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Constitutional Law--Right to Counsel--Conflicting Interests of Counsel as Ground for Reversal

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CASE COMMENTS

CONSTITUTIONAL LAW—RIGHT TO COUNSEL—CONFLICTING INTERESTS OF COUNSEL AS GROUND FOR REVERSAL.—R and D were convicted of the crime of robbery, and R subsequently filed a petition for a writ of habeas corpus ad subjiciendum. The basis for R's petition was the fact that the court appointed a single counsel to represent both R and D, his codefendant. R claims this appointment resulted in a denial of effective counsel, for when he pleaded not guilty and D pleaded guilty, their attorney was allegedly faced with conflicting interests. At the hearing testimony was submitted to the effect that R made no request for separate counsel based on the alleged conflict of interest prior to or during the trial. Held, that the appointment of the same counsel to represent codefendants was not in itself improper, nor do the facts of the case show a conclusive conflict of interest between the parties. Writ discharged. State ex rel. Favors v. Tucker, 100 S.E.2d 411 (W. Va. 1957).

It is now generally the law in the United States, both under the federal Constitution, and under most state constitutions, often supplemented by statutes, that an accused is guaranteed the right to have the assistance of counsel at his trial. 14 AM. JUR., Criminal Law § 167 (1938).

The scope of the right to counsel in federal criminal cases is determined by the sixth amendment to the Constitution which was adopted in order to reject the application in the United States of the old English doctrine that a person charged with treason or felony could not have the aid of counsel. Cooley, Constitutional Limitations 696 (8th ed. 1927). See also Powell v. Alabama, 287 U.S. 45 (1932); Gall v. Brady, 39 F. Supp. 504 (D. Md. 1941). The sixth amendment provides that in all criminal prosecutions the accused shall enjoy the right "to have the assistance of counsel for his defense." U.S. Const. amend. VI. In 1938 this provision was interpreted to mean that that right of counsel was guaranteed in all criminal cases tried before federal courts. Johnson v. Zerbst, 304 U.S. 458 (1938). This decision, in turn, was the basis for Rule 44 of the Federal Rules of Criminal Procedure, which establishes the practice in the federal district courts: "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 proceeding unless he elects to proceed without counsel or is able to obtain counsel."
Of course, the right of an accused in a criminal case to have the assistance of counsel may be waived, provided it is waived intelligently, understandably, and in a competent manner. Whether there has been an intelligent waiver of the right depends upon the particular facts and circumstances in each case, including the background, experience, and conduct of the accused. *Glasser v. United States*, 315 U.S. 60 (1941); 5 Wharton, Criminal Law and Procedure § 2012 (1957).

Insofar as the state courts are concerned, it is within the intendments of the due process clause of the fourteenth amendment to the federal Constitution that one accused of an offense shall be entitled to the assistance of counsel at all times. *Powell v. Alabama*, supra. This does not mean, however, that every person charged with a serious crime in a state court is guaranteed counsel regardless of the circumstances, for in determining whether an accused was denied the right of assistance by counsel in violation of due process, each case depends on its own facts, at least when a crime subject to capital punishment is not involved. *Palmer v. Ashe*, 342 U.S. 134 (1951); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Quicksall v. Michigan*, 339 U.S. 660 (1950); *Gibbs v. Burke*, 337 U.S. 773 (1949). As a result of these decisions, the practices in the state courts vary greatly. Although the constitutions of all the states except Virginia contain provisions with respect to the assistance of counsel in criminal cases, none of them expressly provide for advice to an accused of his right to counsel. Thus the uniformity that is found in the federal district courts in this regard is nonexistent so far as the states are concerned. Annot., 3 A.L.R.2d 1003 (1948).

In this state W. Va. Const. art III, § 14, provides that the accused in cases involving crimes and misdemeanors “shall have the assistance of counsel.” This provision has been held to be permissive and conditional upon the pleasure of the accused in its application to the conduct of the trial; and therefore, to make a conviction valid, the record need not affirmatively show the prisoner had the assistance of counsel. *State v. Lattimar*, 90 W. Va. 559, 111 S.E. 510 (1922); *State v. Yoes*, 67 W. Va. 546, 68 S.E. 181 (1910). “The right guaranteed is not a requirement that every defendant in a criminal case be represented by counsel. It is the right of a defendant to call for or demand counsel and to have counsel act pursuant to the call or demand....” *Wade v. Skeen*, 140 W. Va. 569, 85 S.E.2d 845 (1955). “Even if said clause makes it the duty of the State to furnish counsel when demanded, it does not follow that such
action is to be taken unless demand therefore has been made...”

*State v. Kellison*, 56 W. Va. 690, 47 S.E. 166 (1904). It thus follows in West Virginia that the accused may waive his right by mere silence. *State v. Briggs*, 58 W. Va. 291, 52 S.E. 218 (1905). This “silent waiver,” however, must be intelligently made, but an intelligent waiver does not imply that a defendant must have precise, or even average, knowledge of every legal or factual question that may arise in the case. Yet he must have sufficient intellect and knowledge to understand and appreciate the consequences of his act of waiver. *Wade v. Skeen*, supra. How a defendant can waive a right of which he is completely unaware is beyond the comprehension of this writer; however, that is the law in West Virginia. Perhaps as a matter of practice many trial court judges in this state do advise defendants of their right to counsel. Still this practice is only discretionary and is not at all mandatory under our law. Failure to give such advice is not ground for a new trial.

The principal case, although not directly involved with an accused’s right to counsel, does involve his right to effective counsel. By the decisions of many jurisdictions in this country, the following elements appear to be essential to effective benefit of counsel: (1) that counsel be appointed in cases in which the defendant is indigent; (2) that counsel have adequate opportunity to prepare and present the case; (3) that counsel be present during all stages of the proceeding; and (4) that counsel be competent. Note, 42 COLUM. L. REV. 271 (1942). Although an extreme case must be established to convince an appellate court that counsel was so grossly incompetent that the defendant did not have a fair trial, it is not impossible to do so. It has been held, for example, that it is improper for a judge to appoint a lawyer already representing a codefendant with conflicting interests. *People v. Rose*, 348 Ill. 214, 180 N.E. 79 (1932); *People v. Bopp*, 279 Ill. 184, 116 N.E. 679 (1917); Fellman, *Right to Counsel Under State Law*, 1955 Wis. L. REV. 281. The *Rose* case, although analogous to the principal case, reached a contrary result. There the codefendants were charged with murdering a policeman and both pleaded not guilty. One defendant testified that he was not present at the scene of the crime, and the other defended by saying he did not fire the shot, but that the first defendant did so. The court-appointed counsel objected to the conflicting interests before the trial began, but his objection was overruled. On appeal, the court held that effective counsel was denied the defendants. One of the basic distinctions between the two cases seems to be the
fact that counsel in the Rose case brought out the possibility of conflicting interests before the case went to trial. This action was in accord with the American Bar Association Canons of Professional Ethics, Canon No. 6 (1957), which says it is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Under this canon a lawyer "represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." Unlike the Rose case, counsel for the defense in the principal case was not faced by such a conflict merely because the codefendants entered unlike pleas, nor did such a conflict arise during the trial. The decision reached by the supreme court in the principal case is obviously a sound one.

T. E. P.

CRIMINAL LAW—CONFINEMENT IN THE PENITENCIARY WITHOUT INDICTMENT—ESCAPE FROM ILLEGAL CUSTODY.—Relator, a 16 year old youth, was adjudged a delinquent and sentenced to the West Virginia industrial school for boys by the juvenile court of Ohio County. Conviction was for the theft of an automobile and was based on a plea of guilty and testimony of the arresting officer. Relator was later certified as an incorrigible and was returned from the school to the juvenile court which thereupon sentenced him to the West Virginia penitentiary and issued commitment thereon. While serving his sentence in the penitentiary, relator escaped and, upon recapture, was indicted and sentenced to an additional fifteen months for the escape. On a writ of habeas corpus, the court held that the relator had been sentenced and committed to the penitentiary without an indictment in violation of W. Va. Const. art. III, § 4, and that he could not, therefore, be guilty of an escape. The prisoner was ordered discharged. State ex rel. McGilton v. Adams, 102 S.E.2d 145 (W. Va. 1958).

There are at least two distinct problems presented by this case. The first, which involves the pertinent statute that permits juveniles to be imprisoned in the penitentiary, can be disposed of quickly. W. Va. Code c. 28, art. 1, § 7 (Michie 1955), allows an incorrigible in the West Virginia industrial school for boys to be "returned to the court by which he was committed to the school, and such court shall thereupon pass such sentence upon him