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Constitutional Law - Criminal Law - Right to Counsel, Biddle v. Commonwealth, 206 Va. 14 (1965)

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rationale when invalidating searches and seizures.[6] Some state courts which have not used the wife's inability to waive the husband's rights to keep out illegally seized evidence, do reach the same result by relying on the doctrine of implied coercion.[7]

This case follows the general federal law in all particulars. It is good that in its first decision on this point this court set a precedent which more than likely will be easy to follow in the future.[8] Apparently the court felt that it should rely on the federal precedents now, rather than having to rely on them at a later date.[9]

Matters relative to search and seizure used to be merely evidentiary matters to be determined by the respective state courts. The decision above seems to show that they are now being thought of as constitutional issues and within the domain of federal jurisdiction.

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Constitutional Law—Criminal Law—RIGHT TO COUNSEL. In *Biddle v. Commonwealth*[1] Mrs. Biddle appealed her conviction for the

6. See Fitter v. United States, 258 Fed. 567 (1919).
Another case decided on the basis of coercion involved an agent, not the wife of defendant, *in re* Tri-State Coal & Coke Co., 253 F. 605 (1918).

7. See People v. Lind, 370 Ill. 131, 18 N.E.2d 189 (1938); Meredith v. Commonwealth, 215 Ky. 705, 286 S.W. 1043 (1926); State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936); Byrd v. State, 161 Tenn. 306, 30 S.W.2d 273 (1930); State v. Bonolo, 39 Wyo. 299, 270 Pac. 1065 (1928).

8. It appears that the federal courts are fast taking on the responsibility of deciding what is proper procedure in state criminal trials. Weeks v. United States, 232 U.S. 383 (1913), established the rule that any evidence seized in violation of the Fourth Amendment right to be free from unreasonable searches and seizures is inadmissible in a federal criminal trial. Wolf v. Colorado, 338 U.S. 25 (1949) held that state law enforcement agencies must not violate this right, but left them free to introduce illegally seized articles into evidence. Mapp v. Ohio, 367 U.S. 643 (1961), applied the federal exclusionary rule to the states in all cases of searches and seizures which violated the Fourth Amendment.

9. The standard of determining what constitutes an unreasonable search and seizure has been left to the states. Yet, here again we have indications that federal courts are gradually extending their powers over state criminal law. Ker v. California, 374 U.S. 23 at 33-34 (1963), points the way by saying that the trial court's findings of reasonableness will be "respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. . . . The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures . . ." Thus future questions of "reasonableness" before the Supreme Court will probably be determined on the basis of federal law.

1. Biddle v. Commonwealth, 206 Va. 14, 141 S.E.2d 710 (1965).

murder of her infant child. She claimed that the lower court erred by admitting her confession because she had not been warned that she could remain silent and that the evidence was not sufficient to sustain a conviction of murder in the first degree, because the death of the baby resulted from negligence and not from a malicious omission of duty.

Mrs. Biddle and her husband were escorted to police headquarters for routine questioning after an autopsy of the defendant's baby had shown that the baby had died from malnutrition and dehydration. The defendant was first questioned about the feeding and health of her child and then her husband was questioned in another room. The detectives then returned to the defendant and asked her if she wanted to tell the truth. She then made incriminating statements about her child's feedings.

The Supreme Court of Appeals of Virginia ruled that the incriminating statements were admissible but reversed her conviction because the Commonwealth had not proved beyond a reasonable doubt that the defendant had wilfully or maliciously withheld food from the baby.[2] The court held that the confession was admissible because it was voluntary and an officer's failure to warn a person that he may remain silent does not render a voluntary confession inadmissible.[3]

When the defendant claimed that the case should be reversed because she had not been informed of her right to remain silent, her right to counsel is also involved.[4] The Supreme Court of the United States has held that the provision of counsel in all criminal cases "is a fundamental right, essential to a fair trial" and that this right applies to the

2. Commonwealth v. Hall, 322 Mass. 523, 78 N.E.2d 644 (1948); State v. Bischert, 131 Mont. 152, 308 P.2d 969 (1957); Pallis v. State, 123 Ala. 12, 26 So. 339 (1899). These cases hold the general rule that if the omission to feed one's baby is negligent and not willful, then the case is manslaughter and not murder.

3. Mendoza v. Commonwealth, 199 Va. 961, 103 S.E.2d, 1 (1958).

4. Massiah v. United States, 377 U.S. 201 (1964). When the United States Supreme Court held that the defendant's Fifth and Sixth Amendment rights were violated by using evidence against him of incriminating statements made to co-defendants after their indictment and in the absence of the defendant's retained counsel and which were overheard on radio by a government agent without the defendant's knowledge, the court has read part of the Fifth Amendment into the sixth and joined them in order to assure the protection of the constitutional rights to remain silent and to counsel in the Federal Courts. If the defendant weren't allowed to consult with his counsel he might not know of his right to remain silent or why and how he should take advantage of this right.

states through the Fourteenth Amendment.[5] The due process clause of the Fourteenth Amendment also prohibits state infringement of the privilege against self-incrimination.[6] The Supreme Court then held that in Federal Courts the right to counsel attaches at the time he is indicted.[7] In *Escobedo v. State*[8] the Supreme Court of the United States held that where an investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the particular suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his attorney, and police officers have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the assistance of counsel in violation of the Sixth Amendment and any statements elicited by the police during the interrogation may not be used against him at a criminal trial.

Applying *Escobedo* causes a problem of determining at what time the questioning focuses on the defendant and become accusatorial. In *Escobedo*[9] the defendant had requested and was denied an opportunity to consult with his lawyer while he was being questioned by the police. Therefore the investigation had ceased to be a general investigation and had focused on Escobedo. The Supreme Court of California has held that when a defendant is in police custody and the police carry out a process of interrogation that lends itself to eliciting incriminating statements, even though he does not request counsel, since the investigation has focused on him he has a right to counsel.[10]

In *Cooper v. Commonwealth*[11] the Supreme Court of Appeals of Virginia held that the alleged confession made by the defendant while he was without his retained counsel was inadmissable since the investigation

5. Gideon v. Wainwright, 372 U.S. 335 (1963).

6. Malloy v. Hogan, 378 U.S. 1 (1964).

7. Massiah v. United States, *supra* note 4.

8. Escobedo v. State of Illinois, 378 U.S. 478 (1964).

9. *Ibid.*

10. People v. Dorado, 40 Cal. Rptr. 264, 394 P.2d 952 (1964); Neely v. State, 398 P.2d 482 (Ore. 1964), also follows the dictum of Dorado.

11. Cooper v. Commonwealth, 205 Va. 883, 140 S.E.2d 688 (1965). While the defendant was in jail awaiting trial a tape recording was played back to him on which the girl he was supposed to have attacked made incriminating statements. Defendant made an alleged confession after hearing the recording and while being interrogated. Though he had been advised of his rights the court held since his intelligence was low, as was his ability to function under stress, the interrogation was accusatory rather than investigatory and Cooper needed the assistance of his counsel at this point.

had focused on him, it was accusatorial and Cooper needed the assistance of counsel at this point. Therefore his constitutional right to counsel had been denied him. The Supreme Court of Appeals of Virginia distinguished *Biddle* because the circumstances under which the confessions were obtained in *Escobedo* and *Cooper* were not present. The court held that the questioning had not focused on the defendant when she made her confession and that since the investigation was still general and not accusatorial her absolute right to counsel had not attached. By holding the *Escobedo* test of the admissibility of a confession inapplicable this left the court to rely on the older rule that a confession is admissible as long as it is voluntary[12] and that the failure of an officer to inform the defendant of her right to remain silent does not make a voluntary confession, made during a routine investigation, inadmissible.[13]

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12. Mendoza v. Commonwealth, *supra* note 3.

13. Biddle v. Commonwealth, *supra* note 1.