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## CRIMINAL LAW-INCOMPETENCE OF DEFENSE COUNSEL AS GROUND FOR NEW TRIAL

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CRIMINAL LAW—INCOMPETENCE OF DEFENSE COUNSEL AS GROUND FOR NEW TRIAL—To represent the defendant, accused of robbery, the court at public expense, appointed an attorney, designated the “public defender.” After conviction, the defendant, by another attorney, petitioned for a writ of error coram nobis on the ground that his attorney had made only a perfunctory defense because of his incompetence and negligence. The petition having been denied in the circuit court, the defendant appealed to the Indiana Supreme Court. *Held*, affirmed. When the record shows no incompetence or negligence on the part of the defense counsel prejudicial to the accused, a writ of error coram nobis will not be granted. *Fluty v. State*, (Ind. 1947) 71 N.E. (2d) 565.

In general a new trial will be granted in a criminal case where the defense counsel is so grossly incompetent as to prejudice the accused and prevent him from having a fair trial.<sup>1</sup> But where the record shows that the accused has had

<sup>1</sup> *State v. Gunter*, 30 La. Ann. 536 (1878); *State v. Benge*, 61 Iowa 658, 17 N.W. 100 (1883); *State v. Swayze*, 30 La. Ann. 1323 (1878); *Roper v. Territory*, 7 N.M. 255, 33 P. 1014 (1893); *Territory v. Clark*, 13 N.M. 59, 79 P. 708 (1905); *People v. Schulman*, 299 Ill. 125, 132 N.E. 530 (1921); *People v. Gardiner*, 303 Ill. 204, 135 N.E. 422 (1922); *State v. Smith*, 199 Iowa 568, 202 N.W. 112 (1925); *State v. Jukich*, 49 Nev. 217, 242 P. 590 (1926); *State v. Blight*, 150 Wash. 475, 273 P. 751 (1929); *State v. Keller*, 57 N.D. 645, 223 N.W. 698 (1929);

a fair trial, a new trial will not be granted.<sup>2</sup> This is true whether the defense counsel is appointed by the court or selected by the accused, although where the attorney is appointed by the court the application of the accused is considered more favorably and the appellate court is more likely to find prejudice.<sup>3</sup> When the defendant selects his own counsel the courts are prone to apply the civil rules of agency and hold that the client is bound by the acts of his counsel even though unskillful and negligent.<sup>4</sup> The fact that the defendant's attorney was of unsound mind, ill, tired or intoxicated is not in itself sufficient to require the granting of a new trial; but the cases indicate that where such incapacity has prejudiced the accused by depriving him of a fair hearing, a new trial will be granted.<sup>5</sup> Errors and omissions by counsel are not grounds for a new trial unless the accused can show that he was prejudiced thereby.<sup>6</sup> The burden is on the one

*People v. Street*, 353 Ill. 60, 186 N.E. 534 (1933); *Sanchez v. State*, 199 Ind. 235, 157 N.E. 1 (1927); *People v. Nitti*, 312 Ill. 73, 143 N.E. 448 (1924); *Sayre v. Commonwealth*, 194 Ky. 338, 238 S.W. 737 (1922); *People v. Nowak*, 372 Ill. 381, 24 N.E. (2d) 50 (1939); *Ex parte Kramer*, 61 Nev. 174, 122 P. (2d) 862 (1942); *Wilson v. State*, 222 Ind. 63, 51 N.E. (2d) 848 (1944). To the effect that the same rule applies in the case of a "public defender," see *People v. Meyer*, 94 Cal. App. 696, 271 P. 751 (1928).

<sup>2</sup> *State v. Blight*, 150 Wash. 475, 273 P. 751 (1929); *State v. Johnson*, 64 S.D. 162, 265 N.W. 599 (1936); *Castro v. State*, 196 Ind. 385, 147 N.E. 321 (1925); *State v. Jukich*, 49 Nev. 217, 242 P. 590 (1926); *State v. Dangelo*, 182 Iowa 1253, 166 N.W. 587 (1918); *Blitstein v. State*, 218 Wis. 356, 259 N.W. 715 (1935); *State v. Lewis*, 273 Mo. 518, 201 S.W. 80 (1918); *State v. Courser*, 199 Wash. 559, 92 P. (2d) 264 (1939); *People v. Riley*, 376 Ill. 364, 33 N.E. (2d) 872 (1941); *People v. Spector*, 254 App. Div. 914, 5 N.Y.S. (2d) 613 (1938).

<sup>3</sup> *State v. Williams*, 9 Houst. (14 Del.) 508, 18 A. 949 (1890); *State v. Dangelo*, 182 Iowa 1253, 166 N.W. 587 (1918); *Castro v. State*, 196 Ind. 385, 147 N.E. 321 (1925); *People v. Blevins*, 251 Ill. 381, 96 N.E. 214 (1911); *State v. Dreher*, 137 Mo. 11, 38 S.W. 567 (1897); *Fambles v. State*, 97 Ga. 625, 25 S.E. 365 (1896).

<sup>4</sup> *Sayre v. Commonwealth*, 194 Ky. 338, 238 S.W. 737 (1922); *State v. Benge*, 61 Iowa 658, 17 N.W. 100 (1883); *State v. Lindstrom*, 180 Minn. 435, 231 N.W. 12 (1930); *People v. Dean*, 308 Ill. 74, 139 N.E. 37 (1923); *People v. Hicks*, 362 Ill. 238, 199 N.E. 368 (1935). Cf. *Wilson v. State*, 222 Ind. 63, 51 N.E. (2d) 848 (1944).

<sup>5</sup> *State v. Bethune*, 93 S.C. 195, 75 S.E. 281 (1912) (unsound mind); *Woolsey v. People*, 98 Colo. 62, 53 P. (2d) 596 (1935) (illness); *Vowells v. Commonwealth*, 15 Ky. L. Rep. 574 (1894) (illness); *Hanye v. State*, 99 Ga. 212, 25 S.E. 307 (1896) (fatigue); *Tiller v. State*, 110 Ga. 250, 34 S.E. 204 (1899) (fatigue); *O'Brien v. Commonwealth*, 115 Ky. 608, 74 S.W. 666 (1903) (intoxication); *Territory v. Clark*, 13 N.M. 59, 78 P. 708 (1905) (intoxication); *People v. Gardin*, 108 Cal. App. 333, 291 P. 701 (1930) (intoxication); *State v. Thompson*, 56 N.D. 716, 219 N.W. 218 (1928) (intoxication); *State v. Keller*, 57 N.D. 645, 223 N.W. 698 (1929) (intoxication).

<sup>6</sup> *State v. Fontenot*, 48 La. Ann. 220, 19 S. 112 (1896); *Walker v. State*, 17 Ga. App. 321, 86 S.E. 735 (1915); *State v. Elliot*, 16 Mo. App. 552 (1885); *State v. Holden*, 42 Minn. 350, 44 N.W. 123 (1890); *People v. Martin*, 210 Mich. 139, 177 N.W. 193 (1920); *People v. Foster*, 211 Mich. 486, 179 N.W. 295 (1920); *Mandell v. People*, 76 Colo. 296, 231 P. 199 (1924); *Meaders v. State*, 102 Tex. Crim. Rep. 437, 278 S.W. 215 (1925); *Hudson v. State*, 76 Ga. 727 (1886); *State*

seeking a new trial in either civil or criminal cases to show prejudicial error. A rule of reasonableness and fairness has thus been worked out in which the courts are saved the burden of unnecessary retrials and the accused is protected in his right to a fair and impartial hearing.<sup>7</sup>

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v. Currens, 46 Kan. 750, 27 P. 140 (1891); State v. Lewis, 273 Mo. 518, 201 S.W. 80 (1918); State v. Mason, (Mo. 1937) 98 S.W. (2d) 574; Swain v. State, 214 Ind. 412, 15 N.E. (2d) 381 (1938); People v. Riley, 376 Ill. 364, 33 N.E. (2d) 872 (1941).

<sup>7</sup>Cases on this subject collected in 16 C.J., § 2642, p. 1145 (1918); 24 A.L.R. 1025 (1923); 64 A.L.R. 436 (1929) and 23 C.J.S., § 1443, p. 1158. Discussion in 71 UNIV. PA. L. REV. 379 (1923); 29 MICH. L. REV. 923 (1931); and 33 MICH. L. REV. 445 (1935). As to accused's right to habeas corpus for incompetence or inefficiency of counsel, see 146 A.L.R. 419 (1943).