Loyola University Chicago Law Journal

Volume 1
Issue 1 *Winter 1970*

Article 13

1970

Criminal Law - Incompetency of Retained Counsel Cannot Afford a Basis for Reversal of a Judgment Rendered in a Criminal Trial

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CRIMINAL LAW—Incompetency Of Retained Counsel Cannot Afford A Basis For Reversal Of A Judgment Rendered In A Criminal Trial.

On May 23, 1967, Joseph R. Hurst, driving with a friend, was stopped on Cottage Grove Avenue in Chicago, Illinois, for speeding by Officers Ervin and Stallworth of the Chicago Police Department. The officers asked Hurst for his driver's license and he stated he had none on his person. While Officer Ervin was in the squad car making a radio report, two shots were fired, fatally wounding Stallworth. Hearing the shots, Officer Ervin looked up as a third shot was fired by Hurst through the squad car windshield, wounding Ervin in the face. Hurst then fled from the scene and was subsequently apprehended.

Defendant Hurst was brought to trial in the Circuit Court of Cook County on charges of murder, attempted murder, aggravated battery and resisting arrest. He pleaded not guilty and waived his right to a jury trial. At the conclusion of the bench trial he was found guilty and sentenced to death by electrocution. Hurst's motion for a new trial was denied. A direct appeal to the Illinois Supreme Court was perfected, urging various constitutional and procedural errors. The defendant first contended that he had acted in self defense, using only such force as was reasonably necessary to prevent his own death. Alternatively, he argued that he was so provoked by the deceased officer that he reasonably believed he was acting in self-defense, and consequently, his conviction should have been reduced to one for voluntary manslaughter. Additional reversible errors were alleged to have been committed at the defendant's hearing on aggravation and mitigation which denied him due process of law.

The defendant also contended that he was denied his right to a trial by a fair jury insured by the seventh and fourteenth amendments to the United States Constitution. Specifically, he argued that when he purportedly waived this right, he was faced with a choice between a bench trial or a trial before a jury in which all jurors who were opposed to the death penalty would have been excluded in violation of the seventh amendment.[1]

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1. Additional allegations of errors on appeal were that the death sentence was demanded by the prosecutor because Hurst had not pleaded guilty, that the rehabilitation question was limited to defendant's mental capacity, that the trial judge failed to give reasons for his decision and finally that the electric chair constituted cruel and unusual punishment.

Finally, Hurst claimed that because his attorney was incompetent he was denied due process and equal protection of the law. In support of this contention, the defendant asserted that his retained counsel was completely unprepared to present his defense because he had not familiarized himself with the case. Additionally, his counsel had failed to call a material witness, failed to raise the issue of voluntary manslaughter, failed to effectively cross-examine the witnesses and attempted to use defendant's case as a vehicle to foster his theories of psychic science and spiritualism.

In affirming the conviction[2] the court, after disposing of Hurst's other objections, considered the issue of incompetency of counsel and held:

> Since the defendant was represented by counsel of his own choosing, counsel's alleged failure to exercise care and skill in the trial of his case cannot afford a basis for reversing the judgment entered.[3]

The future significance of *Hurst* will undoubtedly lie in its treatment of the issue of adequacy of representation by a retained attorney. This view is born out by the strong dissent of Mr. Justice Schaefer in which he criticized the majority for failing to adhere to the rule previously applied in cases where the issue has been raised. Whereas the majority automatically dismissed the assertion of incompetency without first reviewing the record, the dissent points out that the Illinois Supreme Court prior to *Hurst* had always reviewed the record before determining a claim of incompetency of retained counsel. In *People v. Pride*,[4] the court stated that:

> [W]here a defendant in a criminal case employs counsel of his own choice, his judgment of conviction will not be reversed merely because his counsel failed to exercise the greatest skill . . . .

However,

> [W]hen the representation of the defendant . . ., is of such low caliber as to amount to no representation and reduces the trial to a farce, this Court will reverse a conviction because the defendant, under these circumstances, has been deprived of his constitutional right to a fair trial.[5]

Justice Schaefer further indicated that even in *People v. Underhill*,[6] relied upon by the majority, the court did not automatically dismiss the assertion of incompetency, but first examined the record of the trial court. In his view, precluding all inquiry into the competency of

2. People v. Hurst, 42 Ill. 2d 217, 247 N.E.2d 614 (1969).
3. *Id.* at 617.
4. 16 Ill. 2d 82, 156 N.E.2d 551 (1959).
5. 16 Ill. 2d at 94.
6. 38 Ill. 2d 245, 230 N.E.2d 837 (1967).

counsel merely because he was employed by the appellant is unwise and raises serious constitutional questions.

There have been many Illinois cases in which the issue of the incompetency of counsel has been raised. Where the defendant selected his own attorney the court has held, almost without exception,[7] that the failure of such counsel to exercise care and skill in the trial of the case does not afford a sufficient basis for reversing a judgment of conviction.[8] In *People v. Pride*,[9] where the defendant alleged a denial of a fair and impartial trial because of the incompetency of his retained counsel, the Illinois Supreme Court stated that tactical or judgmental errors will not afford a reversal.

> It should be remembered, however, that we, along with defendant's present counsel have the benefit of hind sight in evaluating the tactics defendant's first counsel used. The situation is like the Monday morning quarterback who says that the team should have run rather than passed after he knows the pass did not work.[10]

While the principle established in *Pride* is clearly applicable to *Hurst*, the cases are distinguishable because the defendant in *Hurst* was alleging more than mere tactical or judgmental errors. The attorney's alleged complete unpreparedness to present his defense and advancement of theories of psychic science and spiritualism were claimed to have substantially infringed upon the integrity of the trial procedures.

Prior to the instant case, the rule generally applied in the Illinois courts was that a conviction should be reversed whenever the representation of a defendant by a retained counsel was so ineffective as to amount to no representation at all, reducing the trial to a farce.[11] Thus, in *People v. De Simone*,[12] where the defendant's retained counsel presented a wholly unorthodox insanity defense, the Illinois Supreme Court held that the representation was so ineffective as to amount to no representation at all. The court explained that this unorthodox method of defense exposed defense counsel's apparent lack of knowledge of basic criminal procedure and rules of evidence. When coupled with his

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7. People v. DeSimone, 9 Ill. 2d 522, 138 N.E.2d 556 (1956).
8. People v. Bock, 95 Ill. App. 2d 486, 238 N.E.2d 136 (1968); People v. Washington, 41 Ill. 2d 6, 241 N.E.2d 425 (1968); People v. Mitchell, 73 Ill. App. 2d 35, 220 N.E.2d 19 (1966); People v. Pierce, 387 Ill. 608, 57 N.E.2d 345 (1944); People v. McDonald, 35 Ill. 233, 6 N.E.2d 182 (1936); People v. Hicks, 362 Ill. 238, 199 N.E. 368 (1935).
9. *See* note 4, *supra.*
10. 16 Ill. 2d at 96.
11. *See* note 6, *supra. See also* People v. Clark, 9 Ill. 2d 46, 137 N.E.2d 54 (1956); People v. Stephen, 6 Ill. 2d 257, 128 N.E.2d 731 (1955); People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954).
12. *See* note 7, *supra.*

other tactical and judgmental errors, the court concluded that there was an abridgement of the defendant's fourteenth amendment right of due process of law.

People v. Hurst is, on its facts, analogous to *People v. De Simone*. Defendant Hurst claimed that his rights had been violated by counsel's attempt to use his case as a vehicle to foster his theories of psychic science and spiritualism. In addition to this wholly unorthodox defense, the other alleged indications of incompetency of counsel included lack of investigation of the facts, and the failure to effectively cross-examine witnesses.

Presumably, the Illinois Supreme Court refused to even consider the merits of the inadequacy of counsel contention because it did not review the record of the circuit court with this purpose in mind. Instead, the court automatically dismissed the claim by stating that when a defendant chooses his own counsel he cannot later be heard to complain about lack of his attorney's care and skill in handling the case.

The allegation of incompetency of retained counsel had in some cases been treated rather summarily because there was nothing in the record to show the alleged incompetency or any prejudice resulting therefrom.[13] On the other hand, in *Hurst* the nature of the alleged incompetency was such that the facts which would either establish or disprove it were determinable from the face of the record.

In support of Justice Schaefer's dissent the Illinois courts have, in the past, reviewed the record to determine whether the representation by retained counsel was so inadequate as to cause prejudicial error.[14] In *People v. Stephens*,[15] the court first repeated the general rule, then explained that any other rule would put a premium upon pretended incompetence of counsel.[16] Nevertheless, the court did review the entire record before arriving at its decision finding that the representation of defendant was not of such a low caliber as to require a reversal.

In *People v. Underhill*,[17] relied upon by the majority in *Hurst*, the

13. 3 Ill. 2d at 445, 446.
14. People v. Duncan, 32 Ill. 2d 322, 205 N.E.2d 443 (1965); People v. Palmer, 27 Ill. 2d 311, 189 N.E.2d 265 (1963); People v. Strader, 23 Ill. 2d 13, 177 N.E.2d 126 (1961); People v. Clark, 16 Ill. 2d 82, 137 N.E.2d 54 (1959); People v. Clark, 7 Ill. 2d 163, 130 N.E.2d 195 (1955). It also might be worthy to note that the brief submitted by the State reflected the thought that the Supreme Court would review the record: "The record demonstrates that trial counsel was not only within the competence standards for retained counsel, but was also well within the competence standards for appointed counsel." at 34.
15. *See* note 11, *supra*.
16. *See* Cross v. United States, 392 F.2d 360 (8th Cir. 1968) as to how the federal court handled this problem.
17. *See* note 6, *supra*.

court stated:

> *From an examination of the record* we cannot say defendant's representation was so inadequate as to violate the standards laid down for private counsel. Therefore, defendant must . . . bear the consequences of his chosen attorney's representation.[18] [emphasis added]

Obviously, it was not until the record was examined that the court decided that the defendant should "bear the consequences." In *People v. Pride*, the court again stated that from an examination of the entire record the defendant's counsel did not do a wholly inadequate job. "Since the record is free from substantial prejudicial error and the defendant's guilt has been clearly established . . . ,"[19] the Illinois Supreme Court affirmed.

The *Hurst* court did review the record on the basis of the other contentions. However, if incompetency of counsel had been the sole basis for appeal, the opinion indicates the court would have summarily dismissed the case without reviewing the record.[20]

The position of the federal courts regarding the incompetency of retained counsel issue is similar to the position taken by the Illinois courts before *Hurst*.

In *Cross v. United States*,[21] the defendant was convicted of conspiring to possess and pass counterfeit federal reserve notes with intent to defraud and of passing and uttering the notes. The defendant appealed on the ground that he was denied effective assistance of counsel as contemplated by the Sixth Amendment of the United States Constitution. The Court stated:

> The rule applicable is that a charge of inadequate representation can prevail only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the court.[22]

On this basis the United States Court of Appeals for the Eighth Circuit reviewed the record and found that the trial technique of defendant's retained counsel was adequate. However, in view of defense counsel's statement that his willful neglect of duty resulted in defendant's case not being investigated or developed, the court remanded the case with

18. 38 Ill. 2d at 254, 255.
19. 16 Ill. 2d at 98.
20. The Supreme Court indicated in the record that the allegation could not afford a basis for reversing the judgment, so it must be inferred they would never reverse.
21. *See* note 16, *supra*.
22. 392 F.2d at 366.

instruction for an evidentiary hearing to ascertain whether the sixth amendment right to effective assistance of counsel had, in fact, been abridged.

In *Lunce v. Overlade*,[23] the defendants appealed the denial of their request for a writ of habeas corpus, contending that they were not afforded effective assistance of counsel. The court stated:

> [A]s a rule, an accused cannot proceed to trial with counsel of his own choice and then later claim a denial of due process chargeable to the state because of errors committed by such counsel . . . However, where the representation of an accused by his counsel is so lacking in diligence and competence that the accused is without representation and the trial is reduced to a sham, it is the duty of the state to see that the essential rights of the accused are preserved by appropriate intervention.[24]

The United States Court of Appeals for the Seventh Circuit reversed the dismissal of the petition and remanded the cases to the district court, stating that if the petitioners could establish by adequate and competent proof the pertinent allegations contained in their petition, then the convictions would be so lacking in fundamental fairness that they could not be sustained.

The *Cross* and *Lunce* cases indicate that to determine whether the trial was a sham, farce, or mockery of justice denying the accused due process of law or invading his right to effective assistance of counsel, the practice of the federal courts is to review the record of the lower court decision.

However, it should be noted that a conviction will be reversed only upon a showing of an extraordinary set of facts and circumstances. The federal courts generally will not afford relief for claimed inexperience, lack of preparation, unskillfulness, or mistakes of judgment.[25] This reluctance to invalidate judgments because of ineffective representation is based, at least in part, on the fear that unscrupulous counsel can easily upset a valid conviction by deliberately failing to perform an essential function during the course of the trial.[26]

The decision in *Hurst* appears to alter the longstanding procedure of both the Illinois and the federal courts. Prior to *Hurst*, the Illinois courts of review would, upon the showing of an extraordinary set of

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23. 244 F.3d 108 (7th Cir. 1957).
24. 244 F.2d at 110.
25. Huspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941); Tompsetl v. Ohio, 146 F.2d 95 (6th Cir. 1943); Hendrickson v. Overlade, 131 F. Supp. 561 (N.D. Ind. 1955).
26. *See* note 16, *supra*.

circumstances, review the trial court record on the issue of the adequacy of representation by privately retained counsel.[27]

Because the United States Supreme Court has, in a steady progression of criminal cases involving right to counsel,[28] indicated that this right involves a right to representation which is in some degree "effective" or "adequate," the failure of the Illinois Supreme Court in *Hurst* to review the record may have violated the defendant's rights under the sixth and fourteenth amendments to the Constitution. The case most often cited as establishing a substantive right to representation which is adequate or effective is *Powell v. Alabama.*[29] In *Powell,* the United States Supreme Court plainly stated that the concept of due process of law contained in the fourteenth amendment condemns any "denial of effective and substantial aid." Although the case dealt with a failure to make an effective appointment of counsel, the denial referred to can just as easily be present where the attorney is privately retained.

Nevertheless, many courts have, in their attempts to delimit claims of incompetency of counsel, distinguished between privately retained counsel and court-appointed counsel and made review more readily available in the latter case. This distinction by which relief has been limited in the case of retained counsel has been justified on either an agency rationale or a "state action" theory.[30]

Under the first theory, the accused was said to be bound through the law of agency by the acts of his own privately retained attorney. The application of this agency approach to the attorney-client relationship has been highly criticized because of the absence of the traditional innocent third party injured by the acts of the principal's agent. Perhaps more significantly, the theory incorrectly presupposes a principal sufficiently informed to direct and control his agent.[31] It can be assumed that a client never authorizes the incompetent handling of his defense.

The second theory rests upon the fact that court-appointment of an inadequate representative is clearly "state action" and, therefore,

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27. People v. Palmer, 27 Ill. 2d 311, 189 N.E.2d 265 (1963).
28. Powell v. Alabama, 287 U.S. 45 (1932). This is an appointed counsel case but its weight is felt even in retained counsel cases. *See* Avery v. Alabama, 328 U.S. 444 (1940). Justice Black states that the sixth amendment requires effective assistance of counsel. *See also* Gideon v. Wainwright, 372 U.S. 335 (1963) effective assistance of counsel in all criminal felony cases.
29. 287 U.S. 45 (1932).
30. Waltz, *Inadequacy of Trial Defense Representation As a Ground For Post Conviction Relief in Criminal Cases,* 59 NW. U.L. REV. 289 (1964).
31. *Id.* Also, it can be assumed that a client never authorizes the totally incompetent handling of his case.

subject to the prohibitions of the Fourteenth Amendment Due Process clause. On the other hand where there is a conviction of an accused after wholly inadequate representation by retained counsel "state action" is more difficult to find. It could be contended that the licensing of the attorney and his status as an officer of the court constitutes "state action."

Furthermore, the entire conduct of the trial in which a person is deprived of his life and liberty because of wholly inadequate representation can be asserted to be "state action."[32]

Whatever the reason for so holding, the rule in *Hurst* barring claims of inadequate representation by retained counsel expressly holds defense counsel's status as appointed or retained to be relevant to the question of whether the defendant received a fair trial. Logic dictates an opposite result. The goal is a fair trial and one can easily imagine a set of circumstances under which retained counsel's incompetency places the accused in a worse position than he would have been in had he appeared *pro se*. Cases dealing with retained counsel misrepresenting a fact to his client, thereby inducing him to plead guilty are good illustrations.[33] One such case discussing the importance of adequate representation is *Wilson v. Rose*[34] in which the United States Court of Appeals for the Ninth Circuit affirmed the reversal of the appellee's conviction, stating:

> Appellee was entitled to the aid of counsel in determining his plea. The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence . . . [the accused] needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment.[35]

The similarities between this case and those in which the retained attorney does an extraordinarily ineffective job are obvious. In neither case is the defendant permitted to favorably put forth his defense, and in both cases the client must bear the burden of defense counsel's inadequacy. If the cases are similar in the respect that the

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32. *Id.* at 300; *see also* Stanley v. United States, 329 F.2d 765 (9th Cir. 1956) incompetency will not invalidate the conviction where inadequacy may not be imputed to the State.
It should also be noted that when the court recognizes a difference between appointed and retained counsel it is punishing a man because he can afford his own attorney.
33. People v. Washington, 41 Ill. 2d 6, 241 N.E.2d 425 (1968); People v. Wegner, 40 Ill. 2d 28, 237 N.E.2d 486 (1968).
34. 366 F.2d 611 (9th Cir. 1966).
35. *Id.* at 614.

retained attorney has done an inadequate job, then reversal in one warrants reversal in the other. A defendant subjected to wholly ineffective representation should not be forced to suffer the consequences without relief in one situation and not in another based upon an arbitrary distinction.

The Illinois Supreme Court's automatic dismissal of the incompetency of retained counsel in *Hurst* raises the possibility that defense counsel's representation was so inept that it amounted to no representation. The major constitutional difficulties with this holding are obviated if it can be assumed that representation by a retained attorney can never be so poor that the trial becomes a "sham" or a "mockery of justice." The assumption is, however, difficult to make. There has been a considerable neglect in the criminal area on the part of most attorneys.

> The bar has never given sufficient attention to the problem of criminal justice in America. Probably this is because most of our lawyers practice civil law exclusively and never come in contact with, or acquire very great interest in, the problems of criminal justice. Dean Pound has commented that in the general run of criminal cases, taking the country over, counsel fall far short of the standard which is maintained for civil cases.[36]

While most appeals claiming incompetency of counsel do not have merit, closing the door on an appeal without determining whether or not the claim has any substance, creates the possibility of constitutional error. Because of the general lack of career criminal lawyers, an allegation of incompetency should receive equal consideration along with other claims of error.

A defendant is not entitled to a perfect trial, only a fair one.[37] However, the concept of the adversary proceeding, which is basic to our trial system, rests on a semblance of equality between counsels on both sides. An accused confronted by a state prosecutor must be allowed to present his defense as effectively as possible through counsel, or he is inevitably prejudiced to some degree. As the degree of defense counsel's incompetency expands, so does the prejudice until, ultimately, there has been a denial of due process.

The courts have repeatedly stated that a client assumes the risk of tactical and judgmental errors when he chooses his own attorney; how-

36. Schwartz, Cases & Materials On Professional Responsibility and the Administration of Criminal Justice, p. 103 National Counsel On Legal Clinics, American Bar Center 1961, Chicago, Illinois.
37. People v. Morris, 3 Ill. 2d 437, 448, 121 N.E.2d 810 (1954).

ever, that risk should not include the possibility that his attorney will do an extraordinarily inadequate job affording him no representation at all. Unfortunately, *People v. Hurst* obscures this distinction and the Illinois courts following that rule will be unable to ascertain whether there has been the representation necessary to comply with the Constitution. To quote Justice Schaefer's admonishment in the *Hurst* opinion:

> To erect an insurmountable barrier which precludes all inquiry as to the competence of the representation of a defendant in a criminal case solely upon the ground that he was represented by retained counsel is unwise, in my opinion, even apart from the serious constitutional question it raises.[38]

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38. 42 Ill. 2d at 226.