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Right to Counsel - Representation by Attorney Disqualified for Non-Payment of Bar Dues

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RIGHT TO COUNSEL — REPRESENTATION BY ATTORNEY DISQUALIFIED FOR NON-PAYMENT OF BAR DUES

In a recent Texas Court of Criminal Appeals decision the Court put a new twist in the age-old constitutional right of the accused in a criminal case to legal counsel, either by his own selection or court appointment[1].

In the lower court the appellant was convicted of murdering a nine month old baby girl by crushing her skull with his knee, and leaving her to die in the woods. He had confessed to the killing and all the elements of the confession were corroborated by the State's evidence. His sanity was placed in issue by his counsel due to several commitments to mental institutions since 1945. On conflicting expert testimony, the jury found that he was of "dull normal" mentality but nevertheless sane since he could distinguish between right and wrong.

On appeal it was contended that the appellant had been deprived of his right to effective legal counsel because his court-appointed lawyer had not paid his bar dues since 1946 and had been removed from the practicing attorneys list. The Appellate Court upheld this contention and reversed the conviction.

Under the Texas constitution, any person charged with a capital offense must be represented by legal counsel unless this right is expressly waived. Where the accused is indigent and unable to retain counsel it is the duty of the court to appoint one[2]. The decision in the instant case turned upon the court's interpretation of the phrase "legal counsel." Based solely on the fact that the attorney had not paid his state bar dues and therefore did not have his name on the list of practicing attorneys, the majority of the court concluded that the appellant had not received qualified counsel. No contention was

1 Eusebio Regalado Martinez v. State of Texas, 318 S.W.2d 66 (1958).

2 Vernon's Ann. Texas Const., Art. I, § 10.

made that the attorney conducted an incompetent or faulty defense.

No other case has been found which rests the decision on such a technical ground. As a matter of substantive law it is difficult to see where the accused was deprived of any privilege to which he was entitled.

In a South Dakota case[3] the counsel for the convicted defendant had been disbarred several months prior to the trial. On appeal the defendant pointed out that the disbarred attorney had complete control of his case at the trial level, and attempted to rely on this as grounds for reversal. In regard to this argument the court said:

> While Mr. Sullivan (the attorney) may have deceived the court and his client and thereby subjected himself to the discipline of the court, this fact alone would not entitled the defendant to a new trial unless it appeared that his rights have been prejudiced in some manner by the deception of his counsel[4].

In *State* v. *Myers*[5] the court said that our most prized and cherished right is that of a fair trial and the only way to maintain this right is to provide an accused with *effective* counsel, which means:

> . . . honest, learned, and able legal counsel given a reasonable opportunity to perform the task assigned to him by the court. Only when it clearly appears in the record that this discretion has been abused should we interfere[6].

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[3] State v. Johnson, 64 S.D. 162, 265 N.W. 599 (1936).

[4] The counsel was later tried and convicted of contempt of court and sentenced to 30 days in jail. In Re Sullivan, 64 S.D. 165, 264 N.W. 601 (1936).

[5] 248 Iowa 44, 79 N.W.2d 382 (1956).

[6] 287 U.S. 45 (1932). Also brought up on the same docket were the other two accused in Patterson v. Alabama, and Weems v. Alabama.

Most courts have adopted this policy and placed the burden on the accused to prove that he was not afforded a fair trial based on the record.

The leading case on the right to counsel is *Powell* v. *Alabama*[7]. Although the trial judge had appointed the entire local bar to defend the accused, it was not until the day of the trial that anyone communicated with him in regard to his defense. Thus the Supreme Court held that as a matter of substantive right the accused was not afforded a fair trial. No lawyer could defend such a case effectively without investigating his client's side of the case before the day of the trial.

The reported cases on this point have applied the test: "Did the deficiency in counsel prejudice the rights of the accused?" They have affirmed convictions where the attorney was young and inexperienced, the ink on his bar certificate being "hardly dry"[8], counsel failed to raise the defense of insanity[9], counsel failed to refute the good character of the deceased who the accused was charged with murdering[10], or where counsel was "negligent or unskillful[11]."

The rule of the instant case requires a trial free of technical error regardless of the effect on the substantive rights of the accused. At a time when our court calendars are filled years in advance, the unfortunate result of the widespread adoption of such a criteria is readily apparent. Had the court chosen the approach of the dissent, supported by the long established doctrine of jeofails, that: no error committed during the course of the trial should vitiate the verdict unless the error was prejudicial to the rights of the accused, those rights would have been protected and the cause of judicial efficiency advanced.

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[7] Iowa v. Dangelo, 182 Iowa 125, 166 N.W. 587 (1918); United States v. Stoecker, 216 F.2d 51 (7th Cir. 1954); Williams v. United States, 218 F.2d 276 (4th Cir. 1954); Jones v. Texas, 159 Cr. 526, 265 S.W.2d 116 (1954).

[8] People v. Ives, 17 Cal.2d 459, 110 P.2d 408 (1941).

[9] People v. Reeves, 412 Ill. 555, 107 N.E.2d 861 (1952).

[10] Ex parte Lovelady, 152 Cr. 93, 207 S.W.2d 396 (1948).

[11] State v. Jukich, 49 Nev. 217, 242 P. 590 (1926); Diggs v. Welch, 148 F.2d 667 D.D.C. (1945).

The utility of the instant holding is further jeopardized by the fact that a convicted accused is not deterred by the possibility of perjury and contempt proceedings from lying in order to avail himself of a technical point based on his counsel's conduct.

Under the Texas constitution, the State may not re-try an accused where, as here, the conviction has been reversed on appeal[12]. An acknowledged criminal is a free man due to technical error which had no effect on his substantive rights. Justice is a two-edged sword; the people should not be denied the enforcement of the law unfettered by frivolous rules which are not required by the rights of the accused.

There have been no Virginia cases deciding the point at issue in the instant case but reversals have only been granted where some substantive right of the accused was violated. There is no reason to allow a decision to be set aside solely because of a defect in form. If an accused's substantive rights have not been breached and, a lawyer, no matter how competent, would have employed the same tactics and the jury would have reached the same verdict, then it should not matter that the defending lawyer had not paid his bar association dues. The burden of proof should rest upon the accused to show where his rights have been prejudiced.

L.P.R.

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[12] Texas Constitution, Art. 5, § 26, Art. 1, § 14. It is explicit in declaring "the state shall have no right of appeal in criminal cases."