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CRIMINAL LAW

Right to Counsel—Waiver—Indigent Prisoners. In *McClintock v. Rhay*,[1] a habeas corpus proceeding, the Washington Supreme Court was presented with the problem whether an effective waiver of an accused's right to the assistance of counsel may be withdrawn upon request of the accused. After waiving his right to be represented by counsel, petitioner pleaded guilty to a charge of first degree forgery. While a pre-sentence investigation was being conducted, petitioner made a written request to the county prosecutor for the presence of appointed counsel at the judgment proceeding and repeated the request to the court when brought in for final judgment and sentencing. Both requests were denied, and judgment and sentence were entered. From the state penitentiary, petitioner applied for a writ of habeas corpus. Basing its opinion exclusively on the tenth amendment to the Washington constitution,[2] the supreme court vacated the judgment and sentence and ordered that petitioner be returned to the superior court and that counsel be appointed.

The *McClintock* opinion proceeds from the assumption that when brought before the superior court for judgment and sentencing the accused had had a *right* to assistance of counsel, even after the admittedly effective waiver, and addresses itself only to the question whether the right of an indigent prisoner to have court-appointed counsel is co-extensive with an accused's right to be assisted by counsel. Two points arise from this opinion: (1) reinstatement of the right to counsel after an effective waiver of the right, and (2) the application of the tenth amendment to the Washington constitution to such a right.

That an accused's right to counsel may be waived, provided the waiver is intelligent and competent, is beyond question.[3] The matter of withdrawal of such a waiver had not previously arisen in Washington, nor has it arisen in most other jurisdictions. There are a few similar but distinguishable cases[4] in which, after waiver, no request

[1] 152 Wash. Dec. 544, 328 P.2d 369 (1958).

[2] The tenth amendment provides in part the following:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel. . . . In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

[3] The most recent prior Washington cases on this point are Friedbauer v. State, 51 Wn.2d 92, 316 P.2d 117 (1957); *In re* Klapproth v. Squier, 50 Wn.2d 675, 314 P.2d 430 (1957); and *In re* Wilken v. Squier, 50 Wn.2d 58, 309 P.2d 746 (1957). See also *In re* Gensburg v. Smith, 35 Wn.2d 849, 215 P.2d 880 (1950).

[4] In *Ex parte* Connor, 16 Cal.2d 701, 108 P.2d 10, 15 (1940), the accused had at

for counsel was made of anyone until the court had convened and the trial had, or was about to be, begun. In these cases the appellate courts mentioned avoidance of unnecessary delay as a reason for refusing to upset the convictions that followed refusal of the requests, and suggested that had the requests been more timely the result might have been different. In the *McClintock* case, the accused had requested the appointment of counsel apparently well before judgment was to be rendered, thereby negativing any suspicion that he was more interested in waging a delaying action than in being represented by counsel. On this ground the cases can be distinguished.

The fact that petitioner's first request was directed to the prosecuting attorney rather than to the court is probably of no importance, in the absence of statutory provision indicating to whom the request, if originated after arraignment, is to be made.[5] It is a simple enough matter to arrive at the view that the duties of the prosecuting attorney as an officer of the court include relaying to the court an accused's request for the appointment of, or for an opportunity to secure, counsel. If this conclusion is accepted, it can be said that in the *McClintock* case the request was timely and was not intended to delay the judicial proceedings, and that the Washington position does not differ from the other jurisdictions cited.

The Washington court, however, did not mention timeliness of the request as a matter for consideration. It could be argued from this case that waiver of the right to counsel may be withdrawn at any time and that a request for a continuance, at any stage of a criminal prosecution, must be granted if the accused wants to secure

arraignment waived his right to counsel and pleaded not guilty. At the subsequent trial, the accused refused to reply to the judge's query about counsel and did not demand counsel until given an opportunity to cross-examine the first witness for the prosecution. Upon learning of the prior effective waiver, the trial judge refused to grant a continuance until counsel had been obtained, and the accused was convicted. On petition for a writ of habeas corpus, the California Supreme Court said of the accused that "his attitude, both at that time [arraignment] and at the commencement of the trial, was equivalent to a final declination of counsel. . . , and precluded him from again raising the question when the trial was well under way." In State v. Fowler, 59 Mont. 346, 196 Pac. 992 (1921), the accused refused counsel and pleaded not guilty. Months later, the case came on for trial, and the accused's request for time to obtain counsel was denied. It was held that the accused had had ample time to procure counsel and that no constitutional right had been denied by refusing to delay the trial.

See also State v. McKinnon, 41 Nev. 182, 168 Pac. 330 (1917).

[5] RCW 10.40.030 deals with appointment of counsel for indigents at the time of arraignment. RCW 10.01.110 requires the appointment of counsel when an indigent prisoner *"shall be arraigned* upon the charge that he has committed any felony," and proceeds to the matter of compensation for such counsel. (Emphasis added.) RCW 10.46.050 is simply a re-phrasing of that portion of the tenth amendment dealing with the right to be heard in person or by counsel and the right of compulsory process for witnesses.

the assistance of counsel. Adoption of this argument would place Washington in a position contrary to that of those few other states in which this question has arisen. The basis for the difference in views is the value of expeditious judicial proceedings weighed against insuring that the accused, when he desires it, may enjoy "the guiding hand of counsel at every step in the proceedings against him," [6] even at the risk of having this safeguard abused.

Assuming with the court in the *McClintock* case that a waiver of the right to counsel is effective only until counsel is requested, the consideration is presented whether the tenth amendment can justifiably be construed to give all indigent prisoners a right to court-appointed counsel. After setting forth certain rights, including the right to counsel, the amendment states that: "[I]n no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." From the quoted passage the court decided, first, that "a defendant in a criminal proceeding is an *accused person* until formal judgment and sentence have been entered," [7] and, second, that an indigent accused person "is entitled, *under amendment 10,* to have an attorney appointed *at public expense*. . . ." [8] (Emphasis added.)

The tenth amendment does not distinguish between an indigent prisoner and one who can afford privately enlisted counsel; the distinction is one made by the Washington court in this case. No attempt was made to ground the distinction on any statute, although it is possible to see in RCW 10.01.110[9] an ambiguity in the phrase "shall be arraigned" which could be interpreted "shall have been arraigned."

It should be observed that the Federal Constitution is not applicable in this situation. The due process clause of the fourteenth amendment does not include a right to be appointed counsel in all cases,[10] and the sixth amendment does not apply to proceedings in state courts.[11]

A literal reading of the Washington tenth amendment leads to the conclusion that an accused person who cannot or will not pay any fee to secure the assistance of counsel has a right to have counsel

[6] Powell v. Alabama, 287 U.S. 45, 69 (1932), a case often cited and quoted on the value of the right to counsel.
[7] 152 Wash. Dec. 544, 545, 328 P.2d 369, 370 (1958).
[8] *Ibid.*
[9] *Supra* note 5.
[10] Betts v. Brady, 316 U.S. 455 (1942); Note, 30 WASH. L. REV. 88 n. 7 (1954).
[11] Betts v. Brady, *ibid.*, cases cited n. 9.

appointed to work for nothing until judgment has been rendered. It is unlikely that such a novel meaning was intended.

An alternative interpretation is that given to the amendment in the *McClintock* opinion: that the language of the amendment imperfectly states that an indigent accused person is entitled to have an attorney appointed at public expense.

Largely because of the lack of supporting reasoning in the opinion, the total effect of the *McClintock* case on Washington law is not clear. That a timely request for the assistance of counsel must be granted, even after the right has been waived, seems to be certain. The broad language implying a right to secure counsel, either privately or through the court, at any moment in the proceedings, will no doubt be modified when a request has been refused because it is clearly a tactical stalling device. The extent of the modification (i.e., the willingness to tolerate delay in criminal proceedings) cannot be ascertained from the *McClintock* case.

TIMOTHY R. CLIFFORD

Aiding and Abetting Distinguished—Effect of Knowledge. In *State v. Hinkley*[1] the accused had been convicted of aiding and abetting the commission of a crime. The correctness of the trial judge's instructions regarding the term "abet"[2] was affirmed by the supreme court, which said:

> Although the word "aid" does not imply guilty knowledge or felonious intent, the word "abet" includes *knowledge* of the wrongful purpose of the perpetrator. . . .[3]

The construction of "aid" was unnecessary in this case, and is therefore dictum. But, in the light of the Washington statute, it is dangerous dictum. RCW 9.01.030 makes punishable as a principal every person "concerned" in the commission of a crime, whether he participates directly or "aids *or* abets." (Emphasis added.) Therefore, if "aid" does not imply guilty knowledge or felonious intent, one who innocently aids a criminal is as guilty under the statute as one who knows the use to which his aid will be put. Surely the legislature did not intend this result.

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[1] 152 Wash. Dec. 356, 325 P.2d 889 (1958).

[2] The instructions were:

> [B]efore you can find the defendant Hinkley guilty of aiding and abetting . . . , you must first find that he, the said Hinkley, *did so knowingly* and with criminal intent. To abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting or aiding in the commission of such criminal offense. (Emphasis added.)

[3] 152 Wash. Dec. 356, 358, 325 P.2d 889, 891 (1958).

The definition adopted in the *Hinkley* case was based on the California cases cited therein.[4] The California Penal Code makes punishable as principals all persons who "aid *and* abet" in the commission of a felony.[5] (Emphasis added.) Under a statute using the conjunctive, it is immaterial that cognizance of guilt is an element of only one of the acts. In both California cases cited in the *Hinkley* opinion, it was observed that aiding without abetting (i.e., without guilty knowledge) is not a crime.

Even with a statute using the conjunctive, the California court has not been consistent in its view that aiding does not require knowledge of a wrongful purpose, stating in other cases[6] that an aider or abettor would be guilty only if he acted with knowledge or intent.

From the foregoing it can be seen that the cases cited to support the holding in the *Hinkley* case are inapposite, because they deal with different statutory language, because they do not abrogate knowledge of wrongful purpose as a requirement for conviction, and because they are modified by statements in other cases which are inconsistent with them.

One way to avoid punishing the innocent with the guilty under RCW 9.01.030 (and it is certain that a way will be found) is to construe "concerned" in the statute in such a way that it excludes those who do not have knowledge of the wrongful purpose of the perpetrator.

An alternative solution is that employed by California in *Barrett v. Board of Osteopathic Examiners.*[7] A statute[8] defined unprofessional conduct for a physician, in part, as "aiding or abetting" an unlicensed person to practice medicine. The opinion reversing the revocation of a physician's license says that a literal interpretation of the statute would lead to a conviction of innocent persons and that:

> While it cannot be assumed that the terms were intended to be used in the conjunctive, it must be assumed that it was not the intention of the legislature to make the mere "aiding" in the act a violation of the law unless such aid be wrongfully and knowingly extended.[9]

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[4] People v. Terman, 4 Cal. App. 2d 345, 40 P.2d 915 (1935), and People v. Dole, 122 Cal. 486, 55 Pac. 581 (1898).
[5] CAL. PENAL CODE § 31.
[6] People v. Beltran, 94 Cal. App. 2d 197, 210 P.2d 238 (1949); People v. Doble, 203 Cal. 510, 265 Pac. 184 (1928).
[7] 4 Cal. App. 2d 135, 40 P.2d 923 (1935).
[8] CAL. BUSINESS AND PROFESSIONS CODE § 2392.
[9] 4 Cal. App. 2d 135, 40 P.2d 923, 925 (1935).

The result is the same: "aid" imputes no knowledge; "aiding," unmodified, is not criminal, regardless of what the statute says; to be criminal, "aid" must include knowledge of the wrongful purpose of the perpetrator.

A third solution, the simplest and the most direct, is to refuse to be influenced by the dictum in the *Hinkley* case.

TIMOTHY R. CLIFFORD

DAMAGES

Damages for Mental Suffering Resulting from Breach of Contract. In *Carpenter v. Moore*[1] an unusual aspect of the law of contract damages was re-examined by the Washington Supreme Court. Since the emergence of *Hadley v. Baxendale*,[2] the rule has been that damages are allowed for only those injuries that the defendant had reason to foresee as a probable result of his breach at the time the contract was made. One of the postulates to evolve from the *Hadley* rule was that in breach of contract actions, damages for mental suffering are not allowable.[3] The issue raised in the *Carpenter* case was whether this aforementioned postulate ought to be followed strictly, or whether to allow exceptions in certain cases involving contracts of such nature that it was foreseeable at the time the contract was made that mental anguish would result from a breach of such contract.

The controversy in the *Carpenter* case arose in the following manner: The defendant, a dentist, agreed to make partial plates for the plaintiff, and he expressly guaranteed that all of the work would be done to her satisfaction. The agreed price for the plates was four hundred dollars. The plates did not fit the plaintiff's mouth properly, causing her pain and discomfort. They also caused growths to appear that had to be removed by a surgeon. The plaintiff sued on grounds of malpractice but failed to prove negligence on the part of the dentist. The trial court allowed the pleadings to be amended to an action for breach of contract. Judgment for the plaintiff included four hundred dollars as the price paid for the partial plates and seven hundred and fifty dollars for plain and suffering. On appeal the judgment was modified, deleting the damages for pain and suffering.

It may first be observed that the *Carpenter* case did not present the

[1] 51 Wn.2d 795, 322 P.2d 125 (1958).
[2] 9 Exch. 341 (1854).
[3] Robinson v. Western Union Tel. Co., 24 Ky.L.Rep. 452, 68 S.W. 656 (1902); Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955).