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Criminal Law - Court Appointed Counsel - Right to Adequate Compensation

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also leave open the possibility that, because of the uncontrollable nature of his drinking, any intoxication of the chronic alcoholic will be treated as involuntary, thereby possibly excusing a murder, a rape, or an assault and battery committed under the influence of intoxicants. It remains to be seen whether such an extended application of chronic alcoholism as a defense will occur.

Glenn Chertkow

CRIMINAL LAW–COURT APPOINTED COUNSEL–RIGHT TO ADEQUATE COMPENSATION

Five attorneys were appointed to defend four indigent prisoners, who had been indicted for murdering three guards during a prison riot. The trial was held approximately 150 miles from the attorneys' residences, and they were forced by necessity to take up temporary residence in the locale of the trial court for the duration of the trial. The attorneys sued the county for compensation for their services and out-of-pocket expenses. The trial court found for the attorneys, but the county claimed that there were no funds available with which to pay the attorneys. The Supreme Court affirmed the decision of the lower court and ordered the State of Illinois to reimburse and compensate the attorneys. In dong so, the Supreme Court ruled a state statute limiting compensation of the appointed attorneys unconstitutional in the case at bar. *People v. Randolph*, 35 Ill. 2d 24, 219 N.E.2d 337 (1966).

The *Randolph* case is significant because it is a case of first impression which requires the state to bear the cost of criminal prosecutions, including compensation and reimbursement for attorneys appointed as defense counsel in such prosecutions. The purpose of this note is to analyze the reasoning in the *Randolph* case by examining the precedents used, and the constitutional and statutory provisions considered by the court in its decision, and thereby show the developing recognition of the courts of the practical needs for the implementing of the recent decisions of *Gideon v. Wainwright*[1], *Miranda v. Arizona*[2], and *Escobedo v. Illinois*.[3]

The Illinois Supreme Court's reasoning can be divided into four considerations: first, the duty of the judiciary to provide indigent defendants with counsel; second, the inherent power of the court to regulate and determine the obligations of the legal profession; third, the effect of statutes limiting compensation of court appointed attorneys; and lastly, how the court's order to compensate the attorneys can be executed.

The first consideration involves both constitutional and statutory provisions, and the tradition of the legal profession. The sixth amendment to

[1] 372 U.S. 335 (1963). [2] 384 U.S. 436 (1966). [3] 378 U.S. 478 (1964).

the United States Constitution provides that "in all criminal prosecution, the accused shall enjoy the right . . . of counsel for his defense."[4] This amendment was made applicable to the states by the United States Supreme Court in *Gideon v. Wainwright* where the court said:

> we think . . . that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgement are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.[5]

Illinois, both in the Bill of Rights of its state constitution,[6] and in its Code of Criminal Procedure,[7] guarantees the defendant in a criminal prosecution the right of counsel for his defense.

Traditionally, the attorney is viewed as an officer of the court and as such his purpose is to assist in the administration of justice.[8] And, as an officer of the court, every member of the bar must be prepared to defend a pauper accused of a crime, should the court so order.[9] Historically the profession has borne the burden without reimbursement or compensation,[10] but in 1966 the Supreme Court of New Jersey, in *State v. Rush*,[11] definitively stated that, in view of increasing numbers of increasingly complex criminal prosecutions involving indigent defendants, the burden upon the profession and its members had become too severe.[12]

The *Rush* case is extremely important to the development of the notion that attorneys appointed to defend indigents must be compensated, and to the *Randolph* case, principally for two reasons. First, the New Jersey Supreme Court carefully explained its logic, and secondly, it is the most recent case on point.[13] Because the Illinois Supreme Court in holding that the judiciary has "the inherent power . . . to regulate the practice of law",[14] relied almost exclusively[15] on the logic in the *Rush* case, it is essential that the New Jersey court's approach be explained here.

The New Jersey court, in determining if lawyers appointed to defend indigents should be compensated by the state, considered three issues: one, whether the court had the authority to deal with the subject; two, if such authority existed, whether relief should be granted; and three,

[4] U.S. CONST. amend. VI. [5] Gideon v. Wainwright, *supra* note 1, at 341.

[6] ILL. CONST. art. II,§ 9 (1870).

[7] ILL. REV. STAT. ch. 38, § 113–3(a) (1965).

[8] *In re* Integration of Nebraska State Bar Ass'n., 133 Neb. 283, 275 N.W. 265 (1937); Jackson v. State, 413 P.2d 488 (Alaska 1966).

[9] United States v. Dillon, 346 F. 2d 633 (9th Cir. 1965).

[10] *Ibid.* [11] 46 N.J. 399, 217 A.2d 441 (1966). [12] *Ibid.*

[13] See State v. Loray, 46 N.J. 417, 217 A.2d 450 (1966); State v. Sullivan, 46 N.J. 420, 217 A.2d 452 (1966). *Cf.* United States v. Pope, 251 F.Supp. 234 (D. Neb. 1966).

[14] People v. Randolph, 35 Ill.2d 24, 219 N.E.2d 337 (1966). [15] *Ibid.*

whether authority existed for payment by the state to the attorneys. These are the underlying issues considered by the Illinois court in *Randolph,* but the Illinois court does not explain its reasoning; rather it draws its conclusions from the *Rush* decision.

The first issue involves the notion of the inherent power of the courts. Although courts are reluctant to specifically define the notion, it refers to those powers which are "essential to the existance, dignity and functions of the court from the very fact that it is a court."[16] These powers exist "irrespective of legislative or constitutional grant", and the only limitation "on the courts' inherent power is that the expense incurred or the thing done must be reasonably necessary to preserve the courts' existence and protect it in the orderly administration."[17]

The court in the *Rush* case said that the determination of the obligations of the members of legal profession was the "exclusive responsibility" of the judiciary.[18] It reasoned that the attorney did not owe the indigent a personal duty to defend him, but rather the duty owed by the attorney is owed to the court, and it is the courts' call that he must answer. The duty is incident to an attorney's right to practice, and it is the court's inherent power to determine what are the terms, obligations, and conditions incident to the right to practice.

Finding that they did have the authority to deal with the subject, the New Jersey court examined the second issue: should relief be granted? The court considered the historical rise in indigent criminal cases and the increasing complexity in trying criminal cases.[19] They concluded that "the burden is more than the profession alone should shoulder, and hence [the courts] are compelled to relieve the profession of it."[20]

The reasoning of the New Jersey court concerning the third issue, whether the courts had the authority to transfer the burden on the state, was quite clear. It is the responsibility of the state to provide for the prosecution of criminal causes and to pay for expenses which are incurred in doing so. The state is obliged by the United States Constitution to provide for a fair trial of defendants charged with a crime and to provide them with counsel if they are indigent. Therefore the reimbursement and compensation of the attorneys appointed to defend indigents is an expense

[16] *In re* Integration of Nebraska State Bar Assn., *supra* note 8.

[17] State *ex rel.* Gentry v. Becker, 351 Mo. 769, 778, 174 S.W.2d 181, 183 (1943). See also *In re* Assignment of Huff, 352 Mich. 402, 91 N.W.2d 613 (1958).

[18] State v. Rush, *supra* note 11.

[19] See Cleary, *Law Students in Criminal Law Practice,* 16 DEPAUL L. REV. 1 (1966) for an excellent discussion of the problems involved with providing defense counsel for indigent defendants.

[20] State v. Rush, *supra* note 11, at 412, 217 A.2d at 448.

necessarily incurred in such prosecution and is thus properly borne by the taxpayer.[21]

Affirming the logic in the *Rush* decision, the Illinois Supreme court decided:

> At this time it is necessary to hold only that in the extraordinary circumstances presented in this case, the court's inherent power to appoint counsel also necessarily includes the power to enter an appropriate order ensuring that counsel do not suffer an intolerable sacrifice and burden and that the indigent defendants' right to counsel is protected . . . if such judicial power did not exist, the courts probably could not proceed, and certainly could not conclude the trial of indigent defendants in cases such as this.[22]

The third consideration of the Illinois Supreme Court was the effect of statutory limitations[23] on the compensation and reimbursement by the state of court appointed counsel. In view of the court's conclusion that it had the inherent power to transfer the burden of paying the expenses of defending indigents from the members of the bar to the taxpayer, and that that power existed irrespective of the legislature, the court declared that unreasonable limitation of reimbursement and compensation by statute was unconstitutional.[24]

Finally, the court considered whether there existed authority by which the state could reimburse and compensate the attorneys. This issue involves article IV, section 17, of the Illinois State Constitution which provides that there can be no expenditure of state funds except "in pursuance of an appropriation made by law."[25] The question was whether this provision prevented payment by the state to the attorneys in excess of the statutory appropriation. Previous interpretations of article IV, section 17 have held that it is sufficient that "the expenditure is within the proper purposes of the public authority expending the funds and is reasonably within the broad category of an appropriation made by the General Assembly."[26]

The Illinois court went further, maintaining that article IV, section 18 required the General Assembly to provide "appropriations necessary

[21] State v. Rush, *supra* note 11.

[22] People v. Randolph, *supra* note 14, at 29, 219 N.E.2d at 340.

[23] ILL. REV. STAT. ch. 38, § 113-3(c)(d)(e) (1965).

[24] The Illinois Supreme Court stated, in the dictum of its decision, that the statute was constitutional on its face; that is, the limitation would be upheld where it could reasonably and appropriately be applied.

[25] ILL. CONST. art. IV, § 17 (1870).

[26] People v. Randolph, *supra* note 14, at 30-31, 219 N.E.2d at 341. See also Turkovich v. Board of Trustees of the Univ. of Illinois, 11 Ill.2d 460, 143 N.E.2d 229 (1957).

for the ordinary and contingent expenses of the government"[27] and that article IV, section 17 was satisfied as long as the order by the court for the payment of funds by the state or an agency of the state, is reasonably within the appropriation made by the legislature as an ordinary and contingent expense.[28] The court held that these constitutional provisions were satisfied by the State Penitentiary Act which provides "that all fees and costs arising from the prosecution of convicts for crimes committed within the penitentiary system, which would otherwise be paid by the county, shall be paid by the State."[29] The court concludes that the compensation of attorneys appointed to defend indigent defendants accused of a crime involving the penitentiary system should properly be paid out of the funds provided by this Act.[30]

There arises a question as to whether the court had to rely on the Penitentiary Act in order to order execution of its judgment, or whether it could order the reimbursement of the attorneys in the absence of such a statute. The answer appears to be that the Act was not essential. The court declared that compensation of court appointed counsel is properly within the costs incurred by the state when it performs its obligation to prosecute criminal causes, that under the Illinois Constitution the legislature must provide for the ordinary and contingent expenses of government, and that the legislature cannot unreasonably limit the reimbursement and compensation of appointed counsel. But also important to this question is the fact that in the dictum of both the *Rush* and *Randolph* cases, the courts stated that the legislature should provide a permanent solution to the problem.[31]

The import of the *Randolph* case is inescapable. By it, attorneys appointed by the courts to defend indigents charged with a crime may recover from the state for aggravated and extraordinary economic loss, in excess of present statutory provisions. But more importantly, it is a recognition, and thereby an affirmation, of prior recent decisions,[32] that in order to implement the recent decisions of *Gideon, Miranda* and *Es-*

[27] Turkovich v. Board of Trustees of the Univ. of Illinois, *supra* note 26, at 467, 143 N.E.2d at 232.

[28] People v. Randolph, *supra* note 14; Turkovich v. Board of Trustees of the Univ. of Illinois, *supra* note 26; Owens v. Green, 400 Ill. 380, 81 N.E.2d 149 (1948).

[29] ILL. REV. STAT. ch. 108, § 118 (1965).

[30] People v. Randolph, *supra* note 14.

[31] *Ibid.* See also State v. Rush, *supra* note 11.

[32] United States v. Pope, *supra* note 13; Johnson and Douglas v. Superior Court, 2 Ariz. App. 407, 409 P.2d 566 (1966); State v. Superior Court, 2 Ariz. App. 466, 409 P.2d 750 (1966); Lascher v. State, 64 C.2d 687, 414 P.2d 398 (1966); Schmidt v. Uhlenhopp, ——Iowa——, 140 N.W.2d 118 (1966).

cobedo, the state must accept the responsibility for compensating appointed counsel, for the profession, in view of today's complex and lengthy trials, cannot provide, by itself, adequate and efficient defenses for the indigent without ruinous consequences.

Bruce Petesch

CRIMINAL LAW–PROSECUTOR'S CLOSING ARGUMENT–IMPROPER COMMENT VERSUS PREJUDICIAL INFRINGEMENT

The defendant, John Woodards, was charged with the brutal slaying of Margaret Van Arsdale, an eighty-five year old woman, and was convicted of first degree murder. The Court of Appeals for Lorain County, and the Ohio Supreme Court considered the alleged prejudicial statements in the prosecutor's closing argument and held that while the remarks were intemperate, they were not prejudicial. *State v. Woodards,* 6 Ohio St.2d 14, 215 N.E.2d 568 (1966).

It is the purpose of this note to illustrate the wide latitude presently allowed a prosecutor in the closing argument of a criminal case.[1] To do so, this note will discuss the fundamental rules relating to improper argument which were at issue in the *Woodards* case. It will then be possible to delve into the considerations which determine whether or not a prejudicial infringement necessitating reversal has occurred. The most significant of these considerations are: whether or not the prosecutor's argument is supported by the evidence or is merely personal opinion; the strength of the states evidence; the nature of the crime; and whether opposing counsel made timely objection. The *Woodards* case is noteworthy since it demonstrates how a court weighs these considerations where there has been an infringement of the rules governing proper argument.

The first rule of significance deals with comment on the character and reputation of the accused. Ordinarily, where the accused does not put his character in issue by introducing evidence as to his good character, the prosecutor cannot comment thereon.[2] Secondly, it is improper to indulge

[1] *E.g.,* United States v. Mucherino, 311 F.2d 172 (4th Cir. 1962); State v. Dowthard, 92 Ariz. 44, 373 P.2d 357 (1962); People v. Weire, 198 Cal. App. 2d 138, 17 Cal. Rptr. 659 (1961); State v. Stacy, 355 S.W.2d 377 (Mo. 1962); State v. Christopher, 258 N.C. 249, 128 S.E.2d 667 (1962); Young v. State, 357 P.2d 562 (Okla. 1960); State v. Edgeworth, 239 S.C. 10, 121 S.E.2d 248 (1961); State v. Burtts, 132 N.W.2d 209 (S.D. 1964).

[2] Bland v. State, 210 Ga. 100, 78 S.E.2d 51 (1953); State v. Von Atzinger, 81 N.J.Super. 509, 196 A.2d 241 (1963); People v. Hentenyl, 304 N.Y. 80, 106 N.E.2d 20 (1952); State v. Roach, 248 N.C. 63, 102 S.E.2d 413 (1958); State v. Herrera, 236 Ore. 1, 386 P.2d 448 (1963); Clark v. State, 156 Tex. Crim. 526, 244 S.W.2d 218 (1951); State v. Lindsey, 185 Wash. 206, 52 P.2d 1246 (1936).