Opinion No. 58-07

January 16, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Mr. Walter R. Kegel, District Attorney, First Judicial District, Santa Fe, New Mexico

QUESTION

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Whether the due process of law clause of the 14th Amendment to the United States Constitution requires that court appointed counsel be furnished to indigent defendants at the time of:

1. Arraignment

2. Preliminary hearing before a justice of the peace.

CONCLUSIONS

1. Yes, in capital cases, and under certain circumstances in non-capital cases, unless the right is intelligently waived.

2. No.

OPINION

ANALYSIS

This opinion is restricted to the requirements of the due process clause of the 14th Amendment, as to right to counsel, imposed upon state courts. We do not consider any requirements, in this connection, imposed by either the New Mexico Constitution or statutes. Nor do we consider the 6th Amendment to the United States Constitution. We now turn to some of the cases, decided by the Supreme Court of the United States which assist in answering your questions.

In the leading case of Powell v. Alabama, 287 U.s. 45, 77 L. ed. 158 (1932), the petitioners were charged with rape, were tried and convicted, and sentenced to death. At arraignment, they entered pleas of not guilty, at which time all members of the local bar were assigned to represent them. A few days later, trial commenced. Apparently, petitioners were not asked if they desired counsel, or whether they had employed counsel. It was held there had been no effective appointment of counsel, the court pointing out during **the vital period of arraignment** until the beginning of trial,

petitioners were without effective representation, and that under the facts of the case, petitioners needed counsel at all stages of the proceedings. After a lengthy discussion of due process, the Court at 77 L. ed. 171-172 said:

"In the light of the facts outlined in the forepart of this opinion -- the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives -- we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trail of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, "that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

We believe it may be said with assurance that the **Powell** case is authority for the proposition that where the right to counsel does obtain, then that right inures at such stages of the proceedings so as to effect adequate representation to prepare for trial and to conduct the defense.

Another important case is that of Betts v. Brady, 316 U.S. 455, 86 L. ed. 1595 (1942). There, the petitioner was tried on a charge of robbery. He was unable, due to lack of funds, to employ counsel. At arraignment, he requested the court to assign counsel, which request was denied. He then pleaded not guilty and conducted his own defense. The Court, at 86 L. ed. pp. 1601-1602 said:

"The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the

Fourteenth. Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged and other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial, is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

The petitioner, in this instance, asks us, in effect, to apply a rule in the enforcement of the due process clause. He says the rule to be deduced from our former decisions is that, in every case, whatever the circumstances, one charged with crime who is unable to obtain counsel, must be furnished counsel by the state. Expressions in the opinions of this court lend color to the argument, but, as the petitioner admits, none of our decisions squarely adjudicates the questions now presented."

Petitioner's contention was denied. Further, at 86 L. ed. 1607, the Court reasoned:

"To deduce from the due process clause a rule binding upon the states in this matter would be to impose upon them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. As he says: "Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it." And indeed it was said by petitioner's counsel both below and in this court, that as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner logic would require the furnishing of counsel in civil cases involving property."

Thus, Betts v. Brady leaves considerable doubt when counsel must be appointed, at least in non-capital cases. Each case apparently turns on its own facts. However, the second quotation from this case is of considerable interest as to your second question. While such can't be said to be a holding one way or another, nonetheless it is rather strong intimation that indigent defendants are not entitled to court appointed counsel in a justice of the peace court on preliminary hearing, at least as far as the 14th Amendment is concerned. In this connection, it must be remembered that a justice of the peace in New Mexico cannot impose punishment for commission of a felony. By way of comparison, our investigation discloses that United States Commissioners do not appoint counsel to represent indigent defendants at preliminary hearings.

We mention this since Betts v. Brady, and other cases cited infra, point out how the 6th Amendment imposes stricter standards, as to appointment of counsel, on the federal judiciary than is imposed by the 14th Amendment upon the judiciary of the several

states. In passing, lengthy research by us discloses no case holding the 14th Amendment requires a committing magistrate to appoint counsel for indigent defendants.

Of interest is Rice v. Olson, 324 U.S. 786, 89 L. ed. 1367 (1945), which held that a plea of guilty does not in and of itself constitute a waiver of right to counsel under the 14th Amendment.

While perhaps somewhat beyond the scope of this opinion, we believe Hawk v. Olson, 326 U.S. 271, 90 L. ed. 61 (1945) is of some interest. There the petitioner had pleaded not guilty to a charge of first degree murder, and moved for a continuance of 24 hours to consult counsel. The motion was denied, the trial proceeded, and a conviction resulted. It was held that such denial of an opportunity to consult counsel violated the 14th Amendment.

In Canizio v. New York, 327 U.S. 82, 90 L. ed. 545 (1946), petitioner had pleaded guilty to a charge of unarmed robbery. The plea was entered on June 1, 1931. Sentence was imposed on June 19, 1931. Petitioner was 19 years of age at the time and unfamiliar with legal proceedings. Apparently he was not asked if he desired counsel, or advised of his right to counsel. However, the record disclosed petitioner was represented by counsel from June 17, 1931 to June 19, 1931. The Court held the 14th Amendment was not violated, taking the view petitioner had counsel in ample time to take advantage of every defense originally available to him.

Carter v. Illinois, 329 U.S. 173, 91 L. ed. 172 (1946) is much to the same effect as the Canizio case, the Court saying at 91 L. ed. 175:

"But the Due Process Clause has never been perverted so as to force upon the forty eight States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual states. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures."

Now, it might be argued that the Canizio and Carter cases stand for the proposition that a want of counsel at one state of the proceedings, at the time of arraignment for example, can be cured by representation at a subsequent time. Yet it seems to us that if such be so, the question would turn upon local practice and procedure, that is to say, whether or not local procedure would permit a defendant, represented by counsel subsequently, to take advantage of defenses originally available. In New York in 1931, this was apparently so. It might not be so under the criminal codes of all states, which need not approach uniformity, as was pointed out in Carter v. Illinois, supra. Hence, especially in view of Powell v. Alabama, supra, we think the safest course would be to assume that the right to counsel, when it does exist, obtains at arraignment and trial.

In the case of De Meerleer v. Michigan, 329 U.S. 663, 91 L. ed. 584 (1947), the petitioner was only 17 years old at the time he was arraigned on a charge of murder. He pleaded guilty, but the record revealed he did not understand the consequences of his plea. At no time was counsel offered or even mentioned. It was held that petitioner was deprived of rights essential to a fair hearing under the 14th Amendment.

On the other hand, it was held in Foster v. Illinois 332 U.S. 134, 91 L. ed. 1955 (1947) that merely because the record (in a non-capital case) did not disclose an offer of counsel upon a plea of guilty, such was not a deprivation of due process.

In Butte v. Illinois, 333 U.S. 640, 92 L. ed. 986 (1948), petitioner had pleaded guilty to charges of taking indecent liberties with children, and was sentenced to the penitentiary. The record was silent as to any inquiry by the court whether petitioner desired counsel as to petitioner's ability to procure counsel, and as to whether counsel was offered or assigned. Petitioner was then 57 years old. It was held that such silence in the record did not invalidate the sentence, and also, that the 14th Amendment did not require a State Court to make the inquiries or offer, under the circumstances of the case. The Court noted that the consequences of the plea were explained to petitioner. It was said in the opinion that the fact that such practice might not be valid in a federal court did not mean the 14th Amendment had been violated. There was dicta however, to the effect that had the charge been a capital one, the 14th Amendment would require the Court to inquire of petitioner as to his desire for counsel, and to appoint counsel in the event he could not procure one.

In Uveges v. Pennsylvania, 335 U.S. 437, 93 L. ed. 127 (1948), it was held that the 14th Amendment required a state trial court to inform the accused of his right to counsel, where he was but 17 years of age, although a non-capital offense was involved. The Court intimated in capital cases, a defendant has the right to counsel irrespective of circumstances.

Of course, even in a capital case, the 14th Amendment does not require a state to force counsel upon a defendant who insists on defending himself, since even in a capital case, counsel can be waived, if done so understandingly. See Chessman v. Teets, infra.

Quicksall v. Michigan, 339 U.S. 660, 94 L. ed, 1188 (1950), involved the instance of where petitioner had pleaded guilty to a charge of murder. The question was whether the failure of the record to show an offer of counsel offended due process. Petitioner had served previous penitentiary sentences. The Court held that no constitutional rights had been offended, saying that at least where a non-capital offense was involved (as here), each case depends on its own facts, and that a petitioner must establish that by reason of want of counsel an ingredient of unfairness actively operated in the process that resulted in conviction. In view of petitioner's intelligence, age, and previous court experience, the Court apparently assumed he was aware of his right to counsel.

In Chandler v. Fretag, 348 U.S. 3, 99 L. ed. 4 (1954), petitioner pleaded guilty to a charge of larceny and housebreaking. He waived counsel. The trial court then advised him he would then be tried on a charge of being an habitual criminal, conviction of which would carry a life sentence without possibility of parole. Upon learning of this charge, petitioner requested a continuance to employ counsel. This was denied and he was found guilty of being an habitual criminal. It was held that while counsel had been waived as to the charge of larceny and housebreaking, there was no waiver of counsel in respect to the habitual criminal charge and that due process had been denied. Betts v. Brady, supra, was distinguished, the Court pointing out that there petitioner asked to have counsel appointed, while here petitioner asked for a continuance in order to employ his own.

Chessman v. Teets, 354 U.S. 156, 1 L. ed. 2d. 1253 (1957). Petitioner was held to have been denied due process of law because he was not allowed to be present, either in person or by counsel, during proceedings to settle the trial court record. It was held that since he was denied the right to be personally present, then he should have had counsel even though he had repeatedly refused counsel during the trial itself, which was on a capital charge, and that such refusal at the trial did not amount to a waiver of counsel at the settlement proceedings.

In Moore v. Michigan, 355 U.S. , 2 L. ed. 2d. 167 (1957), it was held that a plea of guilty and refusal of counsel did not constitute an intelligent waiver of rights under the 14th Amendment, where petitioner was only 17 years old at the time, a negro of little education, where there was evidence of mental disturbance, and especially in view of the fact that before the plea of guilty was entered, the sheriff informed petitioner he could not protect him against mob violence in case of a plea of not guilty.

Taking Powell v. Alabama, Bute v. Illinois, and Uveges v. Pennsylvania together, we believe it is reasonably clear that a defendant is entitled to counsel in a capital case, irrespective of circumstances, unless, as in Chessman v. Teets, there is a clear waiver or refusal. And there is intimation in Quicksall v. Michigan that in a capital case, the record should show the offer of counsel. When one enters the non-capital field, Betts v. Brady and other cases cited herein leave considerable doubt, for there the right to counsel depends on the factors of each separate case, although four members of the court are of the view counsel should be provided, unless the right is intelligently waived. At 93 L. ed. 149 the matter was editorially summarized as follows:

"Among the main factors determining the necessity of assistance of counsel as a matter of due process in a state prosecution are (1) gravity of the offense charged, particularly, whether capital or non capital; (2) nature of the issues, i.e., whether simple or complex; (3) age of the accused; (4) mental capacity of the accused; (5) background and conduct of the accused including amount of education and experience; (6) the accused's knowledge of the law and court procedure, including knowledge thereof presumably gained from previous prosecutions; and (7) the degree of protection given the accused during the trial, as appearing from the conduct of the court or the prosecuting officials.

No one of these factors alone seems to be decisive. Even though prosecution in a state court is on a matter of a relatively simple nature, due process requires the assistance of counsel where an accused, by reason of age, ignorance, or mental capacity, is incapable of representing himself adequately. A fair trial test necessitates an appraisal before and during the trial of the totality of the facts of each case to determine whether the need for counsel is so great that the deprivation of the right to counsel works a fundamental unfairness, apparently on the theory that it is the need of the individual defendant for counsel that establishes the real standard for determining whether the lack of counsel renders a trial unfair."

That it would be better to be "on the safe side" cannot be gainsaid.