

448

SYLLABUS:

1. Where a defendant is prosecuted by information rather than by indictment he must either have counsel, be provided counsel or affirmatively and intelligently and understandingly waive counsel and prosecution by indictment by waiver in writing and in open court.

2. When a defendant is prosecuted by indictment he may intelligently and understandingly orally waive counsel, but a written waiver is much to be preferred.

3. Whether prosecution is by information or by indictment and whether appointment of counsel is waived either in writing or orally the court should advise the defendant of his rights in sufficient detail and make sufficient inquiry of the defendant to insure that such waiver was accomplished intelligently and understandingly.

4. All proceedings at arraignment and sentencing should be recorded by a court reporter.

5. Journal entries should be in sufficient detail on all questions of constitutional rights as to avoid a "silent record."

Columbus, Ohio, August 13, 1963

Hon. John L. Beckley
Prosecuting Attorney
Vinton County Court House
McArthur, Ohio

Dear Sir:

Your request for my opinion is in substance as follows:

Under Section 2941.50, Revised Code, as amended by House Bill No. 511, approved June 27, 1963, is it mandatory for the court to appoint counsel for an accused person unable to employ counsel even though the accused desires to waive his right to be represented by counsel?

Section 2941.50 as amended provides:

"After a copy of an indictment has been served or opportunity had for receiving it, or if indictment be waived under section 2941.021 of the Revised Code, the accused shall be brought into court, and if he is without and unable to employ counsel, the court shall assign him counsel, not exceeding two, who shall have access to such accused at all reasonable hours. Such counsel shall not be a partner in the practice of law of the attorney having charge of the

prosecution. A partner of the attorney having charge of the prosecution shall not be employed by or conduct the defense of a person so prosecuted." (Amendment Italicized)

The referenced Section 2941.021 reads:

"Any criminal offense which is not punishable by death or life imprisonment may be prosecuted by information filed in the common pleas court by the prosecuting attorney if the defendant, after he has been advised by the court of the nature of the charge against him and of his rights under the constitution, is represented by counsel or has affirmatively waived counsel by waiver in writing and in open court, waives in writing and in open court prosecution by indictment."

In 1949, at which time Section 13439-2, General Code, contained the identical mandatory language as is presently contained in Section 2941.50, Revised Code, the Supreme Court of Ohio held in *In re Burson*, 152 Ohio St., 375:

* * * * *

"3. A plea of guilty to an indictment raises a presumption of waiver of the right to have counsel appointed to aid the person charged in the indictment, unless there are circumstances which rebut and nullify such presumption. Such waiver may be express, providing it is intelligently and understandingly given, or may be implied.

* * * * *

In reaching its decision the Court commented:

"Since the plea of guilty dispensed with the necessity of a trial, the trial court did not recognize any necessity for the appointment of counsel and appointed none." (page 379)

"In the opinion of this Court, the section of the statute just quoted, mandatory in terms, must be complied with unless compliance is waived by a defendant, which we hold may be done."

Burson has been followed in a number of cases in the course of the past fourteen years two of the more recent being *Doughty v. Sacks*, 173 Ohio St., 407 and *Vertz v. Sacks*, 173 Ohio St., 459. The Burson principle was again applied after a remand of the *Doughty* case to the Supreme Court of Ohio from the Supreme Court of the United States. *Doughty v. Sacks*, 175 Ohio St., 46.

However, holdings by the United States Supreme Court over the past two years have made reliance upon Burson extremely hazardous. These cases are considered in the order in which decisions were rendered.

Hamilton v. Alabama, 368 U. S. 52, 7 L ed 2d, 114, 825 Ct. 157 (Nov. 1961). Hamilton was convicted and sentenced to death and sought relief by way of *coram nobis* claiming that he had been denied counsel at arraignment at which time he pleaded not guilty. The Supreme Court of Alabama while recognizing that petitioner had a right under state law to be represented by counsel at the time of his arraignment denied relief because there was no showing or effort to show that petitioner was "disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty." The United States Supreme Court held in part:

"Under Alabama law, arraignment is a critical stage in a criminal proceeding, because, if the defense of insanity is not then pleaded, it may not be pleaded thereafter except in the trial judge's discretion, which is not reviewable on appeal, and because pleas in abatement and motions to quash based on systemic exclusion of one race from grand juries, or on the ground that the grand jury was otherwise improperly drawn, must also be made at the time of arraignment.

"An accused in a capital case requires the guiding hand of counsel at every stage of the proceedings against him, since without it he faces the danger of conviction because he does not know how to establish his innocence.

"An accused in a capital case needs the guiding hand of counsel at the trial lest he unwarily concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the state exacts for the offense which he in fact and in law committed.

"* * *

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Carnley v. Cochran -US-, 8 L ed 2d, 70, 82 S Ct.-Carnley was an illiterate man, convicted by a Florida state court of the non capital offenses of incest and assault upon a child under the age of 14 who was not afforded the assistance of counsel for his defense. Pertinent portions of the Court's holdings are as follows:

"Where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request for the assistance of counsel.

“One who collatorally attacks his conviction on the ground that the lack of assistance of counsel at his trial deprived him of due process of law under the Fourteenth Amendment does not have the burden of showing that he had not in fact agreed, or been willing, to be tried without counsel.

“Courts indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss.

“The rule that courts indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss, applies to asserted waivers of the right to counsel in state criminal proceedings.

“The due process clause of the Fourteenth Amendment precludes conclusively presuming a waiver of counsel from a plea of guilty; a defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary.

“Presuming waiver of counsel from a silent record is impermissible; the record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer.

“An accused cannot be required to carry the burden of showing that his acquiescence in proceeding with a state criminal trial without the assistance of counsel was not sufficiently understanding and intelligent to amount to an effective waiver unless the record—or a hearing, where required—reveals his affirmative acquiescence.

“Where the constitutional infirmity of a state criminal trial without counsel is manifested, and there is no allegation or showing of affirmative waiver of counsel, a resulting conviction is unconstitutional and the accused is entitled to relief therefrom.”

Going even farther is the holding in *White v. Maryland*, 373 U. S. 259 (April 29, 1963). The court held that it was error when a defendant not represented by counsel was allowed to enter a plea of guilty before a magistrate on preliminary hearing.

In the roughly eight hundred petitions for writs of habeas corpus and related actions which are filed each year in the state and federal courts in Ohio, a substantial number allege that they were denied counsel, or not advised of their right to counsel, or denied

trial by jury, etc. In the past, we have been able to successfully defend such cases by the use of Burson and its successors on those cases involving right to counsel and by using such cases as *Yarbrough v. Maxwell*, 174 Ohio St., 287 and its predecessors in cases involving right to a jury trial and dealing with burden of proof in habeas corpus and the presumption of regularity of proceedings in the trial court. As I commented previously with respect to Burson and right to counsel, the same comment is applicable that complete reliance upon these other authorities is no longer safe. We will increasingly be forced to call upon prosecutors and clerks of courts for the evidence necessary to refute the allegations of a petitioner.

It is therefore my opinion and you are advised that:

- (1) Where a defendant is prosecuted by information rather than by indictment he must either have counsel, be provided counsel or affirmatively and intelligently and understandingly waive counsel and prosecution by indictment by waiver in writing and in open court.
- (2) When a defendant is prosecuted by indictment he may intelligently and understandingly orally waive counsel, but a written waiver is much to be preferred.
- (3) Whether prosecution is by information or by indictment and whether appointment of counsel is waived either in writing or orally the court should advise the defendant of his rights in sufficient detail and make sufficient inquiry of the defendant to insure that such waiver was accomplished intelligently and understandingly.
- (4) All proceedings at arraignment and sentencing should be recorded by a court reporter.
- (5) Journal entries should be in sufficient detail on all questions of constitutional rights as to avoid a "silent record."

Respectfully,
WILLIAM B. SAXBE
Attorney General