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CRIMINAL LAW—Absence of Counsel During Reinstruction of the Jury in a Criminal Proceeding. *Hoskins v. State*, 552 P.2d 342 (Wyo. 1976).

Appellant James Hoskins was tried on a charge of grand larceny. After the jury had deliberated for approximately six hours, they sent a note to the trial judge reading, "We cannot reach a verdict due to lack of evidence."¹ Upon receiving the note, the judge reinstructed the jury in open court, but outside the presence of the regular counsel for the defendant.² Among the supplemental instructions given to the jury was the following statement: "You have commented that to this point you feel there is lack of evidence. There is evidence. Please reconsider the evidence in this case."³ The jury returned for further deliberations, and shortly thereafter the defendant was convicted.

It is fundamental that the giving of supplemental instructions rests with the discretion of the trial judge. This is supported by the fact that none of the federal courts of appeal nor any of the state courts has prohibited such instructions.⁴ Therefore the essential question becomes whether the giving of supplemental instructions in the absence of the accused's counsel constitutes a deprivation of his right to a fair and impartial trial.⁵ The Wyoming Supreme Court held pursuant to Rule 49(a) of the Wyoming Rules of Criminal Procedure⁶ that, although there was technical error, the defendant was in no way prejudiced by the absence of counsel and therefore the error was not reversible.

THE RIGHT TO COUNSEL IN GENERAL

The law is well established that the right to counsel extends to all criminal proceedings. In *Gideon v. Wainwright*,⁷

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1. *Hoskins v. State*, 552 P.2d 342, 344 (Wyo. 1976).
2. Although it appears that regular counsel for the defendant appointed a substitute counsel to appear on behalf of the defendant, because of the inadequacy of the record the court assumed *arguendo* that defendant was not represented by counsel at the time the supplemental instructions were given to the jury. *Id.* at 344.
3. *Id.* at 345.
4. Senneff, *Instructing the Deadlocked Jury: Some Practical Considerations*, JOHN MARSHALL J. OF PRACTICE AND PROCEDURE 169 (1974).
5. U.S. CONST. amend. VI, reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." WYO. CONST. Art 1 § 10, states, "In all criminal prosecutions the accused shall have the right to defend in person and by counsel"
6. WYO. R. CRIM. P. 49(a) *Harmless error*. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
7. 372 U.S. 335 (1963).

the United States Supreme Court invalidated a Florida statute which denied the appointment of counsel in a non-capital offense. The Court found the statute to be violative of the accused's constitutional right to counsel as guaranteed by the sixth amendment. As the Court noted, the fact that the government hires lawyers to prosecute and defendants hire lawyers for their defense is a strong indication of the widespread belief that lawyers in criminal cases are necessities.⁸

*Miranda v. Arizona*⁹ extended the right to counsel to pre-trial interrogation. The court found that the right to counsel at a custodial interrogation was essential to the development of an effective defense and to mitigate any feeling of untrustworthiness that the defendant might have during that time. The Supreme Court further extended the right to counsel to an arraignment where certain rights of the accused might be sacrificed or lost.¹⁰

As early as 1932 the United States Supreme Court noted that the accused requires the guiding hand of counsel at every step in the proceeding.¹¹ This requirement has been extended by both state and federal courts, including the United States Supreme Court. They have consistently held that the right to counsel guaranteed by the sixth amendment applies to all critical stages of the proceedings.¹² The Supreme Court in *United States v. Wade* held a post-indictment lineup to be a critical stage. The Court emphasized that,

[T]he accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.¹³

Consequently, the right to counsel requires the court to determine whether the potential for substantial prejudice to de-

8. *Id.* at 344.

9. 384 U.S. 436 (1966).

10. *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961).

11. *Powell v. Alabama*, 287 U.S. 45 (1932).

12. *United States v. Wade*, 388 U.S. 218 (1967); *State v. Zimmer*, 198 Kan. 479, 426 P.2d 267 (1967); *State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968); *State v. Schenck*, 151 Mont. 493, 444 P.2d 861 (1968).

13. *United States v. Wade*, *supra* note 12, at 226.

defendant's rights inheres in a particular situation and if so, the ability of counsel to avoid that prejudice.¹⁴

ABSENCE OF COUNSEL DURING REINSTRUCTION OF THE JURY

There are two distinct lines of authority with regard to the necessity of presence of counsel during the recital of supplemental instructions to the jury. The rule sustained by one line of decisions is that if the supplemental instructions are given in open court it is not error to give them in the absence of counsel.¹⁵ The better rule is that the giving of further instructions in the absence of, or without notice to counsel and defendant, is error. This view was established by the United States Supreme Court in the civil case of *Fillippon v. Albion Vein Slate Co.*¹⁶ The Court held that the trial judge erred in giving a supplemental instruction to the jury in absence of the parties or their counsel without affording them an opportunity to be present or make timely objection. This ruling was extended to a criminal case in *Shields v. United States*.¹⁷ The Court observed that the *Fillippon* rule was especially applicable to a criminal proceeding, and it was prejudicial error for the judge to communicate with the jury in the absence of the defendant and his counsel. This view is supported by a large number of federal and state courts.¹⁸

Several courts have expressed the opinion with regard to the giving of supplemental instructions that,

... if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal.¹⁹

14. *Id.* at 227.

15. *Palestroni v. Jacobs*, 10 N.J. Super. 266, 77 A.2d 183 (1950).

16. 250 U.S. 76 (1919).

17. 273 U.S. 583 (1927).

18. *United States v. Schor*, 418 F.2d 26 (2d Cir. 1969); *Rice v. United States*, 356 F.2d 709 (8th Cir. 1966); *Ah Fook Chang v. United States*, 91 F.2d 805 (9th Cir. 1937); *United States v. Marken*, 457 F.2d 186 (9th Cir. 1972); *State v. Brugger*, 84 N.M. 135, 500 P.2d 420 (1972); *State v. Ramirez*, 111 Ariz. 498, 533 P.2d 665 (1975).

19. *Ah Fook Chang v. United States*, *supra* note 18, at 810; *Rice v. United States*, *supra* note 18.

PREJUDICIAL EFFECT OF ABSENCE OF COUNSEL IN *Hoskins*

In *Hoskins v. State* there is some indication that regular counsel for the defendant appointed a substitute counsel to appear on the behalf of the defendant. However, the appointment of substitute counsel has been held not to be sufficient to satisfy the accused's right to counsel.²⁰

The Wyoming Supreme Court did not address the issue of the sufficiency of substitute counsel. The majority opinion assumed *arguendo* that the defendant was not represented by counsel at the time the supplemental instructions were given to the jury. Consequently, the court found technical error, but held the error to be harmless because it did not substantially affect the rights of the defendant. This decision was based on the theory that an error, to be regarded as harmful, must present the possibility that, in absence of error, the verdict might have been more favorable to the defendant.²¹

The court found that the supplemental instructions in no way had a coercive effect on the minds of the jurors and therefore the instructions themselves did not constitute error. The factual situation in *Hoskins* is similar to the facts in *Jenkins v. United States*.²² After two hours of deliberation the *Jenkins* jury informed the Court that it lacked sufficient evidence to decide the case. The judge then commented to the jury, "That is all the evidence there is, that is all the evidence anybody can have." The jury returned with a guilty verdict shortly thereafter. This comment is very similar to the one made by the judge in *Hoskins*.²³ Additionally, however the judge in *Jenkins* stated that "you have got to reach a decision in this case." The United States Supreme Court held that, under the circumstances of the case, the judge's statements had a coercive effect on the jury, and, consequently reversed the conviction.

20. *People v. Valentine*, 45 App. Div. 2d 1043, 358 N.Y.S. 2d 175 (1974).

21. *Reeder v. State*, 515 P.2d 969 (Wyo. 1973); WYO. R. CRIM P. 49(a), *supra* note 6.

22. 330 F.2d 220, 221 (D.C. Cir. 1964), *rev'd*, 380 U.S. 445 (1965).

23. *Hoskins v. State*, *supra* note 1, at 349.

The test often used to determine whether supplemental instructions constitute error is whether they force or help to force an agreement or whether they merely start a new train of deliberation ending the disagreement.²⁴ Using this as a test it is submitted that the judge's words in *Hoskins* had the potential to force an agreement. The jury was obviously deadlocked and unable to reach a verdict because of lack of evidence. The most likely interpretation of the jury's note is that the jury had decided that there was insufficient evidence for conviction. The jury only deliberated for a short time after the reinstruction. It is, therefore, not beyond reason to conclude that the judge's statements were interpreted by the jury to mean that there was sufficient evidence to convict. Under these circumstances, regardless of the judge's intentions, it is posited that the statement was potentially prejudicial. Thus, the Supreme Court's reasoning that, in the absence of these particular instructions, the verdict would not have been more favorable to the defendant must be seriously questioned.

The court next addressed, perhaps the most important issue in the case, specifically, whether the absence of defense counsel deprived the defendant of his right to be represented at all stages of the proceeding.

The opinion takes notice of the fact that defense counsel failed to make a timely objection to the court's supplemental instruction.²⁵ However, following trial, defense counsel filed a motion for a new trial challenging the supplemental instructions. Thus, the trial judge was given an opportunity to rule on the propriety of his instructions, in considering the motion for a new trial. The Wyoming Supreme Court reasoned that, since the trial judge ruled favorably on the supplemental instructions, the defendant could not have been prejudiced by the absence of counsel, other than losing an op-

24. *Williams v. Benefit Trust Life Ins. Co.*, 220 Kan. 51, 434 P.2d 765 (1967).

25. Wyo. R. Civ. P. 51 requires that: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." See also WYO. R. CRIM. P. 31. Defense counsel's failure to make timely objection was undoubtedly due to his absence from the court room at the time the instruction was given.

portunity to enter an objection to the instruction at the time given. The court therefore concluded that the decision must be affirmed because the error was harmless.

None of the cases previously discussed deal directly with the problem of whether or not the giving of supplemental instructions is a critical stage in the proceeding as defined by *United States v. Wade*.²⁶ It is submitted that it is a critical stage, and, therefore, any absence of counsel during reinstruction of the jury is a violation of the sixth amendment, which is made obligatory on the states by the fourteenth amendment.²⁷ *Wade* interpreted the sixth amendment as requiring counsel whenever necessary to assure a meaningful defense.

The Wyoming Supreme Court found that, since the trial judge had ruled on the instructions and found them to be unprejudicial, there was no reversible error.²⁸ However, presence of defense counsel would have removed some of the doubt surrounding the effect of the supplemental instructions in this case. The supplemental instructions were made when the defendant was required to stand alone against the state.²⁹ Had counsel been present, he would have been in a position to submit alternative instructions or request a different course of action. Most importantly, he could have objected to the instructions at the time given. Furthermore he could have requested the judge to make it clear to the jury that his instructions were to be construed as meaning there was evidence on both sides.

By the time counsel submitted his objection, the damage had already occurred. Therefore, it is of little consequence that the trial judge addressed the issue after the accused had been convicted. The outcome of the trial and the future of the defendant depended on the impact the supplemental instructions had on the jury. Consequently, it is reasonable to conclude that this was a most critical stage in the proceed-

26. *Supra* note 12.

27. *Gideon v. Wainwright*, *supra* note 7.

28. *Hoskins v. State*, *supra* note 1, at 351.

29. *Id.* at 353.

ing. Absence of counsel at this point exceeds constitutional guarantees and should have been construed as reversible error.

POLICY CONSIDERATIONS

The majority of the Wyoming Supreme Court held in *Hoskins* that, all circumstances considered, there was no reversible error. If this is in fact the case, it is not difficult to ascertain a most important consideration. If the error was truly harmless, it would be a travesty on justice to allow a defendant who was unquestionably guilty to be set free. There can be no valid reason to free an accused when there was error, providing it in no way affected the outcome. To this extent, the majority of the Wyoming Supreme Court was, unequivocally, correct.

It is submitted that *Hoskins v. State* presents quite a different factual situation. As previously pointed out, the jury was unable to reach a verdict. That in itself sheds some doubt as to the defendant's guilt, based on the evidence given.

The right to counsel during the giving of supplemental instructions is the logical extension of past United States Supreme Court decisions. The Court in *United States v. Wade*³⁰ extended the right to counsel to a post-indictment lineup. As emphasized by the Court:

Since . . . there is grave potential for prejudice, intentional or not . . . and since presence of counsel . . . can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that . . . the post-indictment lineup was a critical stage of the prosecution. . . .³¹

This reasoning can be applied with even greater authority when considering the potential for prejudice during the re-instruction of the jury. If the accused is entitled to counsel prior to trial it is difficult to imagine any countervailing

30. *Supra* note 12.

31. *Id.* at 236-37.

policy considerations that can be advanced against the requirement of presence of counsel during all stages of the trial. Furthermore, presence of counsel prevents coercion and assures that the accused will be treated fairly.

However, the most important consideration is that the presence of counsel assures the defendant of a meaningful defense. Considering the amount of effort required by the court to make certain counsel is present and the great potential for prejudice during the reinstruction of the jury, it seems elementary that the absolute right to counsel extend to this portion of the proceeding.

CONCLUSION

The supplemental instructions given by the trial judge in *Hoskins v. State* were potentially prejudicial to the defendant. Even assuming, for the sake of argument, that the instructions had no prejudicial effect, it is unquestioned that the accused's right to counsel under the sixth amendment is absolute at all critical stages of the proceeding. The reinstruction of the jury must be considered a critical stage because of the potential for prejudice. Furthermore, the judge conceivably controls the defendant's future at this point in the proceeding. Consequently, reinstruction of the jury in the absence of counsel is fundamental error and constitutes reversible error regardless of whether the instructions are prejudicial on their face.

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