 4 of the dissenting opinion, 357 U.S. at 448. There cited are statutes of California, Colorado, Illinois, Kansas, Missouri, Montana, New Hampshire, North Carolina, and Ohio.

[12] Conferences during only "reasonable" hours: Mo. ANN. STAT. § 544.170 (1953); N.H. REV. STAT. ANN. § 594:16 (1955).

Conferences only when the arrest is "without warrant or other process": Mo. ANN. STAT. § 544.170 (1953).

"[E]xcept in cases of imminent danger of escape:" COL. REV. STAT. c. 39-1-1 (Supp. 1957); ILL. ANN. STAT. c. 38, § 477 (1935) (not cited in dissenting opinion).

"If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony:" OHIO REV. CODE § 2935.14 (Supp. 1959).

[13] ILL. ANN. STAT. c. 38, § 449.1 (Supp. 1959).

[14] 213 N.C. 16, 195 S.E. 7 (1938).

corpus had been served on the sheriff. The court stated that G.S. § 15-47 was not applicable because the defendant had not demanded of the sheriff to be permitted to communicate with counsel.[15] This opinion was reaffirmed in *State v. Thompson*[16] when the court found that "none of the defendants made a request to be allowed to communicate with relatives or friends or to obtain counsel."

In *State v. Wheeler*[17] the North Carolina court recently handed down an illuminating decision interpreting the nature of this right. The court held that due process had been violated when three defendants jointly charged with robbery were "imprisoned from the time of their arrest until their trial" and were not allowed to communicate with each other. The inquiry was "limited to a determination whether the petitioners were denied the right to be represented by counsel, to have witnesses, and a fair opportunity to prepare and to present their defense." In referring to the first of these rights, the court said: "The rights of communication go with the man into the jail . . . ."[18] From this language it would appear that the defendants' right to communicate with counsel existed prior to incarceration and even "from the time of their arrest."

The Court in the *Crooker* case recognized that the right to communicate with counsel exists under a California statute, but the majority held that a violation of a state statutory right is not a violation of due process per se even though there had been "perhaps a violation of California law."[19] In the *Wheeler* case, however, the North Carolina court appears to refer to this right to communicate with counsel as a federal constitutional right and not merely a state statutory right. The court refers to "rights of communication," which could be interpreted to mean communication with not only each other, but with counsel, friends, and relatives as well.[20] It refers to "such constitutional rights as are here

[15] It would seem reasonable to require that the officer inform the defendant that counsel had requested to see him, thereby giving the defendant an opportunity to request to see counsel.

[16] 224 N.C. 661, 32 S.E.2d 24 (1944).

[17] 249 N.C. 187, 105 S.E.2d 615 (1958).

[18] *Id.* at 192, 105 S.E.2d at 620.

[19] 357 U.S. at 440. The Court here refers to § 825 of the California Penal Code, which provides that after an arrest an attorney "may at the request of the prisoner or any relative of such prisoner, visit the person so arrested." The majority interpreted the accused's argument as asking that it declare that "every state denial of a request to contact counsel be an infringement of the constitutional right *without regard to the circumstances of the case.*" The Court said: "What due process requires in one situation may not be required in another, and this, of course, because the least change of circumstances may provide or eliminate fundamental fairness." This implies that fundamental fairness may still exist even though the defendant's request to see counsel has not been granted immediately. Yet, the judicial prophet might see significance in the Court's recognition last year of "the deep-rooted feeling that the police must obey the law while enforcing the law. . . ." Spano v. New York, 360 U.S. 315, 320 (1959).

[20] 249 N.C. at 194, 105 S.E.2d at 621. The statute refers to the right to communicate with only counsel and friends, but the court here suggests that the officer

involved" and "their constitutional rights." The court states: "[W]e are unable to join in the view that the petitioners' constitutional rights have been afforded them."[21] This pluralization of the term "right" plus the emphasis placed upon the right to communicate with counsel leads to the conclusion that this right is intended to be included among the constitutional rights referred to. Further, the court added that "due process of law implies the right and opportunity to be heard and to *prepare* for the hearing."[22]

Accordingly, in view of the strongly-worded North Carolina statute, the intimations of the North Carolina court in the *Wheeler* case, the long-standing decisions of courts in three other states, and the strong minority on the United States Supreme Court, it is submitted that the officer of the law in North Carolina would be wise to adhere strictly to both the letter and the spirit of this state's statute, and that any person who is accused of crime and who desires to contact counsel, friends, or relatives should be permitted to do so promptly and as soon as reasonably possible. To do otherwise might well be held in violation of a state constitutional[23] and statutory right as well as a denial of the federal guarantee of due process.[24]

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Constitutional Law—Obscenity Statute—Proof of Scienter

In *Smith v. California*[1] the defendant bookseller had been convicted under a Los Angeles city ordinance which made it unlawful "for any person to have in his possession any obscene or indecent writing, or book . . . in any place where . . . books . . . are sold or kept for sale."[2] Thus *scienter* was not an element of the crime. The United States Supreme Court reversed the conviction, holding that the ordinance was unconstitutional as a violation of the first amendment right of freedom of the press.[3] The Court reasoned that under the Constitution knowledge of the obscene contents was necessary for conviction of a crime involving

has the duty to make a "reasonable effort" on behalf of the defendant to contact his relatives. If one were to consider a relative as not necessarily either counsel or friend, the court could be interpreted as extending the accused's right in this respect. Therefore, one arrested logically could contact a minimum of three persons: (1) counsel, and (2) friend, both as provided in the statute, and (3) relative, as covered by the court's suggestion. The use of the plural term "friends" and "relatives" perhaps could authorize communication with more than one representative from each of these classes.

[21] *Id.* at 194, 105 S.E.2d at 621.

[22] *Id.* at 193, 105 S.E.2d at 621. (Emphasis added.)

[23] N.C. CONST. art 1, §§ 11, 17.

[24] Also, the North Carolina statute contains this provision: "Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court."

[1] 361 U.S. 147 (1959).

[2] LOS ANGELES, CAL., MUNICIPAL CODE § 41.01.1.

[3] U.S. CONST. amend. I.