Case Western Reserve Law Review

Volume 14 | Issue 2 Article 23

1963

Constitutional Law--Indigent's Right to Assigned Counsel in Non-Capital State Cases

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Recent Decisions

CONSTITUTIONAL LAW — INDIGENT'S RIGHT TO ASSIGNED COUNSEL IN NON-CAPITAL STATE CASES

Carnley v. Cochran, 369 U.S. 506 (1962)

The "fair trial" rule of *Betts v. Brady*[1] has survived twenty years of direct and indirect attack. Under this rule, the controlling law in non-capital state cases, the right to court appointed counsel depends upon an "appraisal of the totality of facts in a given case."[2] The rule requires appointment of counsel only when "special circumstances" exist which render a fair trial impossible.[3] But, by virtue of *Carnley v. Cochran*,[4] the factors constituting "special circumstances" have been so extended as to cast doubt upon the future longevity of the rule.

Carnley instituted habeas corpus proceedings in the Florida Supreme Court, attacking the validity of his conviction[5] on the ground that his trial without assistance of counsel was an unconstitutional denial of due process of law. Without hearing the merits of Carnley's claim, the Florida Supreme Court discharged the writ.[6] The United States Supreme Court reversed and remanded,[7] finding sufficient "special circumstances" to require the assistance of counsel.[8]

In regard to the issue of "special circumstances," the Court determined that the assistance of counsel might have benefited Carnley in several respects. First, because of the complexity of the statutory provisions applicable to Carnley's offense,[9] an attorney might have successfully

1. 316 U.S. 455 (1942).

2. *Id.* at 462.

3. *Id.* at 473.

4. 369 U.S. 506 (1962).

5. Petitioner was convicted on two counts, the first charging "incest" and the second charging "fondling." He was sentenced to a term of six months to twenty years under the Child Molester Act. FLA. STAT. ANN. § 801.03(1) (1959).

6. Carnley v. Cochran, 123 So. 2d 249 (Fla. 1960).

7. Although requested by Carnley to reverse the decision of the Florida Supreme Court (Brief for Petitioner, p. 21), the Court reversed and remanded the case for a hearing on the question of waiver of the right to counsel.

8. Mr. Justice Black, while concurring in the result, expressed the view that the guarantees of the sixth amendment should be applicable to the states through the due process clause of the fourteenth amendment. He was also of the opinion that *Betts v. Brady* should be overruled. Carnley v. Cochran, 369 U.S. 506, 519 (1962) (concurring opinion). Mr. Justice Douglas, joined by Chief Justice Warren, also concurred in the result but thought that *Betts v. Brady* should be overruled. *Id.* at 520.

9. Carnley v. Cochran, 369 U.S. 506, 507-08 (1962). FLA. STAT. ANN. §§ 741.22, 800.04 (1959) deal generally with the crimes of incest and assault in a lewd, lascivious, and indecent manner. FLA. STAT. ANN. § 801.02 (1959) is applicable to both offenses if committed on a person fourteen years of age or younger.

attacked the validity of the conviction as being repugnant to the Florida Constitution.[10] Second, even if the conviction were valid, special provisions of the Child Molester Act might have been invoked for Carnley's benefit.[11] Third, the Court found that Carnley's illiteracy coupled with the trial judge's inadequate advice to him regarding his rights bolstered his allegation of the unfairness of a trial without the aid of counsel.[12]

In so far as "special circumstances" were found to exist because of the complexity of the legal issues involved and because of Carnley's illiteracy, this decision is in accord with prior Supreme Court determinations.[13] However, in regard to the inadequate advice of the trial judge, the Court found "special circumstances" to exist where it had not found them before.[14] It pointed out that, although the trial judge had advised Carnley of his right not to testify, he had not informed him of the consequences of testifying. Moreover, Carnley had not been advised of his right to examine prospective jurors on voir dire, of his right to submit instructions for the jury, nor of his right to object to the instructions that had been given.[15] The Court also pointed out that no objections had been entered by Carnley, nor was there sufficient evidence of a competent cross-examination of the prosecution's witnesses.[16]

Although the Court did not state that the trial judge's inadequate advice and protection of Carnley's rights were sufficient, in themselves,

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10. Carnley v. Cochran, 369 U.S. 506, 508 n.2, citing Copeland v. State, 76 So. 2d 137 (Fla. 1954). "In the Copeland case . . . the Florida Supreme Court held that the inclusion of rape in the Child Molester Act — with its attendant alteration in the consequences of that offense when committed against a child of 14 or younger — ran afoul of the State Constitution because the Act embraced 11 distinct crimes separately dealt with in other statutes, because the Act failed to set forth at length the general rape provisions which were *pro tanto* amended, and because the title of the Act failed to give notice that the consequences of rape had been changed." *Ibid.*

11. Carnley v. Cochran, 369 U.S. 506, 509-10 (1962). FLA. STAT. ANN. § 801.03(1) (1959) provides for the alternative punishments of imprisonment or commitment to a state hospital. FLA. STAT. ANN. § 801.08 (1959) allows for the suspension of the sentence or probation. FLA. STAT. ANN. § 801.10 (1959) enables the accused to petition the court for a psychiatric examination.

12. Carnley v. Cochran, 369 U.S. 506, 510-11 (1962).

13. Chewning v. Cunningham, 368 U.S. 443 (1961) (recidivist statute); McNeal v. Culver, 365 U.S. 109 (1961) (question of whether the crime charged actually existed); Rice v. Olson, 324 U.S. 786 (1945) (lack of jurisdiction over the offense).

Illiteracy or semi-literacy has been a factor in many cases. See, *e.g.*, McNeal v. Culver, 365 U.S. 109 (1961); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Wade v. Mayo, 334 U.S. 672 (1948).

14. In other cases errors of the trial judge have been held to constitute "special circumstances," but the errors, in those cases were of a more serious nature than those in *Carnley*. See Hudson v. North Carolina, 363 U.S. 697 (1960) (failure of court to give cautionary instructions when co-defendant confessed in open court before the jury); Cash v. Culver, 358 U.S. 633 (1959) (admission of questionable testimony); Gibbs v. Burke, 337 U.S. 773 (1949) (admission of inadmissable hearsay and incompetent evidence).

15. Carnley v. Cochran, 369 U.S. 506, 511 (1962).

16. *Ibid.*

to render the trial unfair, it stated that they were significant.[17] Since no one factor is controlling[18] and one factor may be sufficient,[19] it is reasonable to assume that, had there been only these "special circumstances" present, the same result would have been reached. Therefore, the Court has, in effect, extended "special circumstances" to include errors normally occurring in any trial and, in so doing, has eliminated the standard of *Betts v. Brady* without expressly overruling that case.

Although the problems created by the "fair trial" rule are numerous, the most significant is the vagueness of the standard. The factors constituting "special circumstances" have varied from case to case,[20] and it is virtually impossible to ascertain at the outset of the trial if such factors are present.[21] Thus, the trial court has been left without a meaningful criterion for determining whether counsel is necessary to prevent a denial of due process of law. Since in *Carnley v. Cochran* "special circumstances" were found to exist in the commonly occurring errors of a normal trial, it would seem that the only safe course for a state trial court to follow to prevent a subsequent vitiation of its decision would be to appoint counsel in all non-capital cases.

For all practical purposes the "fair trial" rule of *Betts v. Brady* has been abrogated, and, for the state's process to constitute due process of law, the court must appoint counsel in non-capital cases as it is presently required to do in capital cases.[22] The only step remaining is the inevitable, formal overruling of *Betts v. Brady*.[23]

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17. *Ibid.*

18. Quicksall v. State, 339 U.S. 660, 666 (1950); Gibbs v. Burke, 337 U.S. 773, 780 (1949); Bute v. Illinois, 333 U.S. 640, 675 (1948).

19. See Hudson v. North Carolina, 363 U.S. 697 (1960) (trial court's failure to give appropriate instructions); Uveges v. Pennsylvania, 335 U.S. 437 (1948) (youth); White v. Ragen, 324 U.S. 760 (1945) (accused tried without opportunity for preparation).

20. *E.g., compare* DeMeerleer v. Michigan, 329 U.S. 663 (1947), *with* Gayes v. New York, 332 U.S. 145 (1947).

21. See Gibbs v. Burke, 337 U.S. 773 (1949); Buchanan v. O'Brien, 181 F.2d 601 (1st Cir. 1950).

22. See Tomkins v. Missouri, 323 U.S. 485 (1945).

23. The formal overruling of *Betts v. Brady* is very likely to occur in either this term of the Supreme Court or the next. This seems evident in view of the fact that the Court in granting certiorai has instructed the petitioner to prepare argument on whether it should reconsider the decision of *Betts v. Brady*. Gideon v. Cochran, *cert. granted*, 37. U.S. 908 (1962).