Washington Law Review

Volume 30
Issue 2 *Washington Case Law-1954*

5-1-1955

Constitutional Law

Samuel F. Pearce

lake and back, made partly for the purpose of test-sighting the rifle, was within the course and scope of the employee's employment. If this inference is reasonable, then the question of agency relationship in the *Barnett* case was for the jury and not for the court to decide.[17]

Also, if the inference is reasonable, then was the presumption of agency arising initially in the *Barnett* case overcome by clear and convincing countervailing evidence? Most of defendant's countervailing evidence was introduced to indicate the employee's trip to the lake was merely a family outing. Nevertheless, it was clearly apparent that another purpose, a business one, was to test-sight a deer rifle. As has been shown, the fact that an act has a dual purpose, one being private, will not prevent its being held within the actor's scope of employment. Even if the presumption of agency was held to have been overcome, the inference of agency, from the nature of the employee's employment and the purpose for which the lake trip was made, remained, which normally would be sufficient to take the case to the jury. In the *Barnett* case the court speaks of its "liberal" policy of sustaining decisions in cases of this type. Probably the case stands best for the conservative view that liability should not be extended to an employer for the negligent act of his employee where the relationship between the act and the scope of the employment is at best remote or indirect.

WILLIAM D. CAMERON

Broker's Right to a Commission. *Feeley v. Mullikin*, 44 Wn.2d 680, 269 P.2d 828 (1954), was an action by a broker for a commission on the sale of an apartment house lease and furnishings. The defendants had sold the property to a purchaser procured by plaintiff, consumating the sale through a second broker to whom a commission was paid. The second broker aided in financing the purchase, an opportunity the plaintiff was not given. The trial court found for plaintiff on grounds that defendant's action constituted bad faith, and thereby could not defeat plaintiff's right to a commission. The Supreme Court affirmed, holding that since plaintiff was deprived of the opportunity to consumate the sale, he was, as between him and defendants, the procuring cause of the sale and thus entitled to a commission.

CONSTITUTIONAL LAW

Right to Counsel and Due Process in Criminal Cases. The Washington court has held in a six to three decision that there was no denial of the right to counsel and due process where the defendant went to trial for incest two days after pleading and five days after arrest, the defendant and his court-appointed counsel having agreed to the early

[17] *See* Buckley v. Harkens, 114 Wash. 468, 195 Pac. 250 (1921); Smith v. Eldridge Motors, *supra* note 15; Carmin v. Port of Seattle, *supra* note 9.

trial. The defendant was found guilty and sentenced to life imprisonment. As stated by the dissent in the case, *Buckingham v. Cranor*,[1] "the petitioner ran the gamut from freedom to life imprisonment in the period from sometime Wednesday until sometime the following Monday."[2] The defendant, seeking habeas corpus, grounded his petition on the contentions that his counsel was inexperienced and incompetent and that the early trial date foreclosed proper preparation for defense.

The Washington constitution assures the accused the right to counsel[3] and that assurance is reaffirmed in the decisions.[4] The right to counsel in Federal criminal proceedings is guaranteed in the Federal constitution[5] and similar provision is made in the Federal rules.[6] Where the laws of a state afford no such guarantee the due process clause of the Fourteenth Amendment does not completely fill the gap so as to make the right absolute.[7] The right to counsel carries with it the corollary

[1] 145 Wash. Dec. 107, 273 P.2d 495 (1954), *cert. denied* .....U.S....., 75 Sup. Ct. 360 (1955).

[2] 145 Wash. Dec. at 113, 273 P.2d at 497.

[3] Art. I, §3 contains the general due process clause. Art. I, §22 guarantees the accused the right to counsel in any criminal proceeding. Note also the statutory provisions. RCW 10.01.110, 10.40.030, 10.46.050.

[4] State v. Hartwig, 36 Wn.2d 598, 219 P.2d 564 (1950); Rauch v. Chapman, 16 Wash. 568, 48 Pac. 253 (1897); *In re* Gensburg, 35 Wn.2d 849, 215 P.2d 880 (1950).

[5] "In all criminal proceedings the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const., Amend. VI.

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

[7] A distinction is apparently made between the capital felony and non-capital case. Right to counsel in a capital case is, except in unusual circumstances, an essential element of due process. Powell v. Alabama, 287 U.S. 45 (1932). *But cf.* Quicksall v. Michigan, 339 U.S. 660 (1949) (the Court affirmed a first degree murder conviction where the defendant had pleaded guilty, saying there was no indication in the record that he did not know his rights and no evidence that he had requested counsel).

In non-capital cases the Supreme Court recognizes the right to counsel where there are special circumstances. Betts v. Brady, 316 U.S. 445 (1942) (robbery conviction of indigent defendant was upheld even though his request for counsel was denied; the defendant was an intelligent adult and the indictment clearly stated the charges; the Court said the existence of the right in proceedings before state courts was a matter for the states to decide, the Sixth Amendment not being read into the Fourteenth Amendment); Bute v. Illinois, 333 U.S. 640 (1949) (the approach to the problem was the same as in the Betts case where the defendant was 57 years of age and the indictment was unambiguous); Palmer v. Ashe, 342 U.S. 134 (1951) (the Court found denial of due process where the defendant, deceived by police officers, had pleaded guilty of robbery without counsel; he had a history of mental disorder; this appeal was 18 years after his hearing). The factors determining the necessity of the assistance of counsel as matter of due process in a state prosecution include the gravity of the offense, White v. Ragen, 324 U.S. 760 (1945), the complexity of the issues involved, see Rice v. Olsen, 324 U.S. 76 (1945), and the age, former trial experience and general intelligence of the defendant, DeMeerleer v. Michigan, 329 U.S. 663 (1947); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Gryer v. Burke, 334 U.S. 728 (1948). It has been suggested that the Supreme Court position that a fair trial can be conducted and justice accorded the defendant without assistance of counsel does not reflect settled historical concepts. Beck and Heidelbaugh, *The Right to Counsel in Criminal Cases, An Inquiry Into the History and Practice in England and America*, 28 NOTRE DAME LAW. 351 (1953). Another author observes that "the weight of the Court's opinions leads to the conclusion that there is no absolute right to counsel nor any definite criteria by which the Court determines whether the denial of the right resulted in deprivation

that the counsel must be competent though the standard of competency is not well defined.[8] In one oft-cited case Judge Minton said that "the services of counsel meet the requirements of the due process clause when he is a member in good standing at the bar, gives his client his complete loyalty, serves him in good faith to the best of his ability and his service is of such character as to preserve the essential integrity of the proceeding as a trial in a court of justice . . . . His client is entitled to a fair trial, not a perfect one."[9] Application of this test might lead to less conflicting results than the usual broad standard of "fair trial" or "due process."[10] Adequate time for the preparation of a defense constitutes another corollary to the right.[11] The effectiveness of

of liberty without due process." WOOD, DUE PROCESS OF LAW 217 (1951). See also CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 247 (1953).

[8] There is an indication that Washington might give consideration to the argument that court-appointed counsel was incompetent. State v. Kelch, 95 Wash. 277, 163 Pac. 757 (1917) (the argument was dismissed on the ground that the appointed attorneys had been admitted to the bar several years prior to the trial, the court presuming such experience to be equated with competence). But the majority in the instant case said: "We are convinced the petitioner's actions were taken competently, intelligently and voluntarily. His counsel acted under his directions which, on occasion, were against the advice and judgment of the attorney. Regardless of the competency and experience of counsel, his acts were those of the petitioner, and having limited his attorney's actions, he cannot well complain now that those acts were incompetently done." 145 Wash. Dec. at 109, 273 P.2d at 495. See Glasser v. U.S., 315 U.S. 60, 70 (1942); Coates v. Lawrence, 46 F. Supp. 414, 421-422 (S.D. Ga. 1942).

Just how much mishandling of the case amounts to incompetence is not easy to determine. State v. Bourse, ...Ore....., 264 P.2d 800 (1953) (the appellate court reversed a murder conviction where two inexperienced court-appointed counsel had failed to make timely objection to inadmissible prejudicial evidence); Johnson v. U.S., 110 F.2d 562 (D.C. Cir. 1940) (new trial awarded where court-appointed counsel had failed to examine an inquest transcript and to file an appeal brief on time); U.S. *ex rel.* Hamby v. Ragen, 178 F.2d 379 (7th Cir. 1949), *cert. denied* 339 U.S. 905 (1949) (conviction affirmed where counsel failed to discover the invalidity of prior conviction and defendant was sentenced under the habitual criminal statute); Diggs v. Welch, 148 F.2d 667 (D.C. Cir. 1945), *cert. denied* 325 U.S. 889 (1945) (new trial denied though it was shown that questionable advice had been given the defendant regarding his plea of guilty).

The showing of incompetence must be clear and conclusive. See Diggs v. Welch, *supra;* Bostic v. Rives, 107 F.2d 649 (D.C. Cir. 1939), *cert. denied* 309 U.S. 664 (1940). Incompetence of an attorney employed by a defendant does not ordinarily give the defendant grounds for new trial on the theory that the acts of the attorney are imputed to his client. Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1945), *cert. denied* 324 U.S. 869 (1945). But where the defendant is ignorant of his rights and the attorney acts negligently or improperly the result may be different. Coates v. Lawrence, *supra.* This exception would appear to be reasonable if the ultimate concern is a "fair trial." Compare this last position with the contentions of the Court in DeMeerleer v. Michigan and Uveges v. Pennsylvania, *supra* note 7.

[9] U.S. *ex rel.* Weber v. Ragen, 176 F.2d 579, 586 (7th Cir. 1949).

[10] See note 8 *supra.* In a recent case the application of the standard set out in U.S. *ex rel.* Weber v. Ragen, *supra* note 9, might have brought a different result. The counsel was court-appointed; trial was held 24 hours later; counsel made no motion for continuance though he had requested more time during an in-chambers conference; an affidavit appeared in the record to the effect that he had never tried a case; the conviction for pimping and procuring was affirmed. Lewis v. Territory of Hawaii, 210 F.2d 552 (9th Cir. 1954).

[11] State v. Hartwig, 36 Wn.2d 598, 219 P.2d 564 (1950) (trial was set for the same

counsel is obviously impaired by limitation on time allowed for preparation, no matter how competent the attorney.

In the instant case the court-appointed counsel was a recent law school graduate and had been admitted to the bar within the year prior to the trial. There is no denying the proposition that the age or inexperience of counsel should not, in itself, provide grounds whereby criminal offenders could expect to gain respite but circumstances in an individual case may show deprivation of due process safeguards. [12] The initial responsibility for observance of those safeguards rests with the trial judge.[13] Technically, the defendant here was not denied the right to counsel and the machinery of justice moved at an accelerated speed by his own agreement and direction, but the total circumstances present a close question.[14]

Fluoridation of City Water Supply Constitutional. Washington has joined the growing list of jurisdictions upholding city ordinances providing for fluoridation of city water supplies. The Washington court, in *Kaul v. City of Chehalis*,[15] rejected the arguments that the city's action was ultra vires its statutory power to provide "water," that there was an invasion of the appellant's constitutional rights and that fluoridation was compulsory mass medication. Four other jurisdictions have rejected the same arguments; the U.S. Supreme Court has either denied certiorari or dismissed for want of a substantial federal question.[16] Little can be gained from dissecting the majority arguments or

---

day counsel was to appear in the supreme court; the trial court denied a continuance and court-appointed counsel, designated 45 minutes before trial, was denied a continuance; conviction was reversed); U.S. v. Helwig, 159 F.2d 616 (3rd Cir. 1949) (court-appointed counsel was designated a few minutes before trial; held, right to effective counsel had been denied); Schita v. King, 133 F.2d 283 (8th Cir. 1943).

[12] 145 Wash. Dec. at 117, 273 P.2d at 499 (dissenting opinion).

[13] Glasser v. U.S., 315 U.S. 60, 71 (1942); Gibbs v. Burke, 337 U.S. 773, 781 (1949); State v. Bourse, ...Ore....., 264 P.2d 800, 804-805 (1953).

[14] The dissent pointed up the unusual circumstances involved here. "The unique aspect of the petitioner's case lies in the failure of his court-appointed counsel to insist upon adequate time to prepare the case, in counsel's actual agreement to the early trial date, and *petitioner's apparent consent* to such procedure. In essence, in a case involving the *possibility of a sentence of life imprisonment*, defense counsel, having only a part of Friday and the . . . week-end to investigate and consider the matter, *at his client's request*, agreed to present *no defense*, save the petitioner's own denial of guilt. In one of his affidavits . . . defense counsel stated: 'I believe that I did the best job possible although had I known then what I know now I would have conducted it differently.' 145 Wash. Dec. at 115, 273 P.2d at 498-499. The defendant refused to allow his counsel to use the defense of "frame-up" on the part of the wife because he hoped for a reconciliation with her after the trial; she subsequently divorced the defendant and remarried. 145 Wash. Dec. at 110, 273 P.2d at 496.

[15] 145 Wash. Dec. 575, 277 P.2d 352 (1954).

[16] DeAryan v. Butler, 119 Cal.App.2d 674, 260 P.2d 98 (1953), *cert. denied* 347 U.S. 1012 (1954); Kraus v. City of Cleveland, ...Ohio N.P....., 116 N.E.2d 779 *aff'd.* .....Ohio St....., 121 N.E.2d 311 (1954); Chapman v. City of Shreveport, 225 La. 859,

the counter arguments of the three separate dissents in the *Kaul* case; the extensive treatment given the subject by the members of the Washington court provides a well documented discussion. Excellent notes have appeared in recent periodicals.[17]

The Washington decision warrants additional consideration because of two sidelights to the decision itself. First, the court was divided, five to four, the closest division of any jurisdiction thus far facing the issue.[18] Three of the four dissenters in the *Kaul* case had joined with the majority in an earlier Washington case upholding compulsory X-ray of university students.[19] In that case the issue was basically one of restriction of individual freedom to act or not to act in the exercise of religious belief as opposed to regulation for the protection of society in general. While no question of religious freedom was raised in the instant case, Judge Hill, referring to the X-ray case in his dissent, said: "We were meticulously careful . . . to make it clear that no specific treatment was prescribed by the regulation there in question." He added: "Up to now, the basis for the restriction of liberty of the individual has been that he would not be permitted to jeopardize the health and safety of others."[20]

The general proposition would seem to be that if there is a legitimate public health object sought, and the means employed bear a reasonable relation to that end, the courts will approve the legislative exercise of the police power.[21] With fluoridation the object is the prevention of dental caries; the addition of fluorides to the public water supply is declared to bear a reasonable relation to that end. No court has-indi-

74 So.2d 142 (1954), *dismissed for want of substantial federal question* 348 U.S. 892 (1954); Dowell v. City of Tulsa, ...Okla....., 273 P.2d 859 (1954), *cert. denied* 75 Sup. Ct. 292 (1955).

[17] 4 HASTINGS L. J. 1 (1952) (a discussion of the legal prospects of fluoridation in California prior to the first decided case, DeAryan v. Butler, *supra* note 16); 20 BROOKLYN L. R. 298 (1954) (a discussion of the DeAryan case, noting the court's rejection of the appellant's claim that a present danger must exist before a health measure may be sustained); 5 CATH. U. L. R. 110 (1955) (a discussion of the DeAryan case, Kraus v. City of Cleveland, *supra* note 16, and Chapman v. City of Shreveport, *supra* note 16; the author indicates the limited force of the argument that fluoridation measurably affects only children under the age of 12 and so is for a special class, saying that the whole community will ultimately be benefited since the children will retain the effects throughout their adult lives); 7 ALA. L. REV. 145 (1954) (the note author attacks the decision in the Kraus case, *supra*, on the ground that such a police measure denies the individual's right to treat his health as he deems best; it should be noted that a similar argument was rejected in the cases where raised); 23 GEO. WASH. L. REV. 343 (1955) (an extensive survey of the medical as well as legal aspects of fluoridation, reviewing the cases cited in note 16, *supra*.)

[18] Of the four cases cited in note 16, *supra*, only in the Chapman case was there a dissent and the dissenting opinion is not reported.

[19] State *ex rel.* Holcomb v. Armstrong, 39 Wn.2d 860, 239 P.2d 545 (1952).

[20] 145 Wash. Dec. at 589, 277 P.2d at 361.

[21] 23 GEO. WASH. L. REV. 343, 357 (1955).

cated how far the general proposition might be extended. If medical science should discover a drug for the prevention of cancer, could a city, in the exercise of its police power, add that drug to the water supply? A good affirmative argument could be made on the basis of the fluoridation cases. We are past the point of protecting society from the possible dangers of uncontrolled non-conformity.[22] The individual must accept treatment for dental caries even though his rejection of such treatment, were he free to choose, would injure him alone.[23] If the appellant in the instant case had prevailed the other members of the community would be in no worse danger from his non-conformity than they would be if fluorine treatment had never been discovered. The courts may well be faced with the problem in the future of how far the state may go in the treatment of physical ills; it may even be a question of extension of the police power to the point of paternalism.

The second interesting sidelight on the *Kaul* case is the manner in which the fluoridation was effected. The Chehalis City Council passed an ordinance calling for the addition of fluorides to the water supply. In some instances fluoridation has come via the ballot box but the resistance has been strong.[24] Of course, council action may be subjected to test by ballot.[25] So the situation is presented where pro-fluoridation forces have come away from the courts triumphant but have met with less than resounding success at the polls.[26]

SAMUEL F. PEARCE

Constitutional Law—Location of Executive Agency Offices at the Seat of Government. - In a mandamus action by four private citizen-taxpayers and a domestic corporation of the state the court was asked, in *State* ex rel. *Lemon v. Langlie,* 145 Wash. Dec. 107, 273 P.2d 464 (1954), to compel the governor and the individual heads

[22] This refers to those cases involving vaccination and other health measures. Zucht v. King, 260 U.S. 174 (1922); Jacobson v. Massachusetts, 187 U.S. 174 (1905); State *ex rel.* Holcomb v. Armstrong, *supra* note 19.

[23] The city of Chehalis has but a single water supply and the appellant, as pointed out in the dissent, is left with the alternatives of shipping in untreated water for his consumption, not using water or moving from the city. In some instances the existence of an alternative water supply in the area would weaken the argument. It must be admitted that the appellant's refusal to drink fluoridated water or to take other treatment for dental caries will injure no one but himself since the disease is not contagious. The suggestion that each individual could fluoridate his own water on a voluntary basis has not been accepted. Dowell v. City of Tulsa, *supra* note 16.

[24] According to the Washington State Department of Public Health six cities in Washington have rejected fluoridation when it was put to a vote; three have approved.

[25] Charter of City of Seattle, adopted March 12, 1946, as amended in 1948 and 1950, Art. IV, §1, H. RCW 35.22.200. RCW 35.17.240. These statutory and charter provisions concern the recognition of the referendum as a legislative device.

[26] A recent example is the city of San Diego, California. Its fluoridation ordinance was upheld in DeAryan v. Butler, note 16 *supra.* On June 8, 1954 the electorate voted to stop fluoridation, 49,976 to 41,382. Bulletin No. 748 (Citizens' Medical Reference Bureau, Inc., N.Y. 1954).

of thirteen executive agencies to move the offices of those agencies from Seattle to Olympia, the state capital. Affirming the lower court's action in overruling a demurrer to the petition, the court, in a five to four decision, held: (1) In the absence of a statute governing taxpayers' suits a demand on the proper officer to take action is a condition precedent to the maintenance of a taxpayer's action challenging the validity of what public officers have done or are about to do, unless facts are alleged which show such a demand would have been useless; (2) the courts of the state have jurisdiction to determine questions of the location of the seat of government; (3) the Governor should be dismissed as a respondent because the result of the order directed to the heads of the agencies will be the same whether the Governor is a party or not, the court declining to decide whether mandamus will lie to the Governor; (4) the state constitutional provision for the location of the executive departments of the state, Article III, § 24, in the light of the congressional enabling act and the historical background of the territorial laws, requires the location of the whole of the executive department at the seat of government. The dissent contended that since these executive agencies existing subsequent to the passage of the constitution were created by the legislature, the legislature, in the absence of limitation, has the power to locate the offices of these agencies and that such location is a political, not a constitutional question. See also *Equity* at page 138.

CONTRACTS

Quasi-Contractual Remedy in Unjust Enrichment — Cause of Action. The problem of the quasi-contractual remedy for unjust enrichment was raised in *Mill & Logging Supply Co. v. West Tenino Lumber Co.*[1] One Herrington had been operating a lumber mill in Tenino under the name of Herrington Lumber Mill Co. and since 1939 had been regularly supplied with tools and machinery by the plaintiff and its assignors. On November 23, 1948, he executed a bill of sale for his mill to the Thurston County Investment Co., a co-partnership, which in June 1949 transferred the mill to the defendant. Both of these transfers were unknown to the plaintiff. Herrington continued to hold himself out as the owner, doing business under the old firm name and the plaintiff went on doing business with him as before. In March 1950 a receiver was appointed for the Herrington Lumber Mill Co. and the plaintiff learned for the first time about the change in ownership. The plaintiff brought this action to recover the value of the machines and tools supplied on credit. The complaint failed to allege the relation between Herrington and the defendant. The trial court sustained a demurrer to the complaint and dismissed the action. On appeal the court reversed and remanded the cause for a trial on the merits as to that part of the indebtedness which was incurred since the transfer of the title to the defendant. The decision, following the pleadings of the

[1] 44 Wn.2d 102, 265 P.2d 807 (1954). See also *Corporations* at page 109.