University of Miami Law Review

Volume 15 | Number 3 Article 12

5-1-1961

Due Process -- Right to Select Counsel

Richard B. Knight

consequential indeed, but not nearly so far-reaching. Mr. Justice Stewart seems to begin his opinion correctly by stating that "what is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts."[30] Then, apparently losing sight of this invocation, he indulges in a constitutional argument unnecessary to the result reached. He attempts to show that as a result of Mr. Justice Frankfurter's statement in *Wolf v. Colorado*,[31] the majority is justified in overthrowing the "silver platter" doctrine. This rationale could be expected were the Court excluding illegally-obtained evidence from a state prosecution. This the Court was not called upon to do. Instead, it has extended its undisputed supervisory power over the federal courts to exclude all unlawfully-obtained evidence from federal prosecutions, no matter what the source. But while the Court has reached a logical and necessary result, it appears to have compromised itself by rebutting the unjustified reasoning of the "silver platter" doctrine first set forth in *Weeks v. United States*,[32] rather than merely reaffirming its inherent power over the federal courts.

PHILIP N. SMITH

DUE PROCESS—RIGHT TO SELECT COUNSEL

Petitioner was found guilty of burglary and sentenced to the state prison. The trial judge allowed defense counsel to withdraw five days before the trial, and refused to appoint counsel or grant petitioner's request for a continuance so that he could obtain his own counsel. By habeas corpus proceedings the petitioner challenged the legality of his conviction. *Held*: conviction set aside since the denial of a reasonable opportunity to employ counsel violated the due process clause of the Fourteenth Amendment to the Federal Constitution and the Florida Constitution. *Cash v. Culver*, 122 So.2d 179 (Fla. 1960).[1]

30. Elkins v. United States, 364 U.S. 206, 80 Sup. Ct. 1437, 1443 (1960).

31. "The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." Wolf v. Colorado, 338 U.S. 25, 27 (1949).

32. 232 U.S. 383 (1914).

1. After Cash's conviction in 1955 he was sent to Raiford prison to serve a 15-year sentence. No appeal was taken. While in prison he drew up a petition for a writ of habeas corpus which he sent to the Florida Supreme Court. This petition alleged: (1) that he had requested the court to appoint counsel and this request was refused, and (2) that the court refused to grant a continuance, after his attorney had withdrawn five days before the trial began, so that he could obtain counsel. He contended both of these actions of the trial judge violated due process of law. The Florida Supreme Court denied the petition without hearing or opinion.

Thereafter, having obtained an attorney, he petitioned the United States Supreme Court for a writ of habeas corpus, alleging the same facts he had brought before the

Section Eleven of the Declaration of Rights of the Florida Constitution[2] has been construed consistently by the Florida Supreme Court to guarantee a defendant in all criminal actions the absolute right to secure counsel of his own choosing[3] and a reasonable time to consult with his attorney.[4] A clear discussion of this rigid requirement is found in *Deeb v. State*[5] wherein the court said:

> . . . the absolute command of the constitution that in all criminal prosecutions the accused . . . shall be heard by himself or counsel or both is more than a right secured to the accused. It is a mandatory organic rule of procedure in all criminal prosecutions in all courts of this state.[6]

Other states have similar constitutional provisions guaranteeing the accused the right to counsel of his own selection.[7] While the right to select counsel is said to be absolute, a distinction has been drawn, in both the state and federal courts, between such right and the right to have counsel appointed by the court.

---

state court. In addition, he concluded his petition with the statement that he, "a 19-year-old farm boy, without education or any knowledge of trial law" was forced to conduct his own defense. The Supreme Court, noting the only record before them was the petition and the facts therein alleged, held that:

> [I]f petitioner's allegations be true, he was denied the due process of law guaranteed by the Fourteenth Amendment and it was incumbent on the state court to determine what the true facts were. Cash v. Culver, 358 U.S. 633, 638 (1959).

The case was remanded to the Florida Supreme Court with orders to issue the writ and determine the facts. The writ was issued, a hearing held, and the judgment of the court was announced in Cash v. Culver, 120 So.2d 590 (Fla. 1960). The court first noted that at the hearing Cash admitted that he had not requested the trial judge to appoint counsel. Nevertheless, the court went into the record to determine whether the facts brought the case within the rule of Betts v. Brady, 316 U.S. 455 (1942), to the extent that due process required counsel to be appointed even without request. The court concluded that it did not and noted that Cash "conducted his defense with almost unbelievable competency for a layman." Concerning the second allegation, that denial of continuance had operated to deny Cash a reasonable opportunity to employ counsel and thus denied him due process of law, the court noted the holding of the United States Supreme Court in Chandler v. Fretag, 348 U.S. 3 (1954), and also the guarantees of the Florida Declaration of Rights, *infra* note 2. The court said, "we are not at this point holding that the record submitted necessarily leads to the conclusion that Cash was denied a reasonable chance to employ another lawyer." The court then appointed a Circuit Court judge to serve as commissioner of the court, gather the facts and make a speedy report. It is the hearing on the commissioner's report that forms the instant case. It is interesting to note that no new facts were adduced from the commissioner's report than were available to the court at the time it denied, without hearing, Cash's original petition.

2. "In all criminal prosecutions, the accused shall have the right to a speedy and public trial . . . and shall be heard by himself, or counsel, or both . . . ."

3. Wood v. State, 155 Fla. 256, 19 So.2d 872 (1944); Messer v. State, 120 Fla. 95, 162 So. 146 (1935); Reed v. State, 94 Fla. 32, 113 So. 630 (1927); May v. State, 89 Fla. 78, 103 So. 115 (1925).

4. Christie v. State, 94 Fla. 469, 114 So. 450 (1927); Coker v. State, 82 Fla. 5, 89 So. 222 (1921).

5. 131 Fla. 362, 179 So. 894 (1937).

6. *Id.* at 373, 179 So. at 898-99.

7. Phrases in each of the constitutions vary to a limited degree. Those which state the right as "to appear and defend in person and by counsel" are: ARIZ. CONST. art. 2, § 24; COLO. CONST. art. 2, § 16; ILL. CONST. art. 2, § 9; MO. CONST. art. 2, § 22; MONT. CONST. art. 3, § 16; N. M. CONST. art. 2, § 14; S.D. CONST. art. 6,

Prior to 1932, there was no federal constitutional requirement that the state appoint counsel for indigent defendants in criminal actions. In *Powell v. Alabama*,[8] the United States Supreme Court held that due process of law, as embodied in the Fourteenth Amendment, required representation by counsel in all state capital cases. As a result, it became mandatory for the states to provide counsel for indigent defendants in such cases. This decision has been implemented by state statutes, similar to Florida's, which require appointment of counsel in capital cases.[9]

Eleven years later, the United States Supreme Court in *Betts v. Brady*[10] held that the due process clause of the Fourteenth Amendment *could* require the appointment of counsel in actions in the state court for non-capital crimes. The Court refused to enumerate the situations which would require the appointment of counsel or even decide what facts in a case might be such that due process would require appointment.[11] Rather, the Court stated that each case would be decided on its facts because:

> [T]hat which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and the light of other considerations, fall short of such denial.[12]

In *Chandler v. Fretag*[13] the Court held what previous decisions[14] had clearly implied. The court announced that there was a definite distinction

---

§ 7; UTAH CONST. art. 1, § 12; WYO. CONST. art. 1, § 10. Other states phrase the right as "to be heard by himself and his counsel": ARK. CONST. art. 2, § 10; DEL. CONST. art. 1, § 7; IND. CONST. art. 1, § 13; KY. CONST. § 11; PA. CONST. art. 1, § 9; TENN. CONST. art. 1, § 9; VT. CONST. ch. I, art. 10. Or "by himself and counsel": N.H. CONST. part 1, § 15; WIS. CONST. art. 1, § 7. Or "by himself and by counsel": CONN. CONST. art. 1, § 9. Also, "by himself and counsel or either": ALA. CONST. art. 1, § 6. Or, as in Florida, "by himself and counsel or both": MISS. CONST. art. 3, § 26; S.C. CONST. art. 1, § 18; TEX. CONST. art. 1, § 10. Or "to appear and defend in person and with counsel": CAL. CONST. art. 1, § 13; IDAHO CONST. art. 1, § 13; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 10. And "in person or by counsel": KAN. CONST. BILL OF RIGHTS § 10; NEB. CONST. art. 1, § 11; WASH. CONST. art. 1, § 10; NEV. CONST. art. 1, § 8; N.Y. CONST. art. 1, § 6. Or "himself and his counsel or either at his election": MASS. CONST. part 1, § 12; ME. CONST. art. 1, § 6. Or "to be allowed counsel": MD. CONST. DECL. OF RIGHTS art. 21.

8. 287 U.S. 45 (1932).

9. "In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary . . . ." FLA. STAT. § 909.21 (1959).

10. 316 U.S. 455 (1942).

11. The Court in Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948), set down some of the factors which must be considered in determining, in each case, whether such denial of counsel was a violation of due process. This case involved a prosecution for burglary and the Court stated: "Where the gravity of the crime and other factors, such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto, render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair . . ." the constitution requires that the accused must have legal assistance at his trial.

12. 316 U.S. 455, 462 (1942).

13. 348 U.S. 3 (1954).

14. House v. Mayo, 324 U.S. 42 (1945); White v. Ragen, 324 U.S. 760 (1945).

between the right to obtain counsel in a criminal action and the right to have counsel appointed. The former was held to be absolute, the latter, except in capital cases, conditional.[15]

In the instant case, the Florida Supreme Court, relying upon the United States Supreme Court decisions in this field and the provisions of both federal and state constitutions, held that refusal of the trial court to grant a continuance denied the petitioner the right to obtain counsel and this was a denial of due process of law.

The instant case involved no new principle of law, and, considering prior decisions, the result might be said to have been expected. At the same time, viewing the five-year history of this case[16] two questions might be asked.

In light of the fact that the Florida Supreme Court said that "the instant case does not require any novel recognition of a constitutional claim,"[17] why did it take five years to reach this decision?

Secondly, the court criticized the trial judge for failing at the outset of the case to have a "straightforward recognition of the organic rights of one accused of a crime."[18] Admitting the criticism to be valid, could not the same criticism be leveled at this court for failing to recognize these same rights alleged in the first petition for habeas corpus which it denied without hearing three years previously?

RICHARD B. KNIGHT

CONFLICT OF LAWS—VALIDITY OF GAMBLING NOTE

In an action based on a check issued in Nevada on a Florida bank, the drawer pleaded that the check had been given for money previously loaned for the purpose of gambling. The trial court in granting recovery to the original bearer ruled that the evidence supported a finding that the bearer had no knowledge of the purpose for which the drawer intended to utilize the money. *Held*, affirmed: the finding of the lower court was not against the manifest weight of the evidence. The appellate court, however, stated that: "A gambling obligation although valid in the state where

15. "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified . . . . [and] a necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." 348 U.S. 3, 9-10 (1954).

16. See discussion, note 1 *supra*.

17. Cash v. Culver, 122 So.2d 179, 187 (Fla. 1960).

18. *Ibid.*