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Criminal Law - Effective Assistance of Counsel, Peyton v. Fields, 207 Va. 40 (1966)

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Criminal Law—Effective Assistance of Counsel. Defendant Fields, convicted for statutory burglary and escape, had counsel appointed ten to fiteen minutes before trial commenced. He thereafter waived arraignment, tendered a plea of guilty to both counts, and sentence was entered accordingly.[1] In a companion case, defendant Yates, convicted for statutory burglary, had counsel appointed the day on which he was indicted. Counsel conferred with Yates twenty to thirty minutes on that day, after which a plea of not guilty was entered. He conferred with him once again, for about thirty minutes, on the day of trial.[2] The Supreme Court of Appeals of Virginia dismissed, *inter alia*, petitioners' contention on *habeas corpus* that as a result of insufficient time allowed or actually used by their counsel for consultation and preparation of defenses, they were deprived of due process of law.

In arriving at its decision, the Court was not unmindful of federal precedents[3] nor Virginia's own applicable precedent, *Morris* v. *Smyth*.[4] However, in deciding the present cases being reviewed, the Court emphatically restated the well-settled rule that to prove deprivation of constitutional rights, the petitioner must so prove it by a preponderance of the evidence.[5] In the *Morris* case, inadequate assistance of counsel was grossly apparent. Counsel conferred with Smyth "about 10 minutes," failed to summon a vital witness at defendant's request, and took no part in the proceedings, however, no answer was filed by the warden to the petition and the petition was dismissed without a hearing, the Court following the rule that where allegations of a

1. Peyton v. Fields, 207 Va. 40, 147 S.E. 2d 762, 766 (1966). The Supreme Court of Appeals found that Fields knew of no witnesses that could have been called, nor did he present any defenses which could have been presented at the trial on his behalf.

2. Yates v. Peyton, 207 Va. 91, 147 S.E. 2d 767, 772-773 (1966). The Supreme Court of Appeals found that Yates failed to show that time was insufficient for the attorney to prepare an adequate defense, and, although counsel failed to call Yates' co-defendant as a witness, as requested (the attorney maintained that an interview with this co-defendant showed that it was not in petitioner's best interest to elicit this testimony), petitioner still did not show that he was prejudiced in any way as a result of such inaction.

3. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) made applicable in the present factual situation through *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963).

4. 202 Va. 832, 120 S.E.2d 465 (1961).

5. Peyton v. Fields, *supra* note 1, at 766.

petitioner are not denied, they must be accepted as true.[6] Thus Morris proved his deprivation of effective assistance of counsel by a preponderance of the evidence. However, in the instant cases, the petitions of both prisoners were answered by the warden and plenary hearings were held on the allegations. Here the warden refuted petitioners' allegations and the Court held that the prisoners failed to carry their burden of proof.[7]

The question of court-appointed counsel having a sufficient amount of time for preparation is decided in one of two ways: (1) legislative determination of a time period in which counsel must have for his preparation.[8] (2) The view taken by the majority, and which Virginia adopts, requiring that the court look at each case on its own factual basis to determine whether counsel had reasonable time in which to prepare for trial.[9] It would seem from a survey of the cases that the petitioner has a much better chance of proving a denial of constitutional rights if it should happen that counsel's motions for a continuance are dismissed.[10] The Supreme Court of Appeals in the present cases, likewise placed much weight on the fact that neither had requested a continuance, and also on counsel's contention during the plenary hearings that they had adequate time for preparation.[11]

The present cases reflect the majority rules in determination as to alleged denial of effective counsel, but Justice Sneed probably ex-

6. Morris v. Smith, *supra* note 3, at 833.

7. Peyton v. Fields, *supra* note 1; Yates v. Peyton, *supra* note 2, at 773.

8. See, *e.g.*, California Codes, section 1049 (1872) (Penal Code) (After his plea, the defendant is entitled to at least five days to prepare for trial).

Texas Statutes Annotated, Art. 26.04(b) (1965) (Code of Criminal Procedure) (The appointed counsel is entitled to ten days to prepare for trial, but may waive the time by written notice, signed by the counsel and the accused.)

9. *E.g.*, United States v. Ray, 351 F.2d 554, 555 (4th Cir., 1965); Johnson v. State, 372 S.W.2d 192, 194 (1963); Avery v. Alabama, 308 U.S. 444 (1940); Reynolds v. Cochran, 365 U.S. 525 (1960); Lorenz v. People,–Colo.–, 412 P.2d 895 (1966); Re Newbern 53 Cal. 2d 786, 3 Cal. Rpter. 364, 350 P.2d 116 (1960).

10. *E.g.*, French v. State, 161 So.2d 879 (Fla. App. 1964); People v. Shiffman, 350 Ill. 243, 182 N.E. 760 (1932); Reliford v. State, 140 Ga. 777, 79 S.E. 1128 (1913); Stone v. Collins, 104 La. 629, 29 So. 180 (1900); Johnson v. State, *supra* note 8; Reynolds v. Cochran, *supra*, note 8; Lorenz v. People, *supra*, note 8. But see, Avery v. Alabama, 308 U.S. 444, 446, 84 L.Ed. 377, 60 S.Ct. 321, where Justice Black vigorously asserted that "Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance had been denied, does not constitute a denial of the constitutional right to assistance of counsel."

11. Peyton v. Fields, *supra* note 1, at 765; Yates v. Peyton, *supra* note 2, at 769.

presses an underlying motive when he states in *Peyton v. Fields*, "He made the customary and often abused claim for relief, i.e., that he was denied due process of law because he was not afforded effective assistance of counsel by his court-appointed counsel . . ." [12] However, the rules used by the Court in the instant cases are logical and, indeed, provide substantial justice. Based on the totality of the circumstances of the defendants' cases, the law should not require the useless formality of extended preparation when the defendant cannot show that the fruits of such preparation would be increased.

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Armed Services—SOLDIERS AND SAILORS CIVIL RELIEF ACT—IMMUNITY OF NON-RESIDENT SERVICEMAN FROM STATE AUTOMOBILE "LICENSE FEE." A serviceman residing in a state solely because of military or naval orders is accorded broad immunity from local tax measures, under the Soldiers' and Sailors' Civil Relief Act.[1] In *California v. Buzard*[2] the defendant soldier, claiming immunity under the Act, contested the state requirement that he pay a "license fee" of two percent of the market value of his automobile as a prerequisite to registration.[3] Buzard, a Washington domiciliary, had paid no fees upon his car to

12. Peyton v. Fields, *supra* note 1, at 763.

1. § 514, 56 Stat. 769, 777 (1942), 58 Stat. 722 (1944), 76 Stat. 768 (1962), 50 U.S.C.A. App. § 574 states:

> "(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State . . . solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of any State . . . while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State . . . of which such person is not a resident or in which he is not domiciled . . . personal property shall not be deemed to be located or present in or to have a situs for taxation in such State. . . .
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> "(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid."
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> The legislation shall hereinafter be called "the Act."

2. 382 U.S. 386 (1966).

3. CALIFORNIA REVENUE AND TAXATION CODE, §§ 10751, 10752. (Although the "license fee" was held to be an excise on the privilege of using public highways, rather than