Land & Water Law Review

Volume 3 | Issue 2 Article 14

1968

Criminal Procedure - Capacity of an Individual to Validly Waive His Constitutional Right to Counsel and Privilege against Self-Incrimination - Kennedy v. State

Otis W. Beach

CASE NOTES

CRIMINAL PROCEDURE—Capacity of an Individual to Validly Waive His Constitutional Right to Counsel and Privilege Against Self-Incrimination. Kennedy v. State, 422 P.2d 88 (Wyo. 1967).

Defendant, Emma Breen Kennedy, had a history of drinking since her teens, and had been known to drink for two and three days duration. According to a psychiatrist who testified at defendant's trial, during these sprees she would develop an "irresponsible, don't care what happens manner." On May 23, 1964, Mrs. Kennedy was on one of these sprees. She had started drinking the evening of the day preceding the shooting. Her indulgence continued the next morning and that afternoon she went to a private club in Rawlins. At approximately 4:00 p.m. the bartender at the club refused to serve her for she was obviously intoxicated. That evening, defendant was arrested by city police for driving under the influence of intoxicating liquor and she was brought to the sheriff's office at 7:40 p.m. Mrs. Kennedy could not walk a straight line at this time and the arresting officer observed food scattered about the car and a half-pint of whiskey lying on the back seat. Her speech at the time of this arrest was loud and incoherent. At approximately 9:00 p.m. defendant's husband arrived at the sheriff's office to post bond for his wife, and they started to drive to their home in Sinclair, approximately six miles distant. Upon arriving at Sinclair, defendant climbed out of the car, supported herself and staggered into the house. Mrs. Kennedy shoved a couch in front of the door and when her husband attempted to push the door open she pointed a pistol at him and warned him not to enter. Minutes later, after a neighbor attempted to coax defendant into being reasonable, the defendant fatally wounded her husband. At 10:05 p.m. defendant was again booked at the sheriff's office. According to the testimony of the sheriff and his stenographer, defendant was not intoxicated at this time and she walked perfectly well. The sheriff asked Mrs. Kennedy if she wished to make a statement pertaining to the incident and advised her that she did not have to make a statement. She was also advised that she was entitled to legal counsel. Mrs. Kennedy replied that she would like to make a statement and the sheriff again

advised her that she was entitled to counsel. Defendant's statement was taken by the sheriff's stenographer in the jail kitchen at 10:52 p.m. The trial court found that at the time of waiving counsel and making the statement the defendant was not intoxicated. She was thereafter convicted of murder in the second degree. Defendant appealed, contending that she was deprived of the right to counsel and that her written confession was inadmissible as not being voluntarily given in that she was without capacity to waive intelligently her constitutional privileges. The Wyoming Supreme Court in a three-to-one decision *held* that defendant intelligently waived her right to counsel and that the written confession was voluntarily given after having been advised of her constitutional rights.[1]

The Court reached its conclusion after an extensive review of the facts relevant to the claim of intoxication. However, the specifics of the law of waiver and the required capacity of an individual to effectively waive his rights were not discussed. If defendant did not possess the required capacity to validly waive her rights then her Constitutional guarantees of right to counsel and privilege against self-incrimination were violated.

Waiver had been defined as the voluntary and intentional relinquishment of a known right,[2] the essential elements being knowledge and intent.[3] To constitute a valid waiver, the evidence must show that an accused was offered counsel but intelligently and understandingly rejected the offer.[4] Anything less does not constitute a valid waiver.[5] As a general rule, courts indulge in every reasonable presumption against waiver of a fundamental constitutional right,[6] and do not presume acquiescence in the loss of such rights.[7]

Before an accused can intelligently and understandingly waive a right he must, by necessity, be informed and advised

1. Kennedy v. State, 422 P.2d 88 (Wyo. 1967).
2. Upper Columbia River Towing Co. v. Maryland Cas. Co., 313 F.2d 702, 706 (9th Cir. 1963); Matsuo v. Liberty Mutual Ins. Co., 240 F.2d 824, 829 (9th Cir. 1957).
3. 92 C.J.S. *Waiver* (1955).
4. Carnly v. Cochran, 369 U.S. 506, 516 (1962).
5. *Id.*
6. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Glasser v. United States, 315 U.S. 60, 70 (1941). *See also*, Williams v. Green, 270 F. Supp. 977 (N.D. Ohio, W.D. 1967).
7. People v. Carter, 58 Cal. Rptr. 614, 427 P.2d 214, 218 (1967).

of the rights and privileges accorded him.[8] The Supreme Court of the United States in the well-known cases of *Escobedo v. Illinois*[9] and *Miranda v. Arizona*[10] set forth the warnings required which are the prerequisites to a valid waiver and to the admissibility of any statement made by an accused.[11] Briefly, the necessary warnings which must be conveyed to a defendant in accordance with the opinions are as follows: (1) He must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation; (2) He must be warned of the right to remain silent and that anything stated can be used in evidence against him; (3) He must also be advised that if he is an indigent a lawyer will be appointed to represent him. As to this latter warning, it need not be given to one known to have an attorney or known to have ample funds to employ one, but if any doubt exists as to financial ability the warning must be given.[12]

"Presuming waiver from a silent record is impermissible,"[13] and "there is not room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated."[14] Facts, such as lengthy interrogation and evidence that the accused was in any manner threatened or tricked, show that one did not validly or effectively waive his privileges.[15]

After the required warnings an express statement on the accused's part that he will make a statement and does not desire counsel, followed closely by a statement *could* constitute waiver.[16] To determine in what particular situa-

8. 92 C.J.S. *Waiver* (1955); Miranda v. Arizona, 384 U.S. 436 (1966); People v. Carter, *supra* note 7.
9. 378 U.S. 478 (1964).
10. *See* authorities cited *supra* note 8.
11. *Escobedo* and *Miranda* should apply only to cases where the trials have begun after the decisions were announced, June 22, 1964, and June 13, 1966, respectively. *See* Johnson v. New Jersey, 384 U.S. 719, 733 (1966). However, "the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of the involuntariness claim." Johnson v. New Jersey, *supra* at 730. Thus, Miranda is a factor to be considered in testing voluntariness of the confession. *See also* Kennedy v. State, *supra* note 1, at 95 (dissenting opinion).
12. Miranda v. Arizona, *supra* note 8, at 473 n.43.
13. Carnly v. Cochran, *supra* note 4, at 516.
14. Miranda v. Arizona, *supra* note 8, at 475.
15. *Id.* at 476.
16. *Id.* at 475.

tions this will constitute waiver, all pertinent facts and circumstances of each case must be considered and evaluated.[17] One of the primary factors which must be considered by the courts in the determination of waiver is the extent of the accused's education and background.[18] Other very important factors under consideration include whether or not the accused was under the influence of drugs,[19] whether he was frightened, hysterical, depressed, intoxicated[20] or sick.[21]

For convenience in evaluating the validity of waiver, one author has classified defendants into three groups: the fully competent, the marginal defendant, and the submarginal defendant.[22] Under these classifications, the fully competent individual possesses a sufficient knowledge and understanding of the requisite facts to enable him to fully understand the consequences of waiver, the marginal type is intelligent enough to apprehend the consequences of waiver if advised, but has no present knowledge of such consequences, and the submarginal defendant lacks any ability to appreciate the consequences of waiver. The author concludes:

> The only type of defendant who should be permitted to waive is the fully competent defendant, because only he has the requisite knowledge and appreciation of the consequences of waiver. The marginal defendant may be transformed by proper and effective explanation into a fully competent defendant, but until this transformation occurs he may not waive, even though a "mature, intelligent individual" or an "intelligent, mentally acute" person.[23]

17. Commonwealth v. Maroney, 246 Pa. 186, 231 A.2d 746, 747 (1967).
18. *See* Powell v. Alabama, 287 U.S. 45 (1932), where the Supreme Court took notice of the illiteracy of the defendants involved; Adams v. United States *ex rel*, McCann, 317 U.S. 269 (1942) where the court noted that the defendant had studied law, and was therefore capable of knowingly and intelligently waiving his constitutional privileges. Knowledge of the law because of previous violations seems also to be taken into consideration. *See* Fullen v. State, 283 F.2d 116 (10th Cir. 1960).
19. Bryant v. State, 229 Md. 531, 185 A.2d 190 (1962). The defendant had taken narcotics (heroin) within several hours prior to the confession but the court held that the defendant's statements were freely and voluntarily given. He appeared normal in all respects and gave answers involving details as to dates and times.
20. Mundell v. State, 224 Md. 91, 223 A.2d 184 (1966). Defendant was advised of his rights and was rational and coherent at the time the statement was taken.
21. Cooper v. State, 1 Md. App. 190, 228 A.2d 840 (1967). *See also* Johnson v. Zerbst, *supra* note 6, at 464: "The determination of whether there has been an intelligent waiver of the right to counsel must depend upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."
22. Comment, 49 MINN. L. REV. 1133, 1145 (1965).
23. *Id.*

Applying the above legal principles to the facts of the principal case, the issue is whether the defendant, apparently afflicted with alcoholism and having consumed alcohol over the lengthy period of time shown, at the time of the confession had the capacity intelligently and understandingly to waive the rights bestowed upon her by the Constitution of the United States.[24] Granting that the trier of facts found that defendant was not intoxicated at the time of the alleged waivers, this does not, of itself, render an accused capable of validly waiving his rights.

Drunkenness has never been an excuse for one accused of a crime. However, it is recognized that the state of intoxication may be invoked to negative malice or deliberation on the part of the accused.[25] If intoxication may negative the existence of specific intent, analagously it would seem probable that one afflicted with alcoholism who had been drinking for such a considerable length of time would not possess the required capacity to validly waive constitutional privileges.

At best it seems that such a person could be classified as a marginal defendant, incapable at such time of being "transformed into a fully competent defendant."[26] This would appear to be especially true in light of the fact that Mrs. Kennedy was only asked to give a statement pertaining to the incident and was not told of her husband's death until after the completion of the statement. Nor was Mrs. Kennedy advised of her right to appointed counsel if she was indigent.

In conclusion, it seems highly improbable that the State's evidence was sufficient to overcome the strong presumption against waiver,[27] and that the statement and waiver of counsel proceeded "from the spontaneous suggestion of the party's own mind, free from the influence of any disturbing cause."[28] This is not to say that one in such a situation as Mrs. Kennedy could not validly waive her rights.[29] If a defendant possesses sufficient knowledge and understanding of the factual situa-

24. Kennedy v. State, *supra* note 1, at 97 (dissenting opinion).
25. *See* People v. Giullett, 342 Mich. 1, 69 N.W.2d 140 (1955). *See also* INBAU & SOWLE, CASES AND COMMENTS ON CRIMINAL JUSTICE 395 (1960).
26. *See supra* note 22.
27. People v. Carter, *supra* note 7, at 218.
28. State v. Jones, 276 P.2d 445, 455 (Wyo. 1954).
29. Mundell v. State, *supra* note 20.

tion, understands the consequences and is appraised of the rights accorded him, only then can an accused intelligently and knowingly waive his constitutional rights.

OTIS W. BEACH