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Constitutional Law -- Due Process of Law -- Waiver of Right to Counsel in State Courts

William H. Burton Jr.

nebulous condition—such as the world was in until the Supreme Commander said, "Let there be light, and there was light."

It is herewith submitted that the General Assembly of North Carolina has, with any reasonable interpretation of the effect of G. S. 1-97(6), provided the requisite "light."

JOE H. BARRINGTON, JR.

Constitutional Law—Due Process of Law—Waiver of Right to Counsel in State Courts

In a recent case, *Carter v. People of State of Illinois*,[1] the Supreme Court of the United States held that failure by a state court to appoint counsel for accused who pleaded guilty to murder did not constitute a denial of due process where the record showed that accused, with his rights fully explained to him, did not request that court appoint counsel, and the record contained no evidence which would indicate that the defendant was incapable of intelligently waiving his right to counsel.

The petitioner, Roy Carter, Negro, had pleaded guilty without the aid of counsel when arraigned on an indictment for murder in 1928. He received a ninety-nine-year sentence and in 1945 he brought a petition for his release on writ of error in the Supreme Court of Illinois claiming that the conviction on which his confinement was based was vitiated by the denial of his right to the assistance of counsel under the Fourteenth Amendment. Petitioner did not allege that he had requested counsel be appointed or that he was ignorant of his right to counsel. Carter was, in fact, represented by counsel on the day of sentence, appointed by the court without his request.[2] At the time of the relevant events in 1928 Carter was thirty years of age and although he could read and write, he had no formal education. He was of average mentality, quiet and industrious, had worked as a cook and mechanic for the eleven years preceding and had never before run afoul of the law. Although these facts do not appear in the common law record, they do appear in a transcript of testimony in connection with a hearing on mitigation of the offense which was attached to the record. The Illinois Supreme Court[3] affirmed the judgment of the trial court, and dismissed the writ stating that the right to be represented by counsel is one which the defendant may claim or waive as he shall determine, as no duty rests upon the court to provide legal assistance for an accused unless he states

[1] Carter v. People of State of Illinois, —— U. S. ——, 67 Supp. Ct. 216, 91 L. ed. 157 (Adv. Ops.) (1946). For cases on the general subject "Right to Counsel" see Note (1940) 84 L. ed. 383.

[2] *Id.* at ——, 67 Sup. Ct. at 219, 91 L. ed. at 160. Canizio v. People of State of New York, 327 U. S. 82 (1946). Appointment of counsel on day of sentence cured earlier defect of denial of right to counsel; a noncapital offense.

[3] People v. Carter, 391 Ill. 594, 63 N. E. (2d) 763 (1945).

under oath his inability to procure counsel and expresses a desire to have the court appoint one for him,[4] and as there was no bill of exceptions in the record and it did not appear that the defendant sought to have an attorney appointed, assignment of error on the question could not be sustained.[5]

The Supreme Court of the United States in affirming the judgment of the Illinois court restricted its view to the record before the state court on writ of error, i.e., the common law record which included indictment, judgment on plea of guilty, minute entry bearing on sentence and the sentence. Justice Frankfurter, writing the opinion for the majority stated that the Illinois court followed local practice in restricting its review to the common law record, that such practice constitutes allowable state appellate procedure[6] and that there was no showing of a denial of due process on that record, but intimated that petitioner should bring a proper action in the state court in order to place the pertinent facts, referred to above, before the court. Only after exhausting available state remedies can the petitioner come into a federal court.[7] Decision on whether or not the whole case including the above-mentioned facts would show a denial of due process was consequently reserved until such facts were properly before the court.

In a dissent by Justice Douglas in which Justices Black and Rutledge concur, it is agreed that there is no showing of a denial of the right of counsel on the common law record, but doubt is expressed as to the true basis for the state decision and it is concluded that the least that can be done is to remand the decision to the state court so that any state

[4] ILL. CONST. Art. II, §9: "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, . . ." ILL. REVISED STAT. 1943, c. 38, §730: "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense."

[5] People v. Stubblefield, 391 Ill. 609, 63 N. E. (2d) 762 (1945); People v. Stack, 391 Ill. 15, 62 N. E. (2d) 807 (1945); People v. Braner, 389 Ill. 190, 58 N. E. (2d) 869 (1945).

[6] Frank v. Mangum, 237 U. S. 309, 340 (1915): ". . . Repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, . . ." Brown v. New Jersey, 175 U. S. 172, 175 (1899): "The State has full control over the procedure of its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." McKane v. Durston, 153 U. S. 684 (1893): "It is therefore clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may seem proper."

[7] *Ex parte* Hawk, 321 U. S. 114 (1944), holding a state should deny all remedies to a person whom it holds in prison in violation of the Constitution of the United States, the federal courts would be available to provide a remedy to correct such wrong. Kantok v. Clark, 68 F. Supp. 595 (D. N. H. 1946) held an application for habeas corpus by one detained under state court judgment of conviction will be entertained by a federal court only when it affirmatively appears that applicant has exhausted his remedies in the state courts and there is no adequate remedy available under the state law.

procedural question may be untangled from the question arising under the Federal Constitution.[8] Justice Douglas further states, however, that if the evidence contained in the transcript was properly before the court then there would be a showing of a denial of due process.

Justice Murphy, in a separate dissent, contends that even on the common law record there is a clear showing of a denial of due process as there is no affirmative evidence that petitioner understood the necessary consequences of his plea, or that, fully appreciating all of his legal rights, he intelligently waived his right to counsel.

In the *Scottsboro* case,[9] Justice Southerland, writing the opinion for the majority, made the often repeated statement, ". . . in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, 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."[10] This language has created much doubt as to just what requirements the due process clause of the Fourteenth Amendment places upon the state courts in a capital case.[11] Where the accused pleads guilty to a crime in a state court there is a duty upon the court to inform him of the meaning and consequences of such a plea, and the Supreme Court of the United States has held that there is a duty upon the state court to inform the defendant of his right to counsel.[12] The question then arises, is there a duty upon the court to appoint counsel after explaining to the accused the meaning of the plea of guilty and his right to counsel? If requested, the duty of appointment is clear.[13] It is where the accused in a capital case fails to make a request that the difficulty arises. Does his failure to speak constitute a waiver? The Supreme Court of the United States has never defined the scope of waiver in a capital case in a state court but has in several cases held certain circumstances not to constitute a waiver.[14]

The court in the instant case did not undertake to define waiver, but

[8] *Cf.* State Tax Commissioners of Utah v. Van Colt, 306 U. S. 511 (1939).
[9] Powell v. Alabama, 287 U. S. 45 (1932).
[10] *Id.* at 71.
[11] *Cf.* Betts v. Brady, 316 U. S. 455, 458 (1942). Certiorari granted because of conflicting decisions on the question of an accused's right to counsel.
[12] Rice v. Olson, 324 U. S. 786 (1945); Tompkins v. Missouri, 323 U. S. 486 (1945).
[13] Williams v. Kaiser, 323 U. S. 471 (1945). *Cf.* Betts v. Brady, 316 U. S. 455 (1942). Counsel not appointed at accused's request; noncapital offense and held not to constitute a denial of due process.
[14] De Meerleer v. People of State of Michigan, —— U. S. ——, 67 Sup. Ct. 596, 91 L. ed. 471 (Adv. Ops.) (1947). Petitioner not advised of the consequences of plea of guilty or of his right to counsel; Woods v. Niersthumer, —— U. S. ——, 66 Sup. Ct. 996, 90 L. ed. 931 (Adv. Ops.) (1946) (coercion in plea of guilty); Hawk v. Olson, 326 U. S. 271 (1945) (petitioner not permitted to consult with attorney in period between arraignment and the impaneling of the jury); Rice v. Olson, 324 U. S. 786 (1945) (plea of guilty is not a waiver of right of counsel;

its decision did result in declaring a waiver in the circumstances of this case by holding that when the accused has been made aware of his right to counsel and then fails to request that the court appoint counsel to assist him with his defense, such failure constitutes a waiver and there is a presumption that such waiver was competently and intelligently made. It is clear then, that the defendant, on a subsequent attack on the judgment contending that he was denied due process by the failure of the court to appoint counsel for him, must place sufficient evidence before the court to overcome the presumption that the waiver was intelligently and competently made. This holding seems to be in accord with the general proposition that the burden of proof is upon him who claims injury. Justice Murphy, however, at least in capital cases, would start with the assumption that any trial in a state court, where the accused was tried and convicted without the aid of counsel, raises a presumption of a lack of due process and places the burden upon the state of overcoming this presumption and showing that the defendant did intelligently and competently waive his right to counsel. This view, most certainly, appeals to one's sense of justice and fairness but it is contrary to the above-mentioned proposition that the burden of proof is with him who claims injury, and from a practical point of view would place a tremendous burden upon the state.

Since no test has been laid down by the Supreme Court as to what constitutes an intelligent and competent waiver of the right to counsel in a state court proceeding, it would seem pertinent to examine the federal cases on this point. In the case of *Erwin v. Sanford,*[15] the petitioner on writ of habeas corpus alleged that he had been denied his constitutional right of assistance of counsel. The court dismissed the writ stating that the evidence showed that the petitioner freely and voluntarily entered a plea of guilty of the offense charged in the indictment, that no request for counsel was made by him and that the entry of his plea of guilty, since freely and voluntarily entered, was an intelligent and competent waiver of his right to assistance of counsel, and therefore, failue of the court to appoint counsel for him was not a denial of his constitutional right.[16] In the case of *Parker v. Johnson*[17] it was

noncapital offense); White v. Regan, 324 U. S. 760 (1945) (coerced plea of guilty); House v. Mayo, 324 U. S. 42 (1945) (forced to plead without the advice of his counsel whose presence he requested); Tompkins v. Missouri, 323 U. S. 485 (1945) (petitioner ignorant of his right to counsel); Williams v. Kaiser, 323 U. S. 471 (1945) (petitioner requested aid of counsel and request was refused).

[15] Erwin v. Sanford, 27 F. Supp. 892 (N. D. Ga. 1939).

[16] *Accord:* Adkins v. Sanford, 120 F. (2d) 471 (C. C. A. 5th, 1941); Franzeen v. Johnston, 111 F. (2d) 817 (C. C. A. 9th, 1940); Cooke v. Swope, 109 F. (2d) 955 (C. C. A. 9th, 1940); Sedorko v. Hudspeth, 109 F. (2d) 475 (C. C. A. 10th, 1940); Harpin v. Johnston, 109 F. (2d) 434 (C. C. A. 9th, 1940); *cert. denied,* 310 U. S. 624 (1940); Moore v. Hudspeth, 109 F. (2d) 475 (C. C. A. 10th, 1940); McDonald v. Hudspeth, 108 F. (2d) 475 (C. C. A. 10th, 1940); Towne v. Hudspeth, 108 F. (2d) 676 (C. C. A. 10th, 1939); Cundiff v. Nicholson, 107 F. (2d)

held that the accused had waived his right to counsel even though the court failed to explain this right to him. Furthermore it did not appear that petitioner was otherwise conscious of his right to counsel. The court reasoned that since the evidence showed that the accused would have pleaded guilty even had he been informed of his right to counsel and therefore the lack of knowledge concerning the existence of his right was not prejudicial, his free and voluntary plea of guilty constituted a competent waiver.[18]

It would seem then that in the federal courts a free and voluntary plea of guilty constitutes an intelligent and competent waiver. The right to counsel in the federal courts is specifically guaranteed by the Sixth Amendment,[19] and is also covered by the due process clause of the Fifth Amendment.[20] As the right to counsel in a state court does not come under the provisions of the Sixth Amendment, and is covered only by the due process clause of the Fourteenth Amendment,[21] it would seem to follow, and the Supreme Court has so held, that the right of the accused to counsel is afforded a greater protection in the federal courts than in the state courts.[22]

In the instant case, the accused, with his rights fully explained to him, including his right to counsel, freely and voluntarily pleaded guilty. Nevertheless, nineteen years after sentence was imposed, the Supreme Court has granted Carter the right to place before the court, in a proper action, pertinent facts concerning himself in order that it may then be determined whether he was capable of intelligently and competently waiving his right to counsel. The Supreme Court in granting Carter this right, irrespective of the outcome, has, in this case, afforded greater protection to an accused in a state court, than is afforded in the federal

162 (C. C. A. 4th, 1939); McCoy v. Hudspeth, 106 F. (2d) 810 (C. C. A. 10th, 1939). *Cf.* Adams v. United States *ex rel.* McCann, 317 U. S. 269 (1942); Walker v. Johnston, 312 U. S. 275, 286 (1941); Johnson v. Zerbst, 304 U. S. 458, 468-469 (1938); Roberts v. United States, 158 F. (2d) 150 (C. C. A. 4th, 1946).

[17] Parker v. Johnson, 29 F. Supp. 829 (N. D. Cal. 1939).

[18] *Accord:* O'Kieth v. Johnson, 129 F. (2d) 889 (C. C. A. 9th, 1942).

[19] U. S. CONST. AMEND. VI: "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel."

[20] U. S. CONST. AMEND. V: ". . . nor shall be deprived of life, liberty, or property, without due process of law. . . ."

[21] Betts v. Brady, 316 U. S. 455 (1942). The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth Amendment.

[22] Compare Avery v. Alabama, 308 U. S. 444 (1940) with Glasser v. United States, 315 U. S. 60 (1942); *cf.* Betts v. Brady, 316 U. S. 455 (1942). Mr. Justice Roberts, speaking for the majority in holding that refusal of the court to appoint counsel in that situation did not constitute a denial of due process, stated, however, that if the trial had been in a federal court, the Sixth Amendment would have made the appointment of counsel mandatory.

courts where a free and voluntary plea of guilty is held to constitute an intelligent and competent waiver. It is submitted that should Carter succeed in getting before the Supreme Court of the United States the fact that he had no formal education, and was wholly unfamiliar with court procedure, it will be held that he did not intelligently and competently waive his right to counsel.[23]

WILLIAM H. BURTON, JR.

Constitutional Law—Schools and School Districts—School Bus Transportation for Parochial School Students

The United States Supreme Court, in *Everson v. Board of Education of Ewing Township*,[1] held it not unconstitutional for a state to provide transportation to students attending private schools. A New Jersey statute[2] authorized the boards of education of the school districts of the state to make rules and contracts for the transportation of children to and from school when the children lived remote from any schoolhouse. The statute specifically included transportation for school children to and from school other than a public school, except such school as is operated for profit in whole or in part. The township of Ewing had no school past the eighth grade, after which grade children attended schools in nearby communities. The township provided no transportation to the other schools but, pursuant to the statute, the school board adopted a resolution recommending the transportation of pupils to three public high schools and to *Catholic schools* by way of public carrier.[3] In accordance with this resolution, the school board periodically reimbursed parents of children attending the three public high schools and Catholic schools outside the township for fares expended for transportation. The plaintiff, as a district taxpayer, challenged the constitutionality of the statute and the resolution of the board of education pursuant to it. The Court of Errors and Appeals, reversing[4] the Supreme Court[5]

[23] The four dissenting justices stated that the record, with these facts included, shows a denial of due process, although the majority withheld an opinion on this point until such time as the question was properly before the court.

[1] —— U. S. ——, 67 Sup. Ct. 504, 91 L. ed. (Adv. Ops.) 472 (1947).

[2] NEW JERSEY LAWS 1941, c. 191, p. 581; N. J. REV. STATS. 18:14-8 NJSA.

[3] (Italics supplied.) An interesting difference in viewpoints concerning this resolution developed. Mr. Justice Black, for the majority, was of the opinion that, since the appellant did not allege, and there was nothing in the record to show, that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools, the statute and resolution would not be found unconstitutional on a postulate neither charged nor proved but which rested on nothing but a possibility. Mr. Justice Rutledge was of the opinion that it could not be assumed that there were no such children, but the resolution should be held discriminatory on its face unless it were positively shown that no other sects sought, or were available to receive, the same advantages.

[4] 133 N. J. L. 350, 44 A. (2d) 333 (1945).

[5] 132 N. J. L. 98, 39 A. (2d) 75 (1944).