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Criminal Law: Waiver of Counsel by Minor Defendants

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This reappraisal of the standard of care to be applied to minors in the operation of dangerous instrumentalities was followed by a great number of jurisdictions. Although at this time the courts are still divided on the point, the *Dellwo* view appears to serve as a model for the modern trend of American courts.

The *Adams* case seems to narrow the gap between the *Dellwo* view and that of the *Restatement's* as to the appropriate standard of care to be applied to a primarily negligent minor. The case in its holding, although not adopting the *Restatement* view completely, unmistakably points towards a single standard for all engaged in adult activities.

It is believed that the *Dellwo* trend, as exemplified in the *Adams* case, has gathered progressive momentum. It is clear that it foreshadows the rule of the future, now inferentially approved by the New Mexico court; that minors taking part in activities normally engaged in by adults are to be held to an objective standard of care.

Hopefully, Oklahoma, and other jurisdictions will follow this trend.

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CRIMINAL LAW: WAIVER OF COUNSEL BY MINOR DEFENDANTS

"The accused may, of course, intelligently and knowingly waive . . . his right to counsel either at a pretrial stage or at the trial." [1]

In conjunction with many recent decisions concerning constitutional rights of an accused in criminal proceedings, perhaps one of the most troublesome questions facing our courts today concerns the minor defendant. Should he be permitted to waive his right to counsel, or must the court appoint counsel for him regardless of his wishes, expressed or implied? In the past courts have been reluctant to state that minority is in itself sufficient to require the appointment of counsel for a defendant.[2] But with a continuing emphasis upon due process of law as it concerns the right of an accused to a fair and impartial trial, in the future a minor may be deemed incapable of waiving his right to counsel. This may be true particularly in cases where he is charged with a felony or a serious misdemeanor.[3]

[1] Escobedo v. Illinois, 378 U.S. 478, n.14 (1964).

[2] *E.g.*, Commonwealth *ex rel.* Popovich v. Claudy, 170 Pa. Super. 482, 87 A.2d 489 (1952); State v. Banford, 13 Utah 2d 63, 368 P.2d 473 (1962); State v. Angevine, 62 Wash.2d 980, 385 P.2d 329 (1963).

[3] See Annot., A.L.R.2d 1160, 1185 (1960).

A recent Arkansas case which seemingly demonstrates this growing concern for the minor defendant is *Meeks v. State*,[4] in which the defendant Meeks, nineteen years of age, was charged with burglarly and sentenced to six years in the penitentiary upon his plea of guilty. He was offered counsel by the court, but this offer was refused. His motion to set aside judgment and that he be allowed to enter a plea of not guilty was overruled by the trial court. Citing *Swagger v. State*[5] as controlling, the supreme court reversed and remanded the cause, stating:". . . . [It is] error to permit a young, inexperienced person to plead guilty to a serious charge where he has no attorney."[6] But *Swagger* could have been distinguished from *Meeks*. Two of the three justices who dissented in *Meeks* pointed out distinct differences between the two cases. Swagger, a nineteen-year Negro boy, pleaded guilty to a charge of assault to kill and was given the maximum sentence of twenty-one years in the penitentiary. After his commitment, he filed a motion to set aside the judgment and order of commitment on the ground that he was not represented by counsel at the time he entered his plea of guilty. The record does not show that the court personally informed the defendant that an attorney would be appointed to represent him if he so desired. The boy was practically illiterate although his petition alleged that he had gone to school.

In distinguishing the two cases, Chief Justice Harris, dissenting in *Meeks*, emphasized the fact that Swagger was not informed by the court that counsel would be appointed to represent him if he so desired, but Meeks was in fact offered counsel and rejected this offer.[7] Justice Ward, also dissenting, pointed out that Swagger's mental condition was in issue, but this was not brought to the attention of the court because he was not represented by counsel. Meeks, however, was sent to the State Hospital for examination and was found to be normal. He had also completed ten years schooling.[8]

This case is most important in that the court held, in essence, that a normal, nineteen-year old boy, with ten years of schooling is incapable of waiving his right to counsel. Chief Justice Harris interprets the majority opinion as stating that because the defendant is a minor is, of itself enough to require the court to appoint an attorney to represent him; a point with which the majority of jurisdictions disagree.[9]

It is not the language used by the Arkansas court which is disagreeable, but rather the application of this language to the particular facts of the case. In nearly every instance it will be held error to permit one, regardless of age, to plead guilty to a serious charge without the benefit

[4] 396 S.W.2d 306 (Ark. 1966).
[5] 227 Ark. 45, 296 S.W.2d 204 (1956).
[6] *Id.* at ———, 296 S.W.2d at 206.
[7] Meeks v. State, *supra* note 4, at 308 (dissent).
[8] Meeks v. State, *supra* note 4, at 309 (dissent).
[9] *E.g.*, cases cited note 2 *supra*.

of counsel where, because of his ignorance or mental capacity, or lack of knowledge of law and courtroom procedure, he is deemed incapable of representing himself.[10] The crucial issue is not the age of the accused, but whether the evidence shows that he had the capacity, mental or otherwise, to waive counsel. It is certainly difficult to comprehend that a normal, nineteen-year old boy with ten years of schooling could not be considered intelligent enough to waive his right to counsel.

If the decision of the court was based upon a belief that Meeks was "inexperienced," it is probable that this would have been discussed. Yet, the opinion is silent on this point. It is possible that the justices may have determined Meeks was lacking in experience by a subjective evaluation of the record. However, most jurisdictions evaluate the defendant's experience objectively in determining whether he is capable of making an intelligent waiver with emphasis upon his familiarity with criminal procedure rather than the amount of general skill or wisdom he possesses. If Meeks was considered "inexperienced" in any way whatsoever, it was certainly not discussed.

From all indications it appears that the *Meeks* case holds that minority itself is enough to require the appointment of counsel by the court to represent the defendant in criminal proceedings. It seems as if the court was reaching for this conclusion, for the decision in *Swagger* would have been the same regardless of the defendant's age. Swagger's mental condition prevented his making an intelligent waiver of counsel, but this was not true of Meeks. Isn't it more probable than not that age alone was the controlling factor in this case? For had Meeks possessed the same level of intelligence but had been two years older, he would most certainly have been deemed to have made an intelligent waiver of his right to counsel.

Whether or not this is indicative of a trend is yet to be seen, but it is interesting to note that Arkansas is not the only state expressing this viewpoint. Recent opinions in other jurisdictions, although not expressly stating that a minor is incapable of waiving counsel, have also demonstrated this growing concern for the minor defendant. The Supreme Court of Washington, while upholding that a minor may waive counsel, expressed the belief that a more satisfactory procedure would involve the appointment of counsel in every instance where the accused is less than twenty-one years of age.[11] A recent Vermont case, *In Re Moses*,[12] expresses a similar viewpoint. Although holding the minor defendant had waived counsel, the court stated: ". . . [W]e would prefer that the trial

[10] *E.g.*, Wade v. Mayo, 334 U.S. 672 (1948); Rohrer v. State of Montana, 237 F. Supp. 747 (D. Mont. 1964); State *er rel.* Stumbo v. Boles, 139 S.E.2d 259 (W. Va. 1964).

[11] Snyder v. Maxwill, 401 P.2d 349 (Wash. 1965) (per curiam); Klapproth v. Squier, 50 Wash.2d 675 314 P.2d 430 (1957) (dissent).

[12] 122 Vt. 36, 163 A.2d 868 (1960).

courts appoint counsel for all minors charged with serious crimes . . ." [13]

In Kansas it appears that defendants less than seventeen years of age, no matter how well educated, are incapable of waiving counsel. In *McCarty v. Hudspeth*,[14] the court stated: "A boy less than seventeen years of age [is] too immature to make an intelligent waiver. . . ." [15] The Illinois Supreme Court has adopted a rule providing: "In no case shall a plea of guilty or waiver of indictment be received or accepted from a minor under the age of eighteen years, unless represented by counsel." [16]

At the present time Oklahoma follows the majority and permits a minor to waive his right to counsel in a criminal case if the record affirmatively shows there has been an intelligent waiver and it appears beyond all doubt that he fully understands the implications of this waiver.[17] Knowledge of courtroom procedure also weighs heavily in determining whether he is aware of these implications.[18]

It should be remembered that a youthful defendant is not necessarily an ignorant or feeble minded one; many persons less than twenty-one years of age are far more intelligent than others over that age. It would be interesting to see what position Arkansas would take if confronted with a twenty-year-old defendant with the I.Q. of a genius and an understanding of criminal procedure. From the application of the rule in *Swagger* to the *Meeks* case, it appears that this hypothetical defendant would also be adjudged incapable of waiving his right to counsel. If this be the case, then *Meeks* is an important decision in the field of constitutional criminal procedure, its sole concern being protection of the minor defendant.

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[13] *Id.* at _____, 163 A.2d at 872.

[14] 166 Kan. 476, 201 P.2d 658 (1949).

[15] *Id.* at _____, 201 P.2d at 660. *Accord,* Dunafee v. Hudspeth, 162 Kan. 52,4 178 P.2d 1009 (1947) (failure to appoint counsel for twenty-year-old defendant violative of due process); State v. Oberst, 127 Kan. 412, 273 Pac. 490 (1929) (error to permit seventeen-year-old defendant to plead guilty to seven counts of murder without benefit of counsel).

[16] SMITH-HURD ILL. ANN. STAT, ch. 110 § 101.26(4) (1956).

[17] *E.g.,* Dallas v. State, 286 P.2d 282 (Okla. Cr. App. 1956); Clark v. State, 95 Okla. Crim. 375, 246 P.2d 422 (1952); Fields v. State, 77 Okla. Crim. 1, 138 P.2d 124 (1944).

The Oklahoma Court of Criminal Appeals has held that in all cases where an accused, without counsel, pleads guilty and is sentenced on that plea, the record must affirmatively show: " . . . [T]hat the accused knows and understands the nature of the charge against him, and the punishment that can be imposed therefor; knows and understands his constitutional right to be represented by counsel; knows and understand his right to be represented by Court appointed counsel, if he is unable to employ the same, knows and understands his right to a trial by jury." Huggins v. State, 388 P.2d 341, 344 (Okla. Cr. App. 1964).

[18] *E.g.,* Application of McDaniel, 302 P.2d 496 (Okla. Cr. App. 1956); *Ex parte* Cornell, 87 Okla. Crim. 2, 193 P.2d 904 (1948); *Ex parte* Smith, 83 Okla. Crim. 199, 174 P.2d 851 (1946).