Marquette Law Review

Volume 47
Issue 3 *Winter 1963-1964*

Article 15

Constitutional Law: Indigent's Right to Counsel When Charged with a Series of Misdemeanors, Carrying a Possible Substantial Prison Sentence

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is the basis of the union itself. Such a method of punishment is . . . impliedly prohibited by public policy.[33]

In conclusion, it should be noted that conditional pardons, in the proper situation, are not only practical but necessary to effective penal practice. When, however, the condition imposed is so broad as to be arbitrary, whimsical or ridiculous, the very purpose of pardoning may be thwarted. To remedy this situation, a conditional pardon should be viewed as a noncontractual grant of privilege from the state based upon a condition precedent or subsequent which is valid if the condition imposed is valid. A standard should then be adopted by judicial opinion or legislative enactment requiring that conditions imposed in a pardon be held invalid unless shown to bear some reasonable relation to the purposes of conditional pardoning, convict treatment or rehabilitation, and/or societal protection. ROBERT A. MELIN

Constitutional Law: Indigent's Right to Counsel When Charged With a Series of Misdemeanors, Carrying a Possible Substantial Prison Sentence—The case of *Melvin v. Burke, Warden, Wisconsin State Prison*[1] raised the question of the right of a defendant, who is charged with a misdemeanor, to have counsel appointed. In the original action, the County Court of Portage County, Wisconsin found petitioner guilty on nine charges of issuing worthless checks in violation of section 943.24 of the 1961, Wisconsin Statutes. These offenses are defined as misdemeanors under Wisconsin law, and each offense is punishable by a fine of not more than $1000 or imprisonment for no more than one year or both.[2] Petitioner was sentenced to eight concurrent and one consecutive one year terms for a total of two years in the Wisconsin State Prison.[3]

At the time of his arraignment in Portage County, petitioner was informed by the court that he would not be furnished with counsel, the court having no such appointive power under Wisconsin law. After

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[33] *Id.* at 96.

[1] Melvin v. J. C. Burke, Warden, Wisconsin State Prison, File No. 63-c-52 (E.D. Wis. 1963).

[2] Other offenses calling for a fine or one year prison sentence or both include: homicide by negligent use of vehicle or weapon, WIS. STAT. §940.08 (1961); carrying concealed weapon, WIS. STAT. §941.23 (1961); fraud on hotel or restaurant keeper, WIS. STAT. §943.21 (1961); lewd or lascivious behavior, WIS. STAT. §944.20 (1961); harboring or aiding felons, WIS. STAT. §946.47 (1961); bribery of witnesses, WIS. STAT. §943.61 (1961); interference with custody of child, WIS. STAT. §946.71 (1961); cruelty to animals, WIS. STAT. §947.10 (1961); contributing to the delinquency of children, WIS. STAT. §947.15 (1961).

[3] Compounding this problem is the effect of the so-called repeater statute, WIS. STAT. §939.62 (1961), which provides that if the actor is a repeater (convicted of misdemeanors on three separate occasions within a five year period) the maximum term of imprisonment prescribed by law for that crime may be increased to not more than three years for a maximum term of one year or less.

trial and sentencing, petitioner's writ of *habeas corpus* was heard by the United States District Court for the Eastern District of Wisconsin, where petitioner was furnished with non-compensated counsel.

The district court judge dismissed the petitioner from the custody of the Warden of the Wisconsin State Prison. By applying the principles enunciated in *Gideon v. Wainwright*,[4] the judge found that the petitioner had been denied due process of law:

> In this case, it is the opinion of the Court that it is governed by the case of *Gideon v. Wainwright, Correctional Director*, decided on March 18, 1963. As I read that case and the reasoning therein contained, whenever an indigent is faced with a substantial sentence he is entitled to be furnished with counsel at the expense of the State, and if he is not furnished with counsel, due process of law has not been afforded him. . . . Here was a man . . . who was facing possible commitments of up to nine years. And I make the finding that that is a substantial penalty. He was told that the court had no power to furnish him with counsel.[5]

Thus, through its decision in this case, the district court recognized the accused indigent's right to counsel when charged with a series of misdemeanors which carry a possible substantial prison sentence.

A Pennsylvania case which recently construed the effect of the *Gideon* case was *Commonwealth v. Banmiller*.[6] There, it was acknowledged that *Gideon* required appointment of counsel in criminal prosecutions—"state as well as federal, capital as well as non-capital." The appointment of such counsel was deemed essential to a fair trial and was considered a fundamental right guaranteed by the Constitution of the United States in state criminal prosecutions. Although this case involved the question of whether or not *Gideon* was to be applied retroactively, its language indicated the courts intention to recognize the indigent accused's right to counsel in *all* state criminal prosecutions, regardless of the severity of the penalty.

The Federal District Court of Maryland recently commented upon the problem inherent in this broad interpretation of the *Gideon* case:

> *Gideon v. Wainwright*, . . . holds that indigent defendants in criminal cases have a constitutional right to the assistance of counsel. Whether or not the rule so announced will literally be applied to all criminal prosecutions—parking 16 minutes in front of the Post Office Building during prohibited hours, dropping a square millimeter of tinfoil on the sidewalk, using profane language in the presence of a Justice of the Peace—need not here be determined. By any anticipated construction of the *Gideon* opinion, there would seem to be no doubt but that it would now

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[4] 372 U.S. 335, (1963). See, 47 MARQ. L. R. 111 (1963) for a discussion of the principles applied in *Gideon*.
[5] Melvin v. J. C. Burke, *supra* note 1.
[6] 410 Pa. 584, 189 A. 2d 875 (1963).

> apply to a charge such as that against the petitioner, who was sentenced to two years imprisonment. . . .[7]

While these cases have indicated the general interpretation that courts are beginning to give the *Gideon* case, they have given no indication of how extended the indigent accused's right to counsel will become in the future.

At the present time, Wisconsin law requires appointment of counsel only when the accused indigent has been charged with a felony.[8] Clearly, section 957.26 has been shown to be inadequate in light of the *Gideon* and the *Melvin* decisions. The Wisconsin legislature must now determine where to draw the line regarding the requirement that counsel be appointed for the indigent defendant. The *Banmiller* and the *Otten* cases have indicated that *Gideon* can be applied to all criminal prosecutions; whereas, the *Melvin* case required a substantial penalty before *Gideon* could be invoked. It is this writer's opinion that counsel should be appointed in cases where the indigent could be sentenced to a prison term of one year or more.

FRANCIS J. PODVIN

Evidence: The Admissibility of Hospital Records Under Section 327.25 of the Wisconsin Statutes—The recent case of *Rupp v. Travelers Indemnty Co.*[1] pointed out a basic problem troubling many practicing attorneys in regard to one of the exceptions to the hearsay rule. This case involved an action for the recovery of damages for personal injuries sustained by the plaintiff in an automobile accident. The issue on appeal was whether the trial court erred in not admitting into evidence hospital records and records of an orthopedist, who had treated the plaintiff after the custodian of the records identified them as entries made in the usual course of business. The Wisconsin Supreme Court held that the trial court was correct in not admitting these records as regular entries under section 327.25.[2]

The plaintiff in the *Rupp*[3] case failed to call to the stand any doctor, nurse, intern, or employee of the hospital, who had made the various entries, or to offer to show that such persons were beyond the jurisdiction of the court, dead, or insane as required by section 327.25. Admissibility was denied on the ground that a proper foundation for such evidence had not been laid. The court held that it was error to admit these records without first laying a foundation by calling as witnesses those who made said entries or without first showing that the entrants were beyond the jurisdiction of the court, dead, or insane. The trial

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[7] Otten v. Warden, Baltimore City Jail, 216 F. Supp. 289 (D.Md. 1963).
[8] WIS. STAT. §957.26 (1961).
[1] Rupp v. Travelers Indemnity Co., 17 Wis. 2d 16, 115 N.W. 2d 612 (1962).
[2] WIS. STAT. §327.25 (1961).
[3] Rupp v. Travelers Indemnity Co., *supra* note 1.