

## February 1990 Question 5

Deft was formally charged with a criminal offense punishable with a ninety-day maximum jail term and/or a \$500 fine. As Deft was being brought by a policeman to the courtroom for arraignment, Witt, who had witnessed the charged offense and was asked by the prosecutor to be present at Deft's arraignment, said to the policeman, "Yes, that's the guy!"

At the arraignment, Deft established his indigency and requested appointment of counsel and trial by jury. The arraignment judge denied both requests without explanation.

Representing himself in the trial court, Deft moved to exclude evidence of Witt's statement to the policeman that he recognized Deft at the arraignment, and to prevent identification of Deft by Witt at trial. The trial judge agreed to exclude evidence of Witt's statement to the policeman but refused to prevent any potential identification of Deft by Witt at trial.

After the foregoing rulings, Deft negotiated a plea bargain with the prosecutor under which Deft agreed to enter a plea of guilty without admitting that he was, in fact, guilty, and the State agreed that it would not request a jail term. The plea agreement was explained to the court. The judge then advised Deft of the constitutional rights he would waive by pleading guilty and also told Deft the maximum statutory penalty that could be imposed. The judge explained that the plea agreement did not limit the court's discretion in imposing sentence. Deft then waived his rights and agreed to go forward with the plea. After the prosecutor made a proffer of evidence to establish a factual basis for the charge, the judge accepted Deft's plea of guilty, even though Deft told the judge he was really innocent. Deft was sentenced to a fine of \$500 and a thirty-day suspended jail term.

Deft has appealed. The jurisdiction permits an appeal following a plea of guilty. You may assume that each issue raised by Deft is a proper subject for appeal notwithstanding the guilty plea.

Deft argues in the appellate court that his conviction must be reversed on federal constitutional grounds because:

1. He was denied his right to appointed counsel.
2. He was denied his right to trial by jury.
3. Any identification of Deft by Witt was inadmissible at trial.
4. His plea was not shown to be voluntary and intelligent and should not have been accepted since he had maintained that he was innocent.

How should the appellate court rule on each of Deft's arguments? Discuss.

## ANSWER A TO QUESTION 5

### 1. Denial of Right to Counsel:

Defendant's Appeal on this point should be denied. Under Federal Constitutional Law, an indigent defendant has a right to appointed counsel if charged with a felony. Gideon v. Wainwright. This right has been extended to misdemeanor cases, but only when the defendant in fact receives jail time.

On these facts, Deft was charged with a misdemeanor, punishable by a maximum sentence of 90 days and/or a \$500 fine. Deft did not receive a jail sentence, however, he was sentenced to a fine, and a suspended sentence. There is nothing in the facts to suggest that the sentence was not unconditionally suspended. Accordingly, the mere possibility that, before sentence, Deft might be sentenced to jail, is not enough to trigger Deft's right to appointed counsel.

Deft's rights may be violated, however, if there is a possibility that the suspension of the sentence could be revoked by a subsequent act by Deft, such as a conviction for a subsequent crime. If his suspension would be revoked, and Deft made to serve prison time for the original offense, then he had a right to counsel at the earlier trial.

The Appellate Court can avoid this problem, however, by simply reversing that part of Deft's sentence, eliminating it, and then affirming the conviction and the portion of the sentence which imposes a fine. Deft does not have a right to a new trial, merely to a sentence that does not include the possibility of jail time.

### 2. Deft's appeal that he was denied his right to a trial by jury should be denied in its entirety.

A criminal defendant has a Federal Constitutional right to a jury trial for all felonies; and all misdemeanors where the permissible misdemeanor sentence is 6 months or more. There is no right under the Constitution, for a jury trial in state court where the maximum sentence is under six months. (I am assuming that this jurisdiction is a state court. In a federal court, Deft would receive a jury trial).

Here, Deft is charged under a statute that is punishable by a maximum jail sentence of 90 days. The fine provision is immaterial. Deft has no right to a jury trial.

3. Deft's appeal of the court's allowance of Witt to identify Deft in court raises an interesting Wade issue. Witt's identification of Deft at Deft's arraignment was properly excluded by the court as an improper, overly suggestive show-up identification procedure. The procedure was state arranged, since the Prosecutor asked Witt to be present, and I assume the Court found that the Prosecutor asked Witt to be present in order to obtain an identification. Certainly, the court's ruling can be justified in these facts, and will not be disturbed on appeal. The procedure was overly suggestive, because the arraignment was no doubt well after the commission of the offense, and with this passage of time, a one on one show-up, particularly at a court proceeding where Deft is being charged with the offense Witt witnessed, creates a huge risk of misidentification.

However, the Court was not necessarily wrong in allowing Witt to still make an in-court identification. The court should refuse to allow an in-court identification only if this prior show-up at the arraignment was so prejudicial as to make the in-court identification unreliable, in that the Court could

not be sure that Witt's identification of Deft at trial was not based on his memory of the events during the commission of the offense, but instead was based on the improper, suggestive show-up at Deft's arraignment.

The prosecutor had a right at the pre-trial hearing to establish by clear and convincing evidence that Witt had a sufficient, independent (from taint from the arraignment). basis for making an in-court identification, that Witt had a sufficient opportunity to observe Deft at the crime scene to make an in-court identification. If the court had heard such evidence at the pre-trial hearing, and if this evidence sufficiently supports a determination made by the court that Witt had a sufficient basis to make an in-court identification, free from taint, and free from the fear that Witt was really only identifying the man who was arraigned, then his decision will be upheld on appeal. Of course, if the record is silent or insufficient, as to any independent opportunity by Witt to observe Deft at the crime, then the trial court will be reversed, and a new trial, without any incourt identification by Witt, will be ordered.

4. Finally, Deft claims that his plea was not voluntary and intelligent, on the ground that he maintained he was innocent. Under Alford, the Supreme Court has held that a criminal defendant may properly plead guilty without admitting guilty under certain circumstances. A criminal defendant may properly plead guilty, and still maintain his innocence, and be bound by his plea, if his plea was a knowing and voluntary decision on his part, and was done after first: being explained his constitutional right (Boykin), and then expressly waiving those rights.

Here, the court explained to Deft his constitutional rights, and Deft waived them. This presumably included the court telling Deft he had the right to require the prosecutor to prove each and every element of the crime that Deft was charged with committing. Accordingly, Deft could plead guilty, even though maintaining his innocence, since a defendant may voluntarily decide he has no defense, and may wish to give himself the chance if receiving a lenient sentence in return for his guilty plea. If a defendant reasonably makes that decision, he cannot later attack his plea on the grounds that he did not admit his guilt.

In this case, the prosecutor promised not to request a jail time. Deft, however, could not receive a jail sentence, since he was not afforded counsel. The court should have explained this to Deft. If the court did not, Deft may have conceded his guilt in return for an illusionary promise, and/or those grounds an appellate court could reverse,

Here, however, the court told Deft it was not bound by the prosecuting recommendation, and Deft's plea could be seen as motivated not by the prosecutor's promise, but by a desire to obtain leniency from the court.

In any event, since the exact grounds cited in Deft's maintenance of innocence, on these facts, appeal should be denied.

#### ANSWER B TO QUESTION 5

1. Right to appointed counsel - 6th Amendment -

The 6th amendment to the U.S. Constitution guarantees the right to counsel in criminal cases. Indigents unable to afford private counsel are entitled to appointment of counsel to represent

them.

However, the right to counsel is not absolute. In misdemeanor cases the judge has discretion whether to appoint counsel. However, if an indigent is refused appointed counsel, the court cannot impose jail time. Furthermore, in a recent case the Court recognized that in some cases penalties other than incarceration are so severe that appointed counsel is required even if the defendant will not be imprisoned.

The offense for which Deft was charged carried a maximum 90 days or \$500 fine. Thus the judge could properly deny his request for appointed counsel.

However, Deft was sentenced to \$500 and a 30-day suspended term. Since Deft might eventually be incarcerated, the judge probably was in error in refusing to appoint counsel.

The appellate court should rule that in light of the possibility of jail time, refusal to appoint counsel was error.

## 2. Trial by jury - 7th Amendment

The U.S. Constitution preserves the right of a criminal defendant to a trial by jury.

However, this right is not absolute. Courts have interpreted the constitution as requiring a trial by jury only if the charged offense could result in imprisonment for more than 6 months.

The offense for which Deft was charged carried a maximum jail term of 90 days. Accordingly, the constitution does not entitle Deft to a jury trial.

The appellate court should affirm the trial judge's ruling on this point.

## 3. Witt's pretrial identification

The 6th amendment right to counsel applies to any post-charge line-up or show-up. If Deft was entitled to appointed counsel or if he had retained counsel, he would be entitled to have his counsel present if the police set up a line-up or show-up after he was charged.

Furthermore, line-ups or show-ups are improper if they are so "unnecessarily suggestive" as to create a "substantial likelihood of misidentification".

However, the facts reflect that when Witt saw Deft, it was not a line-up or a show-up. It appears that neither the prosecutor nor the cops had asked Witt to look at Deft and identify him. Witt acted on his own. In that case, the identification was not improper and was admissible.

If the prosecutor or the cops had asked Witt to be present so that he could see Deft and identify him, that may well constitute a show-up. The facts suggest that that may be the case since the prosecutor had asked Witt to be present.

In that case, the show-up is unnecessarily suggestive. If Deft was already in custody there was probably no reason to do a show-up in this manner. A line-up that was not so suggestive could have been arranged. A line-up with others present would be less likely to result in misidentification.

If a post charge line-up or show-up is improperly conducted, one remedy is exclusion of the out of court identification. However, this remedy is very harsh and in practice is rarely used.

If Witt can show that he has an independent recollection or means of identifying Deft (independent of the improper show-up) his in-court identification is admissible.,

The appellate court should affirm the trial court's ruling.

4. "Alford" plea acceptable

The Supreme Court has ruled that guilty pleas are valid if they are shown to be a voluntary and intelligent choice among the defendant's alternatives. It has specifically ruled that a guilty plea meets that standard even though the defendant maintains his innocence. Clearly a guilty plea upon a plea bargain may be an intelligent choice if there is overwhelming evidence of a defendant's guilt, even though he insists he is innocent.

Therefore, Deft's guilty plea was acceptable despite his claims of innocence. The appellate court should affirm the trial court's acceptance of the plea.