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Constitutional Law - Repayment of Cost for Legal Counsel as a Condition of Probation

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RECENT DECISIONS

Right to Counsel: Repayment of Cost of Court-Appointed Counsel as a Condition of Probation. Every citizen is guaranteed the right to counsel by the Sixth Amendment to the United States' Constitution. The United States Supreme Court, in *Gideon v. Wainwright*,[1] consolidated years of tradition as well as precedent when it held: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[2] *Gideon* held that an indigent's right to court-appointed counsel was a "fundamental and essential" right which was extended to all the states through the Fourteenth Amendment.

In January, 1972, the Supreme Court of North Carolina promulgated an opinion which may seriously limit this right. The court ruled in *State v. Foust*[3] that a court could impose as a condition of probation the requirement that an indigent defendant reimburse the State for the costs of a court-appointed attorney if he is reasonably able to do so. The decision is couched in terms of judicial reasonableness, importantly limited by the rule that a probationer's inability to pay would be lawful excuse from the condition of probation, "unless, of course, the inability to pay results from a lack of reasonable effort by the defendant to obtain and have available the necessary funds."[4] At first glance, the decision seems fair and logical. As the North Carolina court puts it, this rule requires the accused indigent to consider

> not whether he should refuse counsel rather than risk being jailed if he remains financially unable to pay, but simply whether he is willing to incur the financial obligation of counsel in the event of a probationary sentence. Nonindigent defendants must make similar choices. That nonindigents may be discouraged from engaging counsel by the fact that they are required to pay does not mean that the State must provide them free counsel, or that a reluctance on their part to incur cost of counsel unconstitutionally impedes their right under the Sixth Amendment.[5]

However, the fact that this decision is in direct conflict with an earlier California Supreme Court decision indicates a problem that

1. Gideon v. Wainwright, 372 U.S. 335 (1963).
2. *Id.* at 344.
3. State v. Foust, 13 N.C.App. 382, 185 S.E.2d 718 (1972).
4. *Id.* at ___, 185 S.E.2d at 720.
5. *Id.*

should be closely examined. In a 1969 case, *In re Allen*,[6] the California court voided a similar condition of probation requiring a convicted indigent to repay the State for court-appointed counsel on the ground that such a condition interfered with the exercise of the indigent's Sixth Amendment right. The court pointed out that as the practice of imposing the condition on indigents became widespread, indigents would realize that the offer of a court-appointed lawyer is not the gratuitous offer of assistance that it appears to be, and that convicted indigents may be required to repay the State as a condition of probation.

> This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the Court in *Gideon* . . . .[7]

Thus juxtaposed, the North Carolina and California decisions frame the issue of the exercise of the Sixth Amendment right to counsel by indigent citizens: does the imposition as a condition of probation of the requirement that a convicted indigent reimburse the State for costs of court-appointed counsel interfere with the indigent's exercise of a constitutional right?

The law seems to be well-settled as to what criteria should be used to judge the legitimacy of conditions of probation. A condition of probation is invalid if 1) it has no relationship to the crime of which the defendant is convicted, 2) it relates to conduct not in itself criminal, or 3) it requires or forbids conduct not reasonably related to future criminality.[8] The North Carolina court attempts to construct an opinion which incorporates the condition in question into the category of relation to the criminal act:

> The costs which defendant finds objectionable were necessitated by his misconduct. In our opinion they are directly related to his criminal acts and it is therefore not unreasonable to require defendant to make reimbursement.[9]

The logic is incontestable. The California court also found the condition of probation in question to be within the discretion of the sentencing court because the California Penal Code not only provides for certain specific conditions but also allows the courts to

6. *In re* Allen, 71 Cal. 2d 388, 455 P.2d 143, 78 Cal.Rptr. 207 (1969).

7. *Id.*, ___, 455 P.2d at 144, 78 Cal. Rptr. at 208.

8. *In re* Bushman, 1 Cal. 3d 767, 463 P.2d 727, 83 Cal. Rptr. 375 (1970); State v. Baynard, 4 N.C. App. 465, 167 S.E.2d 514 (1969).

9. State v. Frost, *supra* note 3, ___, 185 S.E.2d at 721.

set "other reasonable conditions."[10] The court invalidated the condition only because it was "unreasonable" on constitutional grounds. Judging from the recent decision in *State v. Garner*,[11] the reasoning of the Wisconsin Supreme Court parallels that of the North Carolina court. The defendant in *Garner* was convicted of nonsupport, and the trial court imposed as a condition of probation the requirement that the defendant take his family off the county welfare roll. Using the rationale that the condition was reasonably related to the crime for which the defendant was convicted, the court affirmed the defendant's probation revocation for his failure to fulfill this condition. The court evinced concern that findings be made as to the ability of the defendant to fulfill the condition with a reasonable effort, just as the North Carolina court had. Although *Garner* is not directly on point, it is the Wisconsin court's most recent indication of its attitude toward the validity of conditions of probation. It seems a short and logical step from the court's position in *Garner* to the North Carolina court's position on a condition of probation that requires an indigent to reimburse the State for court-appointed counsel.

The problem of the validity of the condition in question ultimately depends on the difficult issue of whether or not such a condition would have a "chilling effect" on an indigent defendant's exercise of his right to counsel. In Wisconsin the issue is even more clearly presented, because the legislature itself has indicated that the courts can impose as a condition of probation the reimbursement of State costs for a court-appointed attorney. The Wisconsin Statutes include as costs taxable against the defendant in a criminal action "Attorney fees payable to the defense attorney by the county."[12] The next section of the statutes provides a penalty of up to six months imprisonment for failure to pay taxed fines or costs.[13] But a previous provision says: "When a defendant is sentenced to pay a fine and is also placed on probation, the court may make the payment of the fine a condition of probation."[14] Although there is no similarly express section concerning costs, it seems reasonable that Wisconsin courts may well consider payment of costs (court-appointed attorney fees) a "reasonable and

10. *In re* Allen, *supra* note 6, ___, 455 P.2d at 144, 78 Cal. Rptr. at 208.
11. State v. Garner, 54 Wis. 2d 100, 194 N.W.2d 649 (1972).
12. WIS. STATS. § 973.06(1)(e) (1969).
13. WIS. STATS. § 973.07 (1969).
14. WIS. STATS. § 973.05(2) (1969).

appropriate" condition of probation and thus within their discretion.[15]

The right of an indigent to counsel predates *Gideon* in Wisconsin. The right to counsel in this state was expressly guaranteed in the Wisconsin Constitution,[16] and the Wisconsin Supreme Court immediately recognized the necessary corollary that when a citizen could not afford to retain counsel justice demanded that the court supply it.[17] The United States Supreme Court in *Gideon* simply extended this right long recognized in Wisconsin to all citizens as a federal right. The Court has continued to buttress this right in subsequent decisions, emphasizing how very important it is. In *Miranda v. Arizona*[18] the Court broadened the right to counsel to include assistance of counsel at interrogations, and in *Mempa v. Rhay*[19] one year later, the Court refined its rulings to require counsel for an indigent at every stage of a criminal proceeding where his rights might be affected. More recently, in *Argersinger v. Hamlin*,[20] the Court extended Sixth Amendment rights to defendants in misdemeanor cases.

But the North Carolina court in *State v. Foust* did not take issue with the right of an indigent to counsel, nor did that court have to concern itself with the difficult question of at what point in a criminal proceeding that right becomes choate. The court simply dismissed the possibility that the condition of probation in question would discourage indigents from requesting counsel with one sentence: "Assuming that such a likelihood does exist (an assumption we incidentally find difficult to make) we nevertheless fail to view it as an unconstitutional impediment."[21] So hasty a dismissal of this possibility is both unseemly and ill-advised. In an article cited by the court in support of its decision, *The Right to Counsel in Minnesota*,[22] the writer asks the question (ignored by the North Carolina court) whether, if an indigent is in fact going to have to pay, ought he not be able to choose his counsel rather than have him appointed? This is only part of the problem. It may

15. WIS. STATS. § 973.09(1) (1969).

16. WIS. CONST. art. I, sec. 7.

17. Carpenter v. Dane County, 9 Wis. 274 (1859); County of Dane v. Smith, 13 Wis. 585, 80 Am. Dec. 754 (1861).

18. Miranda v. Arizona, 384 U.S. 436 (1966).

19. Mempa v. Rhay, 389 U.S. 128 (1967).

20. Argersinger v. Hamlin, 407 U.S. 25 (1972).

21. State v. Frost, *supra* note 3, ___, 185 S.E.2d at 720.

22. Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 26 (1963).

well be legitimate policy to attempt to defray the costs of administering justice by requiring all those who are able to do so to pay their share. But if, in order to implement this policy, indigents are required to pay for assistance of counsel, certainly they ought to have the right of control over their counsel that nonindigents have. The Wisconsin Supreme Court has already held that the right to counsel at public expense does not include the right to counsel of an indigent's own choosing.[23] In fact, not only can an indigent not select, neither can he discharge the court-appointed counsel.[24] These rules would indicate a practical problem that the North Carolina court did not consider: if the indigent repays the State, is counsel still to be considered as court-supplied? Or would an indigent who repays the State have concommitant privileges to select and discharge counsel? A better question might be whether those privileges could be denied? The final problem that logically follows all of this is how can the court know, at the time counsel is appointed, whether or not an indigent will have to repay the counsel's cost and therefore allow that indigent to exercise the above privileges?

A problem more difficult to substantiate, but which would have a far greater "chilling effect" on the exercise of the Sixth Amendment right to counsel by indigents, would be simple mistrust of the courts and the legal system. For example, at this writing there is much "welfare reform" being proposed by legislators on both the state and federal levels which requires welfare recipients to work for wages below the minimum wage if such jobs are made available to them. It is considered "unreasonable" to refuse these jobs, and the penalty for such unreasonableness is to be the loss of welfare benefits. Would the same be true of indigents who are required to pay back the State for court-appointed counsel? How much below the minimum wage would the indigent be forced to work before his refusal to do so would withstand the charge that he was refusing to make a "reasonable effort" to repay the State and thus retain his freedom?

The problem, obviously, is that the North Carolina court tied the condition of repayment for State-supplied legal services to the sentence imposed for punishment for a crime. There may not be anything wrong with requiring indigents to pay for State supplied services if they are able: let the State have the remedies that any

23. Rahhal v. State, 52 Wis. 2d 144, 147, 187 N.W.2d 800, 802 (1971).
24. State v. Johnson, 50 Wis. 2d 280, 283, 184 N.W.2d 107, 109 (1971).

creditor has (and any lawyer has with a nonindigent client who is reluctant to pay for services). Then even indigents who are acquitted of wrongdoing might be liable for the cost of court-appointed counsel, just as nonindigents who are acquitted must still be responsible for their legal fees. That is another issue entirely. But the North Carolina court linked the reasonableness of indigents paying for court-appointed counsel only with convicted indigents. While this strongly appeals to the retribution ethic that is primary in our criminal justice system, it overlooks the important fact that a "chilling effect" would occur *before* a determination of guilt, thus making innocent as well as guilty indigents hesitate to accept court-appointed counsel. And certainly they would hesitate, because more than ever they would view conviction as being in the interests of the State and its court. If an indigent is found innocent, he will not have to pay for court-appointed counsel. But if the condition of probation in question is retained, it is obvious that the State desires to have indigents pay for their counsel. Since indigents with court-appointed counsel must be convicted to fulfill this desire, there would seem to be one less State interest in conviction if the indigent refuses court-appointed counsel! A better illustration of a "chilling effect" on the exercise of a constitutional right would be hard to find.

Although this rationale may appear extreme to the North Carolina Supreme Court, the existing distrust of the courts by indigents and minorities would seem to give it some legitimacy. Tying such a condition of probation to a sentence for a crime may well have the kind of "chilling effect" on the indigents' right to counsel that can only further weaken their faith in this country's law and its enforcement.