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Constitutional Law - An Indigent's Right to a Free Transcript - Mayer v. City of Chicago

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CASE NOTES

CONSTITUTIONAL LAW—An Indigent's Right to a Free Trial Transcript. Mayer v. City of Chicago, 92 S. Ct. 410 (1971).

Mayer was a medic at a demonstration who came upon an injured person and was confronted by a policeman while ministering to him.[1] Mayer was charged with disorderly conduct and interference with a policeman. The maximum fine for each offense was $500, but Mayer was given only a $250 fine on each offense in the Circuit Court of Cook County, Illinois. He petitioned the Circuit Court for a free transcript of the proceedings for use on appeal. His stated grounds of appeal were that the evidence was insufficient for conviction and that misconduct of the prosecutor had denied him a fair trial.[2] Other alternatives to a free transcript under the Illinois Supreme Court rules were the "Settled Statement" and the "Agreed Statement of Facts". But Mayer did not resort to either alternative. The Circuit Court found he was an indigent but denied his application for the transcript on the grounds that the Illinois Supreme Court Rule 607(b) provided free transcripts only for appeals on felony convictions.[3] The Illinois Supreme Court also denied the petition in an unreported order.[4] Mayer then challenged the constitutionality of Rule 607(b) as limited to felony cases by appeal to the United States Supreme Court.[5] The Court held that it was constitutional error to deny an indigent appellant's application for a free transcript on the basis of a rule which distinguishes between a felony and lesser crimes or even between the possibility of imprisonment and a fine. The Court further held that where the appellant's grounds for appeal indicate the need of a transcript that he need not meet the burden of showing the inadequacy of alternatives; this burden is to be placed on the State.[6]

1. Mayer v. City of Chicago, No. 70-5040 (Sup. Ct., Oct. 14, 1970) 10 CR. L. REP. 4029-30.
2. Mayer v. City of Chicago, 92 S. Ct. 410, 412 (1971).
3. *Id.* at 413.
4. *Id.* at 414.
5. *Id.*
6. *Id.* at 416-17.

An indigent's right to a free trial transcript, which is expanded in the principal case, has developed from the indigent's right to appeal. This right is not an explicit guarantee of the Federal Constitution. However, the Supreme Court has held that, once this appeal is granted by a statutory scheme, there must be no difference between the kind of appeal provided the indigent and that provided the defendant who is able to pay. The components which make the appeal meaningful must be granted.[7] These rights primarily are the right to counsel and the right to a trial transcript.

Historically the development of the right to counsel provided for in the sixth amendment paralleled the development of the right to a jury trial.[8] The sixth amendment also guarantees a jury trial in "all criminal prosecutions".[9] The Supreme Court in *Duncan v. Louisiana*[10] refused to provide a jury for all criminal prosecutions by narrowly holding that a jury was required for a serious offense, which in *Duncan* was a two year prison sentence.[11] However, *Duncan* refused to draw the line between a serious offense and a petty offense with any designated prison term.[12] In the federal system a petty offense is defined as one punishable by no more than six months in prison or a $500 fine.[13] The Supreme Court in *Baldwin v. New York*[14] more recently accepted the challenge of drawing the line and concluded "[t]hat no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."[15] No person can be denied a jury where the possible penalty exceeds six months imprisonment.[16] The Constitution, if broadly interpreted, should arguably provide a jury trial for all criminal prosecutions including those for crimes which require imprisonment for less than six months or which

7. Griffin v. Illinois, 351 U.S. 12, 18 (1955).
8. U.S. CONST. amend. VI.
9. *Id.*
10. 391 U.S. 145 (1968).
11. *Id.* at 162.
12. *Id.* at 161.
13. 18 U.S.C. §1915 (1970).
14. 399 U.S. 66 (1970).
15. *Id.* at 69.
16. *Id.* at 74.

require fines.[17] Yet the Court limited this right just as it limited the right to counsel.

The sixth amendment also guarantees a right to counsel in "all criminal prosecutions."[18] The constitutional guarantee of the right to counsel does not address itself to the problem of the indigent and the state's duty to supply counsel. Not until *Gideon v. Wainwright*[19] did the Supreme Court grant to the indigent the right to counsel. Florida law appointed counsel only in capital offenses, so the indigent charged with a noncapital felony had to provide his own counsel.[20] The Court held that the sixth amendment's right to counsel in criminal prosecutions applied to the states under the fourteenth amendment's due process clause.[21] Under this application, one lacking funds to pay legal fees must be granted counsel in state trials. On the same date *Douglas v. California*[22] was decided. The California District Court had " '[g]one through' the record and had come to the conclusion that 'no good whatever could be served by appointment of counsel' " for the indigent defendant.[23] The indigent's access to counsel depended on the judge's discretion to grant it. The substitution of his judgment for the right to counsel or right to appeal was held to be a violation of equal protection for the poor which thus violated the fourteenth amendment.[24]

The Supreme Court next, in *Coleman v. Alabama,*[25] indicated an expansion of the right to counsel by requiring it in a preliminary hearing, which it deemed a critical stage of the criminal process.[26] However, as of yet the Court has not recognized the right to counsel for those indigents facing imprisonment for less than six months or merely fines. In *Argersinger v. Hamlin,*[27] which is now before the Supreme Court on reargument, petitioner asked on oral argument that

17. *Id.* at 75.
18. U.S. CONST. amend. VI.
19. 372 U.S. 335 (1963).
20. *Id.* at 337.
21. *Id.* at 342.
22. 372 U.S. 353 (1963).
23. *Id.* at 354-55.
24. *Id.* at 358.
25. 399 U.S. 1 (1970).
26. *Id.* at 9-10.
27. Argersinger v. Hamlin, No. 70-5015 (Sup. Ct. Dec. 6, 1971), 10 CR. L. REP.

the right to counsel be expanded for indigents facing any imprisonment.[28] Although the requested expansion dealt only with imprisonments, the ruling in *Argersinger* may be broader. Yet, the Court may instead draw the line at six months. If the Court limits the right to counsel as indicated, it will parallel the accused's right to jury trial at six months imprisonment. This convergence is only sensible since a right to jury trial would be practically meaningless without counsel to defend the indigent before a jury. Whether one may argue that all limits should be withdrawn, it should at least be admitted that lines should be drawn at the same place.

Unlike the right to a jury trial and the right to counsel, the right to a trial transcript is not guaranteed explicitly in the Federal Constitution but was developed through case law on the theory that once an appeal is granted the right to a transcript for use by a defense attorney is necessary to execute the appeal properly. The prosecutor employs a similar document supplied at the state's expense. The transcript is useful to detect possible errors upon which an appeal may be granted and is evidence for impeachment of witnesses at a new trial.[29] However, before *Griffin v. Illinois*[30] the appellant's acquisition of a transcript was conditioned on his ability to pay for it. The Court in *Griffin* held that the denial of a free transcript to an indigent violated the due process and equal protection clauses of the fourteenth amendment. The Court stated:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendents must be afforded as adequate appellate review as defendents who have money enough to buy transcripts.[31]

The *Griffin* case, although limited by the facts to a free transcript for a felony conviction, set precedent for a panorama of appeals. Ramifications spread from misdemeanor charges to felony charges. In *Williams v. Oklahoma City,*[32] the Court granted a free transcript to an indigent who was

28. *Id.* at 4099.
29. Britt v. North Carolina, 92 S. Ct. 431, 434 (1971).
30. Griffin v. Illinois, *supra* note 7.
31. *Id.* at 19.
32. 395 U.S. 458 (1969).

convicted of drunken driving for which a 90 day jail sentence and a $50 fine were imposed.[33] The Court thus provided the right to a free transcript to an indigent sentenced for a term less than the six month imprisonment term required for the application of the right to counsel and the right to jury trial. As in *Coleman,* which recognized the right to counsel for a preliminary hearing,[34] the Court in *Roberts v. LaVallee*[35] paralleled that holding by ruling that an indigent man must receive a free transcript of the preliminary hearing before trial. As in *Griffin,* refusal was construed to be a violation of the equal protection clause of the fourteenth amendment.[36] Several Supreme Court cases have required free transcripts for indigents for the preparation of appellate hearings in *habeas corpus* proceedings.[37] Yet, the Supreme Court has refused to rule on whether a free transcript for collateral relief should be provided.[38] In another parallel to the right to counsel, the Court in two cases refused to substitute for full appellate review the trial judge's conclusions that an indigent's appeal was frivolous or that no reversible error existed.[39] Thus, the indigent must be granted full appellate review and a free trial transcript.

As the above rulings indicate, the Supreme Court has steadily expanded the circumstances which give rise to an indigent's right to a free transcript. But two bombshells hit when *Mayer v. City of Chicago*[40] and *Britt v. North Carolina*[41] were decided on the same day. *Mayer* ruled that an indigent had a right to a free transcript for appeal even when the indigent was merely fined.[42] Previously the accused must have faced a possible prison sentence. While this decision did not guarantee a complete transcript in all cases, it required "a

33. *Id.*
34. See note 25 *supra* and accompanying text.
35. 389 U.S. 40 (1967).
36. *Id.* at 41.
37. *E.g.,* Gardner v. California, 393 U.S. 367 (1969); Long v. District Court of Iowa, 385 U.S. 192 (1966).
38. Wade v. Wilson, 396 U.S. 282, 286 (1970) (dictum). The Court will not decide whether free trial transcripts will be afforded for collateral relief petitions until it appears that petitioner cannot borrow a transcript from either the state or from his co-defendant.
39. Lane v. Brown, 372 U.S. 477 (1963); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958).
40. 92 S. Ct. 410 (1971).
41. 92 S. Ct. 431 (1971).
42. Mayer v. City of Chicago, *supra* note 40, at 416-17.

record of sufficient completeness," which would be an alternative sufficient for the particular cases.[43] Moreover, the burden is on the "State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds."[44]

The state attempted to defend its refusal to afford transcripts in cases where no imprisonment resulted by proposing a balancing between the burden imposed upon the individual and the cost to the state. In rejecting this possibility the Court noted, "A fine may bear as heavily on an indigent accused as forced confinement." The Court further commented that the State's long term interest does not lie in arbitrarily restricting the right to a transcript to instances where a jail sentence was invoked.[45] This refusal might run the "risk of generating frustration and hostility toward its courts among the most numerous consumers of justice."[46]

In *Britt* an indigent was denied a free transcript upon a mistrial.[47] Yet the result in *Britt* was dependent upon its peculiar facts. The trial took place in a small town. The court reporter was a good friend of all local lawyers and was reporting at the second trial. The Court reasoned that an alternative to a trial transcript would have been supplied if counsel had requested it. A suitable alternative would have required the court reporter to "read back to counsel his notes . . . well in advance of the second trial."[48] The opinion followed the rule set forth in *Mayer*. It reasoned that the appellant was not required to show that a complete transcript was necessary. The burden was instead upon the state to show that other alternatives were satisfactory. But here the state was not required to carry the burden since the appellant conceded "he had available an informal alternative which appear[ed] to be substantially equivalent to a transcript."[49] Thus, the transcript was denied only because of the appellant's

43. *Id.*
44. *Id.* at 415.
45. *Id.* at 416.
46. *Id.*
47. Britt v. North Carolina, *supra* note 41, 435.
48. *Id.* at 434-35.
49. *Id.*

concession. The result in *Britt,* however, cannot be entirely disregarded, and yet it appears to be a maverick in the expanding line of free transcript cases.

CONCLUSION

One aspect of the *Mayer* case is that it failed to adhere to the lines drawn in the right to counsel and right to jury cases. The latter rights are afforded a defendant only when the offense for which he is charged may be punished by imprisonment for a term longer than six months. The result of this disparity[50] may be that the indigent's right to a free trial transcript for a conviction punishable by fine or by less than six months imprisonment will be meaningless without the right of free counsel who can argue from the transcript. Likewise, the right to jury trial will be of little advantage without the indigent's right to free counsel to argue the case before the jury. Although the *Mayer* case may be expansive, its effect will not be so unless the other two rights are uniformly expanded. One may feel such expansion is warranted or unwarranted, but all must admit that uniformity alone will be effective.

Another aspect of *Mayer* lies in its financial effect. A free transcript for every indigent who wishes an appeal from a conviction punishable by fine may overburden the court system. Some estimate of the cost to a county might be calculated by considering an indigent's case in a Wyoming court.

If the accused is charged with a capital offense, a jury must be sequestered and the county must pay room and board during the trial.[51] The jury members are also paid $12.00 per diem.[52] Regarding trials for other felonies and misdemeanors, the judge has the discretion to sequester the jurors.[53] He may,

50. Groppi v. Wisconsin, 400 U.S. 505, 511 (1971). This case held that a state law which prevented a change in venue for a jury trial where a misdemeanor is charged violated the fourteenth amendment. This case and the right to transcript cases may have begun a trend which will eliminate impediments to the right to counsel and right to jury trial in cases where the sentence is less than six months.
51. WYO. STAT. § 7-237 (1957).
52. WYO. STAT. § 1-136 (Supp. 1971).
53. WYO. STAT. § 7-237 (1957).

however, choose not to separate the jury. The county must then pay daily mileage expenses of ten cents per mile for those who live at least five miles from the court.[54] An accused indigent is allowed two witnesses at county expense and additional witnesses if the accused shows that more are necessary to his case and if the court deems them necessary.[55] Each witness is paid $10.00 per diem. An expert witness is paid $25.00 per diem.[56] The county pays the county attorney to prosecute,[57] the assigned defense counsel,[58] and the clerk of court.[59] The defense counsel is paid a maximum of $500 for a capital offense.[60] A recent Wyoming court record indicates that the costs of a capital offense trial can be substantial even without a transcript.[61] If a 500 page transcript is included at seventy-five cents per page,[62] this will be an added burden to a county which may not have the funds to pay the total cost imposed upon it. The effect of these special costs may be that the county will not try many capital offenses. On the other end of the spectrum, the factor of costs may reduce the number of lesser offenses tried.

Because assigned counsels' fees are so meager, some have been placed in ruinous circumstances by defending indigents. In *People v. Randolph*,[63] five attorneys defended four prisoners in a trial which was extraordinary in complexity and duration.[64] After suffering great loss, they requested $31,000

54. WYO. STAT. § 1-135 (Supp. 1971).

55. WYO. STAT. §§ 7-245-7 (1957).

56. WYO. STAT. § 1-195 (Supp. 1971).

57. WYO. STAT. § 18-74 (Supp. 1971).

58. WYO. R. CRIM. P. 6 (a).

59. WYO. STAT. § 18-74 (Supp. 1971).

60. WYO. STAT. § 7-9 (Supp. 1971).

61. District Court Record from Albany County, Wyoming. The record lists the total trial expense to the county in the case of *State v. Mares*, a capital offense case (1971). It excludes attorney expenses.

Jury Fees	$1,627.80
Witnesses	2,106.20
Rooms	525.00
Meals	677.50
Bailiff's Charges	570.00
Guard Charges	736.00
Total	$6,242.50

62. WYO. STAT. §5-82 (Supp. 1971).

63. People v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966).

64. Williams & Bost, *The Assigned Counsel System: An Exercise of Servitude?* 52 MISS. L. J. 32, 37 (1971).

in expenses and fees. The trial court ordered payment but the county asserted its inability to pay.[65] Although the statute involved limited compensation to $500 per case, the Illinois Supreme Court held the statute could not be applied where it appears that counsel could not serve without great financial burden. Since the county was unable to pay, the State of Illinois was ultimately held liable.[66]

The Wyoming Statutes likewise provide only small payment to assigned defense counsel. The maximum for a capital offense is $500, for a felony is $250, and for a misdemeanor is $100.[67] If indigents' defense attorneys demand larger fees and if free transcript costs are added to other county costs, the state may well have to assume part of the burden.

The element of cost may have another effect on the conduct of the litigation. The prosecution may rest its initial decision to charge a suspect upon financial considerations. The prosecutor is aware that if every defendant stood trial, the government could not finance the total expense.[68] The criminal, too, recognizes this fact.[69] From this awareness the process of plea bargaining arises. The accused will plead guilty in exchange for a reduced charge.[70] At the judicial level, to a judge who may be seeking an excuse to show leniency, the guilty plea may be this excuse. One judge stated, "Most judges usually state for the record words to the effect that 'since the defendant has saved the government the time and expense of a trial, the sentence is less than it ordinarily would be.' "[71]

The impact of cost-induced plea bargaining may be uneven and unfair. The innocent accused may negotiate a plea for fear that his insistence on a trial could substantially increase his sentence if he is found guilty. On the other hand,

65. People v. Randolph, *supra* note 63, at 339.
66. *Id.* at 342.
67. WYO. STAT. § 7-9 (Supp. 1971).
68. United States v. Wiley, 184 F. Supp. 679, 685 (N.D. Ill. 1960), *quoting* LUMMAS, THE TRIAL JUDGE 46-47 (this book is no longer in print).
69. *Id.*
70. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 97 (1966).
71. United States v. Wiley, *supra* note 68, at 684.

the guilty accused may negotiate a disposition disproprotionate to his actual guilt in return for lessening the burden upon the system by his plea.

Regardless of one's opinion about the advantages of a full trial as opposed to a reduced charge, the *Mayer* case and its possible ramifications on the right to counsel and the right to a jury trial may pose cost questions to counties. These questions may result in negotiated dispositions or may force the counties to look for finances from other sources.

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