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Right of Accused to Assigned Counsel in Non-Capital Felony Prosecutions--Wolford v. Buchanan--Rule of Gholson Case Modified?

George R. Creedle
University of Kentucky

RIGHT OF ACCUSED TO ASSIGNED COUNSEL IN NON-CAPITAL FELONY PROSECUTIONS – WOLFORD v BUCHANAN – RULE OF GHOLSON CASE MODIFIED?

In the recent Kentucky case of *Wolford* v *Buchanan*,[1] Emerson Wolford, who had been convicted of housebreaking and sentenced to life imprisonment under the Kentucky Habitual Criminal Act,[2] was denied his freedom by the Court of Appeals on an appeal from the circuit court's denial of a writ of habeas corpus. One of the grounds of his petition was that he had been deprived of due process in that the court failed to appoint counsel to defend him and did not advise him concerning his legal rights.

The record of the case is silent on the point as to whether he had counsel, but in his petition and affidavit the prisoner alleged that he had secured the services of an attorney who stated: "You have nothing to worry about for they have no case against you" but who, on the day of the trial, told the prisoner· "I can't do anything for you so I am not going to defend you."[3] On this evidence the Court of Appeals dismissed the point, saying: "By petitioner s affidavit we see that he did have the benefit of counsel, and counsel selected by him. There is nothing to show here that the court was ever apprised of the fact that the selected counsel refused to continue his service."[4] The court then cited the recent significant case of *Gholson* v *Commonwealth*,[5] which it summarized by saying: "In [that case] we dealt with the questions of the duty of the court to appoint counsel and the waiver of rights to counsel. It was held in substance that the question to be determined in all such cases is whether or not it sufficiently appears that the accused was informed of his legal rights and intelligently waived his right to be represented by counsel."[6]

The Gholson case was hailed as a great judicial step towards securing equal protection of law for rich and poor alike in Kentucky[7] It has been interpreted by one writer[8] as establishing a constitutional right[9] of an accused to have counsel assigned, and to be informed by the trial judge of his right thereto. This conforms substantially to the interpretation of that case which the court itself put on it in the *Wolford* case in the language above quoted, since the

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[1] 313 Ky. 512, 232 S.W 2d 1016 (1950).
KY. REV STAT. sec. 431.190 (1948).
[3] Wolford v. Buchanan, 313 Ky. 512, 513, 232 S.W 2d 1016, 1017 (1950).
[4] *Id.* at 514, 232 S.W 2d at 1017.
[5] 308 Ky. 82, 212 S.W 2d 537 (1948).
[6] Wolford v. Buchanan, 313 Ky. 512, 514, 232 S.W 2d 1016, 1017 (1950).
Note, 38 KY. L.J. 317 (1950).
[8] *Ibid.*
[9] Under KY. CONST. sec. 11.

court states that the case dealt with (1) "the duty of the court to appoint counsel," (2) "whether accused was informed of his legal rights" and (3) "waiver of rights to counsel."

The question which then confronts this and future petitioners upon reading this opinion is: Why was not the petition sufficient? The opinion does not make it clear. We shall investigate the reasonable possibilities in a categorical manner.

1. *Petitioner had effective counsel.*

Although the court said that the petitioner in his affidavit admitted that he had counsel selected by himself, the right is to an *effective* assignment of counsel, and in the same affidavit the petitioner alleged that his counsel had abandoned him before the trial. There is nothing in the record to indicate that he was represented by counsel at the trial. The trial judge in the habeas corpus proceeding, who must pass on all questions of law and fact in that hearing,[10] sustained a demurrer to the petition and hence did not determine the issue of fact as to whether or not the petitioner had effective counsel at the trial. Since the demurrer admits that all the facts alleged are true, if it was sustained on the ground of effective counsel, the judge would in effect rule that counsel who abandons his client the day of the trial is effective. It is submitted that this could not be a reasonable answer.

2. *Petitioner made an effective waiver of counsel by failing to insist on the appointment.*

If, as the court said, in these cases the only question was whether it sufficiently appears that the accused was informed of his legal rights and intelligently waived his right to be represented by counsel, then the court may have dismissed the petition because it found such a waiver. But we are dealing with the duty of a trial court to appoint counsel. It is doubtful that the court can be relieved of this duty by the failure of petitioner to insist on appointment.[11] It would appear that a valid waiver relieving the court of this duty would result only when the accused was informed of his right to have counsel appointed, inquired of as to whether he desired counsel, and when the accused then intelligently decided that he did not.

The record is silent as to whether the trial judge informed accused

[10] 25 AM. JUR., 247.

[11] *See* Gholson v. Commonwealth, 308 Ky. 82, 84, 212 S.W 2d 537, 538 (1948), where the court said "In recent cases we have held that a trial court is under no duty or obligation to assign counsel to a defendant where he fails to make a request therefor." citing Hamlin v. Commonwealth, 287 Ky. 22, 152 S.W 2d 297 (1941); Moore v. Commonwealth, 298 Ky. 14, 181 S.W 2d 413 (1944). These cases were *specifically overruled* by the court in the Gholson case

of his right to counsel, whether he was asked if he desired counsel, and whether he decided not to avail himself thereof. It might be inferred that he knew of his legal right to be represented from the fact that he employed counsel, but it does not follow that he knew of his right to have counsel appointed by the court. Again, the ruling on the demurrer could only have decided that although what the petitioner says about not having counsel or being informed of his right to an appointment is true, he waived this right by failing to ask for counsel. As has been indicated, it is doubtful if an affirmative duty to make an appointment can be discharged by the failure of the party in whose favor the obligation exists to insist on it, particularly when he may not be aware of his right.

3. *An accused is entitled only to a trial before a judge who is not consciously denying him effective counsel.*

The court announced an objective rule in the *Gholson* case: that a fair and impartial trial in felony cases includes informing the accused at the beginning of the trial by the judge of his legal rights, and appointment of counsel by the court unless the accused intelligently waives this right.

A third explanation of this case is that the court applied the rule subjectively in the *Wolford* case, making it depend upon whether or not the trial judge *knew* that the accused was represented by counsel, else why should the court state "There is nothing to show here that the court was ever apprised of the fact." This is not in keeping with the spirit of the *Gholson* decision, in which it was said that "*It is incumbent upon the trial judge to determine* whether the waiver of a right to be represented by counsel is made 'intelligently, competently, understandingly and voluntarily [Italics writer s]."[12]

It is to be hoped that the court did not intend in the *Wolford* case to limit the *Gholson* rule by making it subjective. This interpretation of the *Wolford* case is not borne out by the extremely short treatment of the rule in that case, nor is it compatible with the statement of the rule in the *Gholson* case.

It may be that the rule remains the same and the court merely erred in the application of it to this fact situation. However, a more reasonable explanation still remains.

4. *The choice of remedy was wrong — habeas corpus will not lie to correct a defect not apparent on the face of the record.*

The *Gholson* case makes it clear that the right to have counsel appointed is enforceable on appeal: that is, a new trial will be ordered

[12] Gholson v. Commonwealth, 308 Ky. 82, 88, 212 S.W 2d 537, 540 (1948).

unless the court informs the accused of his legal rights and a waiver of counsel is made intelligently Since it seems doubtful that the cases may be distinguished on other grounds, it would seem from the *Wolford* case that this right may not be asserted in a petition for habeas corpus, although the court itself makes no such distinction in its opinion. If denial of counsel makes the proceeding void, the fact that the time for appeal has expired does not ordinarily foreclose relief.[13]

However, in Kentucky habeas corpus lies only to relieve petitioner of a sentence imposed when the judgment is invalid to the extent of rendering it void, and the invalidating defects are shown in the record of the trial.[14] The modern tendency in other jurisdictions is to extend the scope of inquiry in habeas corpus to preserve the constitutional safeguards to human liberty[15] Despite statements to the contrary in *Smith* v *Buchanan*,[16] the very fact that the court considered Wolford's appeal on its merits indicates that it believes that the denial of counsel in a felony case is of such invalidating effect as to make the judgment void. Although habeas corpus lies only when the invalidating defects are shown in the record of the trial and evidence contradicting the record is inadmissible,[17] still here there is nothing in the record contradictory to the allegations in his petition that he was not informed of his legal rights and not represented by counsel. It is true that a judgment of a court of record carries with it a presumption of regularity, and the petitioner in habeas corpus must prove by the preponderance of evidence that he did not make an intelligent waiver,[18] but a question of fact is presented here which calls for a hearing and the demurrer should have been overruled, unless the court intended to make a presumption based on the silence of the record conclusive that there was counsel or that an intelligent waiver existed. It is en-

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[13] Williams v. Kaiser, 323 U.S. 471, 65 Sup. Ct. 363 (1945). *See* Johnson v. Zerbst, 304 U.S. 458, 58 Sup. Ct. 610 (1938); Smith v. O'Grady, 312 U.S. 329, 61 Sup. Ct. 572 (1941).

[14] Smith v. Buchanan, 291 Ky. 44, 163 S.W 2d 5 (1942).

[15] 25 AM. JUR. 179.

[16] 291 Ky. 44, 46, 163 S.W 2d 5, 7 (1942). In this case the trial court had assigned as counsel to represent a murder defendant a person who, after the trial, was found not to be a licensed attorney. The court considered this an unknown error, not appearing on the face of the record, and said that in the case of such errors, although a right to which the defendant was entitled was denied him, habeas corpus would not lie. They later stated that although some courts hold that a denial to a litigant of some constitutional right makes a judgment void, most courts will not allow habeas corpus if the trial court had jurisdiction of the cause.

This case may be distinguished from the *Wolford* case in that there the denial of counsel was evident, in a sense, on the face of the record, as there was no mention of counsel in the record.

[17] 25 AM. JUR. 245.

[18] ORFIELD, CRIMINAL PROCEDURE 427 (1947).

tirely arguable that the silence of the record on the matters of counsel, information and waiver is a "defect apparent on the face of the record" under the Kentucky rule requiring the appointment of counsel, and if the decision rested on this procedural ground the court should have decided that the defect was apparent. However, it is reasonable to assume that the court was governed by the fear they announced in the *Smith* case, that had the writ of habeas corpus been issued, the prisoner would be entitled to a release, "which might result in his final escape from apprehension and punishment for the commission of his crime."[19] They probably felt it would be poor precedent to set free a prisoner on habeas corpus merely because the record of his trial did not indicate whether he had been represented by counsel, when this matter could be taken care of much more expeditiously on appeal, and a new trial ordered whereunder a guilty person might still be confined.

Therefore, it is submitted that the court, after considering the consequences of either choice, may have decided that failure of the court to inform accused of his right to have counsel appointed and to appoint counsel unless intelligently waived was a defect not apparent on the face of the record when no mention of it was made in the record, and that habeas corpus would not lie in this situation. It is apparent that the writ of habeas corpus will be unavailable to practically every defendant in this situation, because mention of counsel will rarely find its way into the record unless the accused asks for it, which is unlikely and in which case the trial court would probably appoint counsel.

There is hope that, although habeas corpus is not the appropriate remedy, this right may yet be vindicated. The writ of coram nobis has been recently revived in Kentucky and will lie when there is a material error of fact not appearing in the record and unknown to the trial court, and not due to any lack of diligence on the part of the defendant.[20] Since the writ has been revived to provide a remedy for unfortunate cases, principally those of newly discovered evidence, falling outside the scope of habeas corpus and results in a new trial rather than immediate freedom for the petitioner, it is very possible that it may lie in a situation like the *Wolford* case.

If the court's fears of a general jail delivery make it impossible for it to evolve a rule requiring an effective appointment of counsel in every felony case because of the necessary retroactivity of the rule,

[19] Smith v. Buchanan, 291 Ky. 44, 49, 163 S.W 2d 5, 8 (1942).

[20] Note, 39 Ky. L.J. 440 (1951), citing Smith v. Buchanan, 291 Ky. 44, 163 S.W 2d 5 (1942); Anderson v. Buchanan, 292 Ky. 810, 168 S.W 2d 48 (1943).

perhaps the time has come for the legislature to amend the criminal code to provide, like the Federal Rules of Criminal Procedure, that:

> "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 proceedings unless he elects to proceed without counsel or is able to obtain counsel."[21]

GEORGE R. CREEDLE

NEGLIGENT MANSLAUGHTER IN KENTUCKY THE RULE IN MARYE v COMMONWEALTH[1]

What degree of negligence is required in Kentucky for a conviction of manslaughter? This question is of particular importance in Kentucky since the statutes set out the punishment for voluntary manslaughter but do not attempt to define the elements of the crime.[2] Involuntary manslaughter remains a common law crime[3] with the punishment being fixed by a general statute.[4]

In a case decided in 1919,[5] where the homicide resulted from the negligent operation of an automobile, the tort standard of care was applied and on a finding of ordinary negligence the defendant was convicted of involuntary manslaughter. Seven years later in a similar case involving a homicide resulting from the negligent operation of an automobile,[6] the court said that failure to exercise ordinary care in the driving of an automobile was sufficient negligence to constitute the crime of involuntary manslaughter. These cases were followed in Kentucky, and the law seemed to be settled that ordinary negligence in the operation of an automobile was sufficient to authorize a conviction of involuntary manslaughter.[7]

As one might expect, since the court had resorted to the rule that ordinary negligence was sufficient to constitute involuntary manslaughter, when it was later confronted with a case involving a greater degree of negligence and consequently deserving a greater degree of punishment, the natural solution was to convict the guilty party of

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[21] FED. R. CRIM. P. 44.

[1] 240 S.W 2d 852 (Ky. 1951).

[2] KY. REV. STAT. sec. 435.020 (1948).

[3] Sikes v. Com., 304 Ky. 429, 200 S.W 2d 956 (1947).

[4] KY. REV. STAT. sec. 431.075 (1950).

[5] Held v. Com., 183 Ky. 209, 208 S.W 772 (1919).

[6] Jones v. Com., 213 Ky. 356, 281 S.W 164 (1926).

[7] Lewis v. Com., 301 Ky. 268, 191 S.W 2d 416 (1945); Lowe v. Com., 298 Ky. 7, 181 S.W 2d 409 (1944); Com. v. Mullins, 296 Ky. 190, 176 S.W 2d 403 (1943).