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Criminal Law - Setting Aside Judgment - Minor's Capacity to Waive Constitutional Right to Counsel

Carlton James Hunke

RECENT CASES

CRIMINAL LAW—SETTING ASIDE JUDGMENT—MINOR'S CAPACITY TO WAIVE CONSTITUTIONAL RIGHT TO COUNSEL—Six weeks after pleading guilty without counsel to a burglary charge, the mentally competent nineteen year old defendant moved to set aside the judgment and that he be allowed to plead not guilty. The Supreme Court of Arkansas *held*, with three judges dissenting, that because of the age of the defendant, he was too young and inexperienced to plead guilty to a serious charge without an attorney, notwithstanding the fact that he had refused the trial court's offer to appoint counsel for him. *Meeks v. State*, 396 S.W.2d 306 (Ark. 1965).

This decision by the Arkansas Court would appear to be the final step in the dramatic reversal of the early English common law rule that a person charged with treason or a felony was denied counsel except for legal questions raised by the accused himself.[1] While even Lord Coke defended this rule, believing that in felonies the court itself was counsel for the accused,[2] experience has shown that this protection is inadequate.[3] It is not surprising then that our constitution guarantees the right to counsel,[4] and that the failure of the trial court to appoint counsel may be a denial of due process within the meaning of the fourteenth amendment.[5]

The sixth amendment right to counsel, however, may be waived,[6] and the question becomes, as in the instant case, what is an effective waiver. The decisions reveal three instances in which the court will find the defendant has not waived the offer of counsel.[7] Obviously the defendant should not be held to have waived a right of which he has no knowledge, and thus there is no waiver where the accused is not advised of his right to have counsel.[8] While this area has probably provoked the most litigation, the decisions

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1. See, *e.g.*, Powell v. Alabama, 287 U.S. 45 (1932); 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 192 (1924).
2. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 698 *et. seq.* and notes (8th ed. 1927).
3. Judges cannot "direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." Powell v. Alabama, *supra* note 1 at 61 (opinion of Sutherland, J); 4 BLACKSTONE COMMENTARIES 355 (1758, Lewis' ed. 1897).
4. U.S. CONST. amend. VI, "In all criminal prosecutions, the accused shall enjoy the right. . .to have the assistance of counsel for his defense." Compare, N.D. CENT. CODE 29-01-06(1) (1960).
5. Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, *supra* note 1.
6. Uveges v. Pennsylvania, 335 U.S. 437 (1948); Johnson v. Zerbst, 304 U.S. 458 (1938).
7. Swagger v. State, 227 Ark. 45, 296 S.W.2d 204 at 208 (1956) (dissent of Ward, J). Those decisions based on the haste of the proceedings, *e.g.*, De Meerleer v. Michigan, 329 U.S. 663 (1947); State v. Jackman, 93 N.W.2d 425 (N.D. 1958), are considered here under the category of failure to advise defendant of his rights.
8. Uveges v. Pennsylvania, *supra* note 6; Powell v. Alabama, *supra* note 1; Swagger v. State, *supra* note 7.

of the United States Supreme Court in *Powell v. Alabama*[9] and *Gideon v. Wainwright*[10] have so firmly established the right to have counsel at trial that the question now involves a determination of when this right arises in the proceedings before trial.[11] Neither is a waiver found when the accused chooses to defend himself and during the trial some legal question arises which the accused, though of full age and sound mind, could not possibly comprehend.[12] Finally, we have the situation involved in the instant case where the courts, since *Johnson v. Zerbst*,[13] have held it in error to permit a young, inexperienced person to plead guilty to a serious charge where he has no attorney,[14] or where the accused lacks mental capacity to waive the offer of counsel.[15]

Clearly the decision under review is not based on the mental condition of the defendant as the state hospital found him to be normal.[16] By basing its decision on the sole factor of the age of the defendant, the Arkansas Court challenges the vast majority of the opinions holding that minority itself does not prevent an intelligent waiver.[17] New York, for example, has refused to reverse the conviction of a sixteen year old defendant,[18] and in fact even refused to hold a hearing as to his mental capacity.[19] An Iowa decision[20] found an effective waiver by a seventeen year old saying age was not the controlling factor in determining the effectiveness of the waiver, and furthermore, the court stated, if there is some arbitrary age under which a waiver is ineffective, it should be designated by the legislature.[21]

The decision is also broader than those based on the defendant's age alone. While the Arkansas Court had found an ineffective waiver by a nineteen year old defendant before,[22] there was also a question of his mental condition in that case.[23] Those decisions in other

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9. 287 U.S. 45 (1932).
10. 372 U.S. 335 (1963).
11. Escobedo v. Illinois, 378 U.S. 478 (1964) (Interrogation); Crooker v. California, 357 U.S. 433 at 448 (1958) (dissent of Douglas, J.) ". . .[T]he accused who wants a counsel should have one at any time after the moment of arrest."
12. Gibbs v. Burke, 337 U.S. 773 (1949). The cases in this area generally also involve a finding that defendant was not advised of his right to counsel, or that the defendant's youth, ignorance or other incapacity made a trial without counsel unfair; *cf. e.g.*, Uveges v. Pennsylvania, *supra* note 6 at 441; United States v. Murphy, 214 F. Supp. 642 at 646 (N.D.N.Y. 1963).
13. 304 U.S. 458 (1938).
14. Uveges v. Pennsylvania, *supra* note 6; Willey v. Hudspeth, 162 Kan. 516, 178 P.2d 246 (1947); State v. Oberst, 127 Kan. 412, 273 Pac. 490 (1929).
15. Wade v. Mayo, 334 U.S. 672 (1948); Rice v. Olson, 324 U.S. 786 (1945); People v. Hardin, 207 Cal. App. 2d 336, 24 Cal. Rptr. 563 (1962).
16. Meeks v. State, 396 S.W.2d 306 at 308 (Ark. 1965) (dissent of Harris, C. J.).
17. People v. Hardin, *supra* note 15; Carpentier v. Lainson, 248 Iowa 1275, 84 N.W.2d 32 (1957); State v. Banford, 13 Utah 2d 63, 368 P.2d 473 (1962).
18. *In re* Crimi, 105 N.Y.S.2d 620 (App.Div. 1951); *Aff'd* People v. Crimi, 303 N.Y. 749, 103 N.E.2d 538 (1952).
19. People v. Crimi, *supra* note 18; *accord*, People v. Begue, 143 N.Y.S.2d 474 at 477 (Sup.Ct. 1955). *Contra*, People v. Cline, 200 N.Y.S.2d 111 at 112 (App.Div. 1960) "Whether defendant was deprived of his right to representation by an attorney connot be determined without a hearing." In this case, however, it appeared defendant was not advised of his right to counsel.
20. Carpentier v. Lainson, *supra* note 17.
21. *Id.* at 36.
22. Swagger v. State, 227 Ark. 45, 296 S.W.2d 204 (1956).
23. Swagger v. State, *supra* note 22; Meeks v. State, *supra* note 16 at 309 (dissent of Ward, J).

states based exclusively on age have only proceeded to the age of seventeen.[24] It is also interesting to note that in those cases the courts have based their decisions on the fact that defendant could not contract, marry, make a will, or be drafted.[25] In the instant case, however, the nineteen year old defendant was subject to the draft,[26] could make a will,[27] marry,[28] and contract without the disabilities of minority.[29] In fact, almost the only thing he could not do was plead guilty to a felony without advice of counsel.[30]

It would appear then that in regard to the foregoing situation the fact that this defendant had not reached his majority is almost without practical legal significance. Certainly there is nothing magical about the age of twenty-one. It is difficult to believe that a nineteen year old defendant, literate and with normal mentality, has insufficient capacity to realize "when he has stolen a car, robbed a man, accosted a woman, or broken into a house."[31] While he may not have the capacity to defend himself on trial, at least he has the necessary mental capacity to plead guilty.[32] The decision thus seemingly becomes the final step in reversing the common law position discussed earlier, because by holding this defendant without capacity to waive counsel, the court would appear to be saying that no one, regardless of age, has such capacity.

Even though there are no cases holding that no one has capacity to waive counsel, the position is not entirely without support.[33] For example in *Powell v. Alabama*[34] the Supreme Court stated, "Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . .He requires the guiding hand of counsel at every step in the proceedings against him."[35]

The view that no one can waive counsel is attractive for its liberality, but this view does not solve the problem. The problem in cases where the courts have found an ineffective waiver of counsel is that it often puts the prosecution at an unfair disadvantage on retrial. Important witnesses may have died or their memory

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24. Willey v. Hudspeth, 162 Kan. 516, 178 P.2d 246 (1947); State v. Oberst, 127 Kan. 412, 273 Pac. 490 (1929).
25. Willey v. Hudspeth, *supra* note 24 at 249.
26. 62 Stat. 604 § 4, 50 U.S.C. App. 454 (1948).
27. ARK. STAT. ANN. §60-401 (Supp. 1965).
28. ARK. STAT. ANN. §55-102 (Supp. 1965).
29. ARK. STAT. ANN. §34-2001 (Repl. 1962).
30. Note that in some states defendant could also have voted. See *e.g.*, KY. CONST. §145.
31. Meeks v. State, 396 S.W.2d. 306 (Ark. 1965) (dissent of Ward, J.).
32. The fundamental difference between these two capacities is the basis for the decision in Johnson v. Zerbst, 304 U.S. 458 (1938). The *Zerbst* decision is heavily relied upon by the majority here, but they apparently ignored this distinction. See, dissent of Ward, J.
33. The Supreme Court Rules in Illinois provide that "In no case shall a plea of guilty or waiver of indictment be received or accepted from a minor under the age of 18 years, unless represented by counsel." ILL. ANN STAT. ch. 110 § 101.26(4) (Smith-Hurd 1955). Moreover the Iowa court in Carpentier v. Lainson, 248 Iowa 1275, 84 N.W.2d 32 at 37 (1957), said it would prefer a rule that everyone under 21 be required to have counsel.
34. 287 U.S. 45 (1932).
35. *Id* at 69. See also, Crooker v. California, 357 U.S. 433 at 446 (1958) (dissent of Douglas, J.).

dimmed, a retrial may place the defendant in double jeopardy,[36] or the trial court may find itself without jurisdiction.[37] In their zealous protection of the accused's liberty, the courts have correctly refused to uphold the conviction merely because the prosecution will be in a difficult position on retrial. The mere requirement of appointing counsel in every instance, whether waived or not, however, only moves the problem to a more sophisticated level and is no guarantee that the first conviction will be upheld. The defendant may refuse to cooperate with counsel or the court may find that the incompetency of the counsel appointed entitles the accused to another trial[38] and once again the prosecution may face the above disadvantages on retrial.

By refusing to accept the defendant's waiver of counsel, the court may also find itself in the anomalous position of denying the defendant equally valuable rights. If the mere right to refuse the aid of counsel[39] is without practical significance, the right of a defendant to place himself on the mercy of the court by pleading guilty without counsel has more substance.[40] For example, in the instant case, the trial judge found as a fact that defendant probably received a shorter sentence by his plea.[41] Certainly this right is equally violated by refusing to accept the waiver be the defendant nineteen or twenty-nine.

The inescapable conclusion in reviewing this case is that the Arkansas Court goes too far in over-turning the conviction merely because the defendant has not reached his majority. The better view and the view of most courts is that before reversing a conviction the court should require a factual finding that the defendant was incapable of adequately defending himself, or that he was unable to obtain counsel, or that he did not "intelligently and understandingly waive counsel."[42] The age and education of the defendant, and the gravity of the crime charged should only be elements in the consideration of whether he had capacity to waive counsel.[43]

While the North Dakota Court has not considered the precise

36. The decisions have not actually gone so far. See Palko v. Connecticut, 302 U.S. 319 (1937). But there is indication that in future decisions the court will indeed find double jeopardy in a new trial after a defendant's successful appeal from a conviction. *Cf.*, Green v. United States, 355 U.S. 184 (1957); compare also, Hoag v. New Jersey, 356 U.S. 464 (1958) (dissent of Douglas and Black, JJ); Ciucci v. Illinois, 356 U.S. 571 (1958) (dissent of Douglas and Black, JJ).

37. Where the defendant has been committed to the penitentiary following conviction the court loses jurisdiction, Emerson v. Boyles, 170 Ark. 621, 280 S.W. 1005 (1926). The defense is generally defeated, however, by saying the conviction is void and with no effect. United States v. Bozza, 155 F.2d 592 at 595 (3rd Cir. 1946); Swagger v. State, 227 Ark. 45. 296 S.W.2d 204 (1956).

38. *Cf.*, Mitchell v. United States. 259 F.2d 787 at 793 (D.C. Cir. 1958). For other problems connected with effective appointment of counsel see, Glasser v. United States, 315 U.S. 60 (1942) (conflicting interests); Reynolds v. Cochran, 365 U.S. 525 (1961) (failure to permit consultation). See generally, COMMENT, *Incompetency of Counsel as a Ground for Attacking Criminal Conviction*, 4 U.C.L.A. L. REV. 400 (1956-57).

39. U.S. CONST. amend IX. See, State v. Thomlinson, 100 N.W.2d 121 (S.D. 1960).

40. *Cf.*, State v. Thomlinson, *supra* note 39.

41. Meeks v. State, 396 S.W.2d 306 at 307 (Ark. 1965).

42. Gibbs v. Burke, 337 U.S. 773 (1949); Rice v. Olson, 324 U.S. 786 at 789 (1945).

43. Uveges v. Pennsylvania, 335 U.S. 437 (1948); People v. Hardin, 207 Cal. App. 2d 336, 24 Cal. Rptr. 563 (1962); Carpentier v. Lainson, 248 Iowa 1275, 84 N.W.2d 32 (1957).

issue presented in the instant case, it has considered three related problems. In one case,[44] the court found an ineffective waiver because of the "unconscionable haste" with which the nineteen year old defendant was sentenced for murder.[45] An effective waiver was found however, where an eighteen year old claimed his plea of guilty had been influenced by promises of a lighter sentence.[46] In *State v. Jackman*,[47] the most recent case considered by the court in this area, it found an effective waiver because of the defendant's prior experience with criminal proceedings even though the twenty year old defendant claimed he thought he was waiving counsel in juvenile and not criminal proceedings. The intimation from these decisions, particularly the *Jackman* decision,[48] is that when the issue is presented to the court it will follow the more favorable majority view set out herein rather than base its decision solely on the age of the defendant.

CARLTON JAMES HUNKE

INSURANCE—POLICY PAYABLE TO WIFE—EFFECT OF PROPERTY SETTLEMENTS—Under a property settlement agreement the wife was to transfer and release any and all interest in certain policies on her divorced husband's life in which she was the named beneficiary. The agreement further provided that the insured was given the right to designate beneficiaries and to exclude the wife if he so desired. The insured made no attempt to change the beneficiary and died six months after the final divorce decree. The Supreme Court of Arkansas, three justices dissenting, *held* that the divorced wife was foreclosed to claim any interest in or proceeds from the policies in light of the specific transfer to the decedent. The dissenting justices reasoned that the provision in the settlement providing for a change of beneficiary "if the insured so desired," should be given effect when considered with his inaction, and that this clearly indicated a desire not to exclude the divorced wife as named beneficiary. *Brewer v. Brewer*, 390 S.W.2d 630 (Ark. 1965).

This case exemplifies one of the problems with which the courts have struggled when determining the effect of property settlement agreements on the right to proceeds of a life insurance policy. Although not considered in most cases, there is some con-

44. State v. Magrum, 76 N.D. 527, 38 N.W.2d 358 (1949).
45. Note that under our classification this decision really involves a finding that the defendant was not advised of his right to have counsel; see *supra* note 7.
46. State *ex rel* Johnson v. Broderick, 75 N.D. 340, 27 N.W.2d 849 (1947).
47. 93 N.W.2d 425 (N.D. 1958).
48. See, *Id* at 429.