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Attorney and Client--Effective Representation--Federal Procedure

G. T. L.

West Virginia University College of Law

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CASE COMMENTS

ATTORNEY AND CLIENT—EFFECTIVE REPRESENTATION—FEDERAL PROCEDURE.—*D* was indicted for possession, removal and concealment of nontax-paid whiskey. In the presence of an attorney of his own choice *D* pleaded guilty and was sentenced. Having served one year of his sentence, he sought to have it set aside under 28 U.S.C. § 2255 (1952). *Held, inter alia*, an allegation that *D* was tricked by his attorney is not a proper matter to be raised by a statutory motion to vacate sentence. *United States v. Busch*, 135 F. Supp. 3 (S.D. W. Va. 1955) Other parts of the decision are not within the scope of this comment.

For its proposition of law the court relied on *Crowe v. United States*, 175 F.2d 779 (4th Cir. 1949). There, under very similar facts, the defendant had the aid of three attorneys of his own choice, and he alleged that only one of them had committed fraud. It might be reasoned that under such facts the defendant's rights were still properly protected by two of his attorneys. Under defendant's allegations in the case at hand there was no protection whatsoever.

Does denial of relief hinge on the fact that in both cases counsel were of defendant's own selection, rather than court-appointed? According to some cases there is a legal basis for such a distinction. It is reasoned that lack of skill or incompetence of counsel employed by the defendant can be imputed to the defendant by reason of his voluntary selection, unless he repudiates his attorney's conduct by making known to the court his objection. *Hendrickson v. Overlade*, 131 F. Supp. 561 (N.D. Ind. 1955); *United States ex rel. Darcy v. Handy*, 203 F.2d 407 (3rd Cir. 1953). The court can not rely on such reasoning when the defendant's attorney is court-appointed.

However, due to the presumption that an attorney selected by the court was selected with due regard for the defendant's constitutional rights, *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir. 1945), the inference must follow that a court-appointed attorney stands on a plane with one of defendant's own selection. As to both, mere allegations of negligence or ignorance will not suffice in an effort to have a sentence set aside for lack of proper representation. An attorney appointed to represent the defendant admittedly may give improper and bad advice, but so may counsel of defendant's own choice. Therefore, unless the defendant represented by court-appointed counsel can override the presumption that the court ap-

pointed a reputable member of the bar, and used care and due regard for the defendant's constitutional rights, no issue under the sixth amendment, guaranteeing the assistance of counsel, has been raised. *Diggs v. Welch*, *supra* at 668.

It follows, that in order to obtain relief on the ground of fraud or incompetence of counsel, irrespective of who selected him, the defendant must proceed on the basis of the fifth amendment to the Federal Constitution, guaranteeing a fair trial under the due process clause. What, then, is the standard under the due process clause?

It would seem that a fair trial is lacking only in the absence of "effective" representation, meaning representation so lacking in competence that it becomes the duty of the court or prosecution to correct it. *Diggs v. Welch*, *supra* at 670. To prevail in a case of this nature, the defendant must show an extreme case of fraud or negligence by his attorney, amounting to a "farce and mockery of justice", *United States v. Wright*, 176 F.2d 376, 379 (2d Cir. 1949), or a "travesty on justice", as stated in *Hendrickson v. Overlade*, *supra* at 563. Thus, it would seem that in a proper case for application of the due process clause, not only must there be extreme negligence on the part of the defense counsel, which some courts impute to the defendant himself, but extreme negligence on the part of the court and the prosecution as well. *United States ex rel. Darcy v. Handy*, *supra* at 427.

When a rare case does approach the point of being reversible as a "farce and mockery of justice," the courts tend to consider strongly the intelligence of the defendant. Where the defendant is intelligent and had some prior experience with court proceedings, he should bear some responsibility, as in the case of *Tompsett v. Ohio*, 146 F.2d 95 (6th Cir. 1945), where the defendant's attorney failed to attend a preliminary hearing some time before the trial and the defendant did not discharge him. But where the defendant is of low intelligence and ignorant of his rights, he may safely depend wholly upon his attorney. *Hillman v. State*, 123 N.E.2d 180 (Ind. 1954). Thus he may rely more strongly on the court for his protection.

In summary, relief does not depend on who appointed counsel, but on the degree to which the defendant's constitutional right to a fair trial has been infringed. According to the principal case a mere allegation that the defendant's attorney misled him is not

sufficient for relief under 28 U.S.C. § 2255 (1952). This rule stands without exception. However, stronger allegations might, in a proper case, bring § 2255 into play. Thus, *Jones v. Huff*, 152 F.2d 14 (D. C. Cir. 1945), allowed a hearing under § 2255. There numerous obvious errors had been committed by the defendant's counsel, e. g., he had failed to object to admission in evidence of an involuntary confession, to call witnesses who would have established the defendant's innocence, to offer a relevant defense and to take steps to obtain an examination of handwritings in a forgery case. See *Adams v. United States*, 222 F.2d 45 (D. C. Cir. 1955) where the defendant's criticism of his attorney was made at the time of sentencing in the presence of the court, but the petition was denied, since the trial court had had an opportunity to decide the issue at that time.

The courts lay down two general reasons for this strict standard. One is that they do not want to open a "Pandora's box of accusations" for every person convicted of a crime and sentenced. *United States v. Malfetti*, 125 F. Supp. 27, 30 (D.N.J. 1954). "If the test to be applied depended upon the skill with which a defendant was represented, there would never be any finality to a trial." *Miller v. Hudspeth*, 176 F.2d 111 (10th Cir. 1949). The other and closely related reason, is that the courts do not think they should use "hindsight", or "second guessing", in determining if trial strategy had been good or bad. *Hillman v. State*, *supra* at 188, dissenting opinion.

In the principal case the court indicated that the defendant's allegations of trickery should have been asserted in the trial court and by appeal. But it would seem that the defendant would not be able to present a case reversible under due process, whether on appeal or by habeas corpus, or under § 2255, since the substantive test for denial of due process does not appear to have been met. The defendant still would be denied the relief he sought. It is little consolation to the defendant to advise him that his mistake was only procedural, when it was substantive as well.

G. T. L.

CONSTITUTIONAL LAW—COURTS-MARTIAL—JURISDICTION OVER EX-SERVICEMEN.—Five months after being honorably discharged from the Air Force, a former serviceman was arrested by military authorities on a charge of murder committed while serving as an airman in Korea. He was taken to Korea to stand trial under au-