Michigan Law Review

Volume 45 | Issue 8

1947

CONSTITUTIONAL LAW-DUE PROCESS CLAUSE-RIGHT OF AN ACCUSED TO HAVE COUNSEL APPOINTED BY THE COURT

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CONSTITUTIONAL LAW—DUE PROCESS CLAUSE—RIGHT OF AN ACCUSED TO HAVE COUNSEL APPOINTED BY THE COURT—On May 16, 1932, petitioner, then seventeen years of age, was arraigned, tried, convicted of murder in the first degree and sentenced to life imprisonment. Petitioner was without legal assistance throughout these proceedings, was never advised of his rights to counsel, was never informed of the consequences of a guilty plea and, as disclosed by the record, was considerably confused as to the effect of such plea. In 1945, he moved for leave to file a delayed motion for new trial in the court in which he was convicted, on the ground that there had been serious impairment of his constitutional rights at the arraignment and trial. On appeal the Supreme Court of Michigan held that there was no error in the trial court's denial of petitioner's motion.[1] On certiorari to the United States Supreme Court, *held*, reversed, *per curiam*. *De Meerleer v. People of the State of Michigan*, (U.S. 1947) 67 S. Ct. 596.

The right of an accused to the assistance of counsel is protected in the federal courts by the Sixth Amendment to the Constitution [2] and in most state courts by provisions in state constitutions and/or statutes.[3] In addition, there are certain circumstances in which the right of counsel in state prosecutions is protected by the due process clause of the Fourteenth Amendment of the Constitution, as an essential requisite to a fair hearing.[4] Thus, where an accused is in fact

[1] People v. De Meerleer, 313 Mich. 548, 21 N.W. (2d) 849 (1946).

[2] "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense." U. S. Const., Amendment VI.

[3] For rulings on the Michigan Constitution and statutes see note 13, infra. For full collections of state constitutions, statutes and judicial rulings see Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252 (1942).

[4] The right to counsel is more strictly observed in the federal courts, where the Sixth Amendment specifically provides for such right, than in the state courts, where

represented by counsel the Supreme Court has held that rulings of the trial court which prevent effective assistance of such counsel are a denial of due process of law.[5] Also, the trial court has the duty to appoint counsel, whether requested or not, in capital cases where the accused is incapable of making his own defense because of ignorance, feeble-mindedness, illiteracy or the like.[6] This doctrine has been applied in non-capital criminal cases where it is clear that the accused is unable to defend himself and where the questions of law and procedure are difficult and complicated.[7] But in the absence of such special considerations, denial of a prisoner's request for counsel in a non-capital felony case has been held not to violate the Fourteenth Amendment.[8] An accused may waive his right to counsel "if he knows what he is doing and his choice is made with eyes open," [9] but a plea of guilty is not in itself a waiver of this right.[10] Where the accused is not otherwise aware of it, failure of the trial court to advise him of his right to counsel is a denial of due process.[11] This doctrine that the due process clause affords a basis for invalidating a state criminal prosecution where the accused's right to counsel has not been sufficiently observed is a comparatively recent development, and its limits are not yet sharply defined.[12] But it would seem clear that the principal case falls well within its scope. The Michigan Supreme Court based its decision on the Michigan Constitution and statute and adhered to a well-established rule of construction that these provi-

due process is the basis for the requirement. "If the accused . . . is not represented by counsel and has not competently and intelligently waived his . . . right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction." Johnson v. Zerbst, 304 U.S. 458 at 468, 58 S. Ct. 1019 (1934). The requirements under the Fourteenth Amendment are clearly much less stringent. For the argument that the Fourteenth Amendment should make the Sixth applicable to state action, see dissenting opinion of Black, J., in Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252 (1942).

[5] Hawk v. Olson, 326 U.S. 271, 66 S. Ct. 116 (1945) (perfunctory defense by public defender without consultation); House v. Mayo, 324 U.S. 42, 65 S. Ct. 517 (1945) (denial to prisoner of continuance to consult his counsel); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932) (failure of court to give defendant reasonable time to consult counsel and prepare defense); White v. Ragen, 324 U.S. 760, 65 S. Ct. 978 (1945) (too little time to consult with appointed counsel). But cf. Avery v. Alabama, 308 U.S. 444, 60 S. Ct. 321 (1940), and Canizio v. New York, (U.S. 1946) 66 S. Ct. 482. See 46 COL. L. REV. 647 (1946).

[6] Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932); Williams v. Kaiser, 323 U.S. 471, 65 S. Ct. 363 (1945). Tompkins v. Missouri, 323 U.S. 485, 65 S. Ct. 370 (1945); Hawk v. Olson, 326 U.S. 271, 66 S. Ct. 116 (1945).

[7] Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989 (1945); White v. Ragen, 324 U.S. 760, 65 S. Ct. 978 (1945).

[8] Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252 (1942); Johnson v. Mayo, (Fla. 1946) 28 S. (2d) 585, cert. den., (U.S. 1947) 67 St. Ct. 492.

[9] Adams v. United States, 317 U.S. 269 at 279, 63 S. Ct. 236 (1942); Carter v. Illinois, (U.S. 1946) 67 S. Ct. 216.

[10] Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989 (1945); Walker v. Johnston, 312 U.S. 275, 61 S. Ct. 574 (1941).

[11] Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989 (1945).

[12] See Boskey and Pickering, "Federal Restrictions on State Criminal Procedure," 13 UNIV. CHI. L. REV. 266 (1946); 42 COL. L. REV. 271 (1942).

sions are permissive only.[13] But procedure in state courts must conform to the minimum requirements of due process as defined by the Supreme Court. Not only does this court's position as to the facts of the principal case seem unequivocably clear, but also a broad rule concerning assignment of counsel, modeled, perhaps, after the procedure in the federal courts,[14] would seem to be preferred policy.[15]

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[13] The Michigan Constitution, Art. II, § 19 (1908) provides that 'in every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense." Two statutes deal with the right to counsel. 3 Mich. Comp. Laws (1929) § 17129, Mich. Stat. Ann. (1938) § 28.854, provides that the party accused "shall be allowed to be heard by counsel." 3 Mich. Comp. Laws (1929) § 17486, Mich. Stat. Ann. (1938) § 28.1254, provides that where the trial judge appoints an attorney to conduct the defense, he shall be entitled to receive compensation from the county treasurer. The Michigan rule of construction is that the first statute is only declaratory of the Constitutional provision, and that the latter guarantees the right to employ counsel, not to have counsel appointed at public expense. The second statute permits the trial judge to appoint an attorney to represent an accused, but it is not mandatory in any case. See People v. Williams, 225 Mich. 133, 195 N.W. 818 (1923), and People v. Crandall, 270 Mich. 124, 258 N.W. 224 (1935). The latter is truly a "white horse" case.

[14] Rule 44 of the federal Rules of Criminal Procedure: "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."

[15] Boskey and Pickering, "Federal Restrictions on State Criminal Procedure," 13 UNIV. CHI. L. REV. 266 at 278 (1946).