

Due Process of Law - Right of Accused to Counsel

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Due Process of Law — Right of Accused to Counsel — Petitioner, Victor Drankovich, who had pleaded guilty upon arraignment, was sentenced to life imprisonment for first degree murder. After serving eleven years of the sentence he appealed for a writ of Habeas Corpus to test the legality of his incarceration. One of the grounds for the issuance of the writ was that the petitioner did not have the benefit of, and was not advised of, his right to counsel at public expense. *Held*: judgment of conviction was vacated because petitioner had been deprived of due process. Where the petitioner was illiterate and ignorant of the law, and was without means to employ counsel when arraigned, the court should have refused to accept the plea of guilty without approval of counsel. *State ex rel Drankovich v. Murphy, Warden*, 22 N.W. 2d. 540 (1946 Wis.).

States are free to regulate procedure in their courts without conflict with the due process clause of the Fourteenth Amendment except where fundamental principles of liberty and justice are invaded.¹ Is the right to counsel so fundamental that a denial by a state court amounts to a violation of the due process clause of the Fourteenth Amendment? Decisions in support of an affirmative answer are in the majority in both state and federal practice.² In the famous *Scottsboro* cases,³ which involved a conviction for rape, the court decided that the right to counsel is so fundamental that a denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel may so offend our concepts of the basic requirements of a fair hearing as to constitute a denial of due process contrary to the Fourteenth Amendment. A recent decision in the case of *United States v. Bergamo*,⁴ conforms with the ruling in the *Scottsboro* cases. The Circuit Court of Appeals for the Third Circuit there held that the accused in a criminal case has a constitutional right to the assistance of counsel, and this includes the right to counsel of one's own choice. Hence, the right to effective assistance is abridged where a trial judge has refused to specially admit out of state counsel for

¹ *Brown v. New Jersey*, 175 U. S. 172 at 175 (1899), cited in *Twining v. Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.ed. 97 (1908). "The state has the full control over procedures in 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 specified or applicable provisions of the Federal Constitution."

² *Brown v. State of Mississippi*, 297 U.S. 278, 56 S.Ct. 461 (1936); *Johnson v. Zerbst*, *Warden*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.ed. 1461, 146 A.L.R. 357 (1938); *Walker v. Johnson, Warden*, 312 U.S. 275, 61 S.Ct. 574, 84 L.ed. 830 (1941); *Tomkins v. State of Missouri*, 323 U.S. 484, 65 S.Ct. 370 (1945); *Williams v. Kaiser, Warden*, 323 U.S. 471, 65 S.Ct. 363 (1945).

³ *Powell v. State of Alabama*, 287 U.S. 45, 53 St. Ct. 55, 77 L.ed. 158, 84 A.L.R. 527 (1932), discussed in 17 Minn.L.R. 415 (1932).

⁴ *United States v. Bergamo*, 154 F. 2d. 31 (C.C.A. 3, 1946).

defendants, and local counsel cannot be efficacious because of insufficient time to prepare the defense.

In Wisconsin the policy as established by Article I, Section 7 of the Wisconsin Constitution,⁵ and early construed in the case of *Carpenter v. Dane County*,⁶ has always been most liberal with respect to preserving the right to counsel. This right has been held to extend to having counsel present to protect the rights of the accused at every stage of the case.⁷ The Attorney General,⁸ commenting on Section 357.26 of the Wisconsin Statutes,⁹ remarked that this section does not confer the right to appointment of counsel but merely furnishes the machinery for the exercise of that right and limits the fees. However it should be construed as broadly as the constitutional provision which it implements. During the 1945 session of the Legislature this section¹⁰ was amended to provide that an accused shall be advised by the court of his right to counsel upon arraignment.

While it is now a recognized principle of constitutional law that the right to counsel is a necessary requisite of due process,¹¹ it is conceded that this fundamental personal right may be waived.¹² Whether or not there has been an intelligent waiver is sometimes difficult to determine, particularly where there has been a plea of guilty. A plea of guilty does not unequivocally amount to a waiver. The background, experience and conduct of the accused must be carefully weighed.¹³ In the present case, there was a finding that the petitioner did not intelligently waive the right to be represented by counsel, even though he pleaded guilty. To sustain this finding the court used the argument that because of illiteracy and ignorance of the law petitioner was incapable of making his own defense. An al-

⁵ Wis. Const., Art. I, Sec. 7: "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel."

⁶ *Carpenter v. Dane County*, 9 Wis. 249, at 253 (1859); "The Circuit Court has the power and it is its duty to assign counsel to criminals unable to secure such counsel, as fully as though the power was enjoined by statute."

⁷ *Smith v. The State*, 51 Wis. 615 (1881).

⁸ 29 Op. Atty. Gen. (Wis. 1940), p. 449.

⁹ Wis. Stat. (1939) sec. 357.26.

¹⁰ Wis. Stat. (1945) sec. 357.26(2): "Upon the arraignment and before plea, of any person charged with a felony he shall be advised by the court of his right to counsel, and a record shall be made of such advice upon the minutes of the court or in a transcript of the proceedings."

¹¹ Cooley, *Constitutional Limitations*, 8th ed. Vol. I, p. 700.

¹² *Dietz v. The State*, 149 Wis. 462 at 749, "Every person sui juris who is charged with crime, has the right to try his own case if he so desires. The trial court would not have been justified in imposing counsel upon the defendant against his will, unless it appeared that he was mentally incompetent, or not sui juris at the time of the trial."

¹³ U.S.C.A., Const. Amend. 14, Sec. I, note 977 p. 148: "The determination of whether there has been an intelligent waiver of the accused's right to counsel so as to render the conviction without assistance of counsel valid must depend in each case upon the particular facts including the background, experience and conduct of the accused." *Commonwealth ex rel McGlenn v. Smith, Warden*, 344 Pa. 41, 24A. 2d 1, (1942).

lustration of a state court reaching an opposite conclusion upon consideration of different circumstances is afforded by the case of *Jones v. Amrine*.¹⁴ There a state statute required the assignment of counsel only on request. However, the same court thirteen years previously in the case of *State v. Oberst*¹⁵ ruled in conformity with the instant case when it held that a seventeen year old youth charged with murder was denied due process because the court failed to appoint counsel when the accused changed his plea from not guilty to guilty.¹⁶ The Pennsylvania Court in *Commonwealth ex rel McGlenn v. Smith, Warden*,¹⁷ declining to follow the majority rule, held that failure to appoint counsel was not a denial of due process. The court reasoned that considering the penitentiary background and experience of the accused he must have known that professional assistance would have been given him upon request, and therefore he must be deemed to have intelligently waived his right to be heard by counsel. In the final analysis the determination of whether or not there has been a waiver must depend upon an appraisal of a totality of facts and circumstances in each individual case. There is no presumption that an accused knows of his constitutional right to counsel.¹⁸ Likewise the courts will indulge every reasonable presumption against the waiver of this constitutional right.¹⁹ Consequently the duty of informing the accused devolves upon the trial judge who should refuse to accept any plea of guilty without assuring himself that it has been intelligently and competently waived.²⁰

In the principal case the counsel for petitioner very ably summarized all of the propositions which have a bearing upon the right

¹⁴ *Jones v. Amrine, Warden*, 154 Kan. 629, 121 P. 2d. 263 at 263 (1942): "Where the accused without counsel and without making a request for counsel personally, understandingly, and voluntarily entered a plea of guilty of burglary in the second degree, in view of the statute then in force requiring assignment of counsel only on request, accused thereby waived the right to be represented by counsel and was not deprived of due process."

¹⁵ *State v. Oberst*, 127 Kan. 412, 273 P. 490 (1929).

¹⁶ A similar result was reached in *Coates v. State*, 180 Md. 502, 25 A. 2d. 676 (1942) when the court of appeals of Maryland held that where counsel was not appointed for an ignorant and impecunious colored boy of nineteen who was charged with robbery and pleaded guilty in four cases, the judgments must be reversed and the pleas of guilty struck because the accused had been deprived of due process of law.

¹⁷ *Commonwealth ex rel McGlenn v. Smith, Warden*, supra, note 13 at I; "The trial court's failure to inform the accused of his constitutional right to be represented by counsel or to provide counsel for the accused was not a denial of due process in view of the fact that the accused had been previously convicted for three separate offenses for which he had been sentenced to prison, and that he was not therefore ignorant of proceedings in criminal court."

¹⁸ *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 82 L.ed. 680 (1942).

¹⁹ *Johnson v. Zerbst, Warden*, supra, note 2 at 465.

²⁰ *Johnson v. Zerbst, Warden*, supra, note 2 at 465.

to counsel as an element of due process. They may be outlined as follows:

1. Due process under the Fourteenth Amendment requires that a defendant accused of murder be furnished counsel.
2. The duty rests upon the trial judge to protect this right.
3. The trial judge should do this whether requested or not.
4. The duty is imperative where the defendant is illiterate, unacquainted with legal proceedings, isolated and away from friends, and without funds.
5. There should be a record of the proceedings.
6. It should not be presumed that the accused knew that he had the right to counsel and voluntarily rejected it.
7. A plea of guilty is not a waiver of the constitutional right.
8. The court should not indulge in the speculation as to whether the defendant was prejudiced by not having counsel.

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