Duquesne Law Review

Volume 6 | Number 1 Article 7

1967

Criminal Law - Right to Counsel

Michael J. Aranson

need not meet the traditional requirements of the term as it applies to police searches. As indicated by the minority, the significance lies in the effect of such a ruling more so than its rationale. For by the majority's insistence upon the formal requirements of the Fourth Amendment, tempered by their realization of the necessity of the inspections involved here, the substantive guarantees of the Fourth Amendment may necessarily be attenuated. The net effect of a standard of "reasonableness" and "probable cause" as created by the majority may relax or compromise any effective protection against unreasonable searches afforded by the Fourth Amendment; for what judicial officer will refuse to acquiesce in the allegations that "probable cause" exists to issue a warrant for an area municipal health or safety inspection under such a standard.

John M. Campfield

CRIMINAL LAW—RIGHT TO COUNSEL—The Pennsylvania Superior Court more explicitly defines an understandingly and intelligently made waiver of counsel by an accused.

Commonwealth ex rel. Mullins v. Maroney, 209 Pa. Super. 270, 228 A.2d 1 (1967).[1]

Relator was one of three men accused of armed robbery in Pennsylvania. He was arrested in Ohio, where he fought extradition, utilizing the services of an Ohio attorney. Unsuccessful, he was returned to Pennsylvania where he pleaded guilty to the charges and was sentenced. Relator then filed a petition for a writ of habeas corpus alleging deprivation of counsel. In the court below, it was decided that relator had not intelligently waived counsel, and a new trial was granted. The Commonwealth appealed, and the superior court, in reversing the decision of the lower court and dismissing the petition of habeas corpus, *held* that the defendant did not sustain his burden of proving by a preponderance of the evidence that the waiver was not understandingly and knowingly made by him.

A fundamental concept in our legal system has been a defendant's right to counsel. The Bill of Rights is clear on this issue, stating that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[2] In the landmark United States

1. This decision is pending allocature to the Pennsylvania Supreme Court. Under the *Pennsylvania Rules of Civil Procedure*, all criminal appeals, with the exception of capital cases, have their final appeal in the Pennsylvania Superior Court. Counsel for the relator, Edward Klett, Esq., is filing for allocature in the Pennsylvania Supreme Court, claiming that the defendant was deprived of his rights under the Pennsylvania and United States Constitutions. If unsuccessful on appeal or allocature, relator will appeal to the United States Supreme Court on similar grounds.

2. U.S. CONST. amend. VI.

Supreme Court decision of *Gideon v. Wainwright*, Justice Black stated, "in our adversary system of criminal justice, any person haled into court, . . . cannot be assured a fair trial unless counsel is provided for him."[3]

The *Gideon* decision was followed by others which defined the rights of all accused persons, both in state and federal prosecutions. The consensus of all of these decisions was that the assistance of counsel is a fundamental right guaranteed by the United States Constitution, and that the appointment of counsel is essential to a fair trial.[4] However, the United States Supreme Court has also decided that counsel need not be forced upon a defendant, and that, under appropriate circumstances, he may waive his right to be so represented.[5]

Problems may easily be seen in the interpretation of what is meant by "appropriate circumstances" and "waived." Most of the decisions of the United States Supreme Court seem to follow the general rule that for the waiver to be valid and effective, it must be the competent and intelligent act of the accused.[6] The problems are: (1) how shall this waiver be made; (2) who shall determine its validity; and (3) what criteria should be used in making the determination.

In the present case, Judge Jacobs used the *McCray v. Rundle* rule,[7] which states that to be effective, a waiver of counsel must be the competent and intelligent act of the accused, a matter to be determined by all of the facts and circumstances of the particular case, including the accused's background and conduct. Utilizing this test, the court accepted the rationale of the trial judge in his decision that the accused did waive his right to counsel, as the trial judge is charged with the exacting duty of determining whether the accused has intelligently and understandingly made his decision to stand trial without the assistance of an attorney.

In making this determination, the judge must do more than ask a few cursory questions; he must delve as far as possible into the mind of the defendant to learn whether he knowledgeably waived his right.[8] The trial judge must consider, among other things, education, age, mental condition,[9] and the accused's apprehension of the nature of the charges and the possible defenses thereto.[10]

---

3. 372 U.S. 335, 339 (1963).

4. United States *ex rel.* Slebodnik v. Pennsylvania, 343 F.2d 605 (3rd Cir. 1965); Commonwealth *ex rel.* Craig v. Banmiller, 410 Pa. 584, 189 A.2d 875 (1963).

5. Carter v. Illinois, 329 U.S. 173 (1946).

6. Johnson v. Zerbst, 304 U.S. 458 (1938); Moore v. Michigan, 335 U.S. 155 (1957).

7. 415 Pa. 65, 202 A.2d 303 (1964). This rule was used in the determination of whether there was an effective waiver in all cases cited in note 14, *infra*.

8. United States *ex rel.* Colwell v. Rundle, 251 F. Supp. 118 (E.D. Pa. 1966).

9. Commonwealth *ex rel.* Fletcher v. Cavell, 207 Pa. Super. 17, 214 A.2d 810 (1965).

10. See Commonwealth *ex rel.* McCray v. Rundle, 415 Pa. 65, 202 A.2d 303 (1964).

The trial judge in this case reasoned that although the accused had only reached the fourth grade, he still was of average intelligence, since he dropped out of school to go to work and not for academic reasons. The accused was 32 years of age, had been in many criminal prosecutions before, and had enlisted the aid of an Ohio attorney to aid him in fighting extradition to Pennsylvania at the time of his arrest.

A trial judge should not lightly assume that an accused has waived this fundamental right,[11] and only after a sufficiently penetrating and comprehensive examination can a judge be assured that an accused's waiver of counsel was intelligent and understanding.[12] In the instant case a majority of the superior court was certain that the following testimony, considering the accused's age, background and intelligence, showed an effective waiver:

"Questions by the Court:

"Q. Your name is Richard Mullins?
"A. Yes, sir.
"Q. Where do you live?
"A. Marion, Ohio.
"Q. Do you have an attorney?
"A. No, sir, I haven't.
"Q. Do you want one?
"A. No, I don't.
"Q. You have a right to have counsel here before you appear before the court, you understand that, do you?
"A. Yes, sir."[13]

---

11. United States *ex rel.* Colwell v. Rundle, 251 F. Supp. 118 (E.D. Pa. 1966).

12. Commonwealth *ex rel.* Fletcher v. Cavell, 207 Pa. Super. 17, 214 A.2d 810 (1965).

13. 209 Pa. Super. at 274, 228 A.2d at 3. Under similar questioning, some courts have held a waiver to be effective while others have not. The following examples will serve to show the confused state of the law on the issue of waiver.

Waiver was held to be effective in: Commonwealth *ex rel.* Johnson v. Myers, 419 Pa. 155, 213 A.2d 359 (1965); Commonwealth *ex rel.* McDonald v. Rundle, 202 Pa. Super. 594, 198 A.2d 324 (1964); and Commonwealth v. Coxle, 415 Pa. 379, 203 A.2d 782 (1964). The *McDonald* case at 595 of 202 Pa. Super. and at 325 of 198 A.2d presents an interesting waiver, inasmuch as there was never a direct question as to whether or not the accused wanted the court to appoint counsel for him:

The Court: "Mr. McDonald, what is your situation?"
Defendant McDonald: "I don't want a lawyer."
The Court: "Do you understand the nature of the charges against you?"
Defendant McDonald: "Yes, sir."
The Court: "Robbery?"
Defendant McDonald: "Yes, sir."
The Court: "Then I understand from you that you do not want a lawyer."
Defendant McDonald: "Yes, sir."

On the other hand, waiver was held to be invalid in Commonwealth ex rel. O'Lock v. Rundle, 415 Pa. 515, 204 A.2d 439 (1964); and in Commonwealth *ex rel.* McCray v. Rundle, 415

Once a trial judge has decided that an accused has effectively waived his right to counsel, the defendant must then show by a preponderance of the evidence that his waiver was not understandingly and intelligently made.[14] In the present case, the relator argued first that because of his lack of formal education he did not understandingly and knowingly waive this right. This argument has been discussed above, with the conclusion that in addition to formal education, factors such as intelligence and past relationships with the courts are also to be considered; thus, the court dismissed this argument. Relator's second argument was that he was not told that the services of the attorney who would be appointed for him if he so desired would be at no cost to him. The Court disposed of this by taking notice of relator's past history with appointed counsel. However, this very issue could easily become quite troublesome in the future. It is incumbent upon a court to *fully* advise accused before accepting his waiver of counsel.[15] The question remains, what does *fully* mean? In the present case there was evidence to show that relator was told that an appointed attorney would be free of charge,[16] but conceivably there will be situations where an accused will not be explicitly told that the services of an appointed attorney will be free.

Judge Hoffman based his dissent on this very issue of whether or not the accused was advised that he was entitled to *free* counsel. Judge Hoffman felt that the rule which calls for a shift in the burden of proof to the defendant was applicable to only a limited number of cases, to-wit: cases which showed a clear offer and rejection of free, court-appointed counsel on the record. Since Judge Hoffman was of the opinion that relator was not clearly offered *free* appointed counsel,[17] he felt that the instant

---

Pa. 65, 202 A.2d 303 (1964). The *McCray* court, in holding the waiver invalid, took a very conservative position based on the trial testimony:

"Q. McCray, stand up. Do you have a lawyer?

A. No, sir.

Q. Can you afford a lawyer?

A. I have tried unsuccessfuly to retain counsel. I was talking to Mr. Cain. However, since it is listed for this morning, I am willing to go along with it for trial to be disposed of, sir.

Q. Are you willing to proceed without an attorney?

A. Yes, sir.", 415 Pa. 65, 68, 202 A.2d 303, 304 (1964).

14. Commonwealth *ex rel.* Wright v. Cavell, 422 Pa. 253, 220 A.2d 611 (1966). This general rule also holds true in the Federal Courts: Carnley v. Cochran, 369 U.S. 506 (1962); Moore v. Michigan, 335 U.S. 155 (1957).

15. Commonwealth *ex rel.* Clinger v. Russell, 206 Pa. Super. 436, 213 A.2d 100 (1965).

16. Captain Holt, the prosecuting officer, testified that when telling relator of his rights, he said to relator, "that if he couldn't afford an attorney that Judge Mook would appoint an attorney for him.", 209 Pa. at 275, 228 A.2d at 5.

17. To support his position, Judge Hoffman quoted from Chief Justice Warren in Miranda v. Arizona, 384 U.S. 436 (1966), at 473:

In order to fully apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult

case did not fall into the area where the burden shifts to the relator. Thus, it was his opinion that the burden should have remained with the prosecution to show that the waiver was knowingly and understandingly made, and that it was not on the relator to prove otherwise.

It is the opinion of this writer that considerable difficulty would be alleviated if a form were to be prepared and given to arresting officers as well as trial judges that would clearly explain not only the right of an accused, but would also explain with no chance of error that free counsel would be provided if the accused could not afford his own.[18] This would not eliminate all problems, for if the accused still wished to waive his rights, the issue of whether he knew what he was doing would still be present, but the factors presently used to determine this particular issue could still be used. Most importantly, however, there would be no differences in a court's questions to an accused regarding counsel, and the issue of whether the accused was aware of the availability of no-cost court-appointed counsel could be eliminated from all appeals.

Michael J. Aranson

SALES—WARRANTIES—Conforming tender by adjustment or minor repair—Under the Uniform Commercial Code, where the seller was denied access and a reasonable opportunity to conform a defective tender by adjustment or minor repair rather than by substituting new merchandise, the buyer failed to show a breach of warranty entitling him to either new merchandise or rescission.

Wilson v. Scampoli, 228 A.2d 848 (D.C. Ct. App. 1967).

Plaintiff Scampoli brought an action to rescind a sales contract for a color television set with a malfunctioning color control. Plaintiff had demanded a new set, but defendant Wilson TV Service only proffered to repair the color malfunction. However, defendant was denied access to the set.

---

with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present . . . . [O]nly with effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

18. The Pittsburgh Police *Superintendent's Memo No. 18-66*, which outlines police investigation procedures, has the following instruction: "He must also be told that he has the right to consult with an attorney before or during police questioning, *and if he does not have the money to hire a lawyer*, a lawyer will be appointed . . . ." [Emphasis added.]