

LEXSEE 17 OHIO ST. 2D 17

**THE STATE OF OHIO, APPELLEE, v. DEAL, APPELLANT**

No. 68-120

Supreme Court of Ohio

17 Ohio St. 2d 17; 244 N.E.2d 742; 1969 Ohio LEXIS 406; 46 Ohio Op. 2d 154

February 11, 1969, Decided

**PRIOR HISTORY:** [\*\*\*1] APPEAL from the Court of Appeals for Franklin County.

The appellant, Thomas Douglas Deal, was indicted in Franklin County on April 17, 1967, on three counts of armed robbery. Counsel was appointed by the trial court to represent him.

The trial began on August 10, 1967. After the state had presented its three witnesses and rested its case, the appellant in open court attempted to discharge his attorney. The court recessed the jury and gave appellant an opportunity to put his complaint in the record. Appellant said, "I'm not getting fair representation. Give me three weeks and I will be ready to go to trial. I asked this man [his attorney] to file a motion which was not filed. I asked this man to subpoena my witnesses and they are not here in court -- that's not fair, that's not giving me no kind of trial."

The court said that the complaint was belated and unreasonable in view of the fact that appellant had not indicated any dissatisfaction with his counsel until the state had rested.

The court decided to proceed with the trial and it called the jury back. It then asked appellant if he had any witnesses, to which appellant replied that he had but that they were not in [\*\*\*2] court. The court asked appellant if he wanted to take the stand. He replied that he would like to, but that he would not do it without having any counsel to examine him, and that he would not consider going on with the attorney he had been assigned.

Closing arguments were waived, and the court submitted the case to the jury, which found appellant guilty as charged.

Appellant obtained new counsel and appealed to the Court of Appeals for Franklin County, contending that he was denied effective representation of counsel and that the trial court erred in asking him whether he wanted to

take the stand, in front of the jury, when it knew he did not.

The Court of Appeals affirmed the conviction, and the cause is now before this court pursuant to the allowance of a motion for leave to appeal.

**DISPOSITION:** *Judgment reversed.*

**HEADNOTES**

*Criminal procedure -- Indigent accused -- Adequacy of assigned counsel questioned during trial -- Duty of trial judge -- Inquiry into complaint -- Trial to proceed, when.*

**SYLLABUS**

Where, during the course of his trial for a serious crime, an indigent accused questions the effectiveness and adequacy of assigned counsel, by stating that such counsel failed to file [\*\*\*3] seasonably a notice of alibi or to subpoena witnesses in support thereof even though requested to do so by accused, it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record. The trial judge may then require the trial to proceed with assigned counsel participating if the complaint is not substantiated or is unreasonable.

**COUNSEL:** *Mr. C. Howard Johnson*, prosecuting attorney, and *Mr. Marvin S. Romanoff*, for appellee.

*Mr. Thomas M. Tyack*, for appellant.

**JUDGES:** SCHNEIDER, J. TAFT, C. J. ZIMMERMAN, MATTHIAS and O'NEILL, JJ., concur. HERBERT and DUNCAN, JJ., not participating.

**OPINION BY:** SCHNEIDER

**OPINION**

[\*18] [\*\*743] Appellant's first assignment of error is that he was denied effective assistance of counsel. His court-appointed counsel did not file notice of alibi defense, nor did he subpoena the witnesses that appellant says were needed for this defense. From the record, it is impossible to determine whether appellant was adequately represented, [\*19] because it contains nothing indicating why no witnesses were called or why no alibi defense was prepared. It is entirely possible that appointed counsel talked to those [\*\*\*4] witnesses and concluded that there was no worthwhile alibi defense. The Court of Appeals affirmed appellant's conviction on the ground that he had not established error because the record did not refute this possibility that counsel had investigated appellant's alibi defense and found it wanting. We reverse because, in the circumstances of this case, it was the duty of the trial court to see that the record contained an adequate investigation of appellant's complaint.

The appellant, by himself, did everything he could be expected to do to preserve his objection as to the incompetency of his counsel and to the defense his counsel had prepared. His objection was specific, not vague or general. He made this objection at the trial, at the close of the state's case, which would seem to assure that such objection was timely. See annotation, 74 A. L. R. 2d 1390, 1411. Compare *Tompsett v. Ohio*, 146 F. 2d 95, where a defendant's failure to object at trial was deemed to indicate acquiescence in the performance of his attorney.

The difficulty here is that the record does not show any investigation by the trial court into appellant's objection, yet appellate review of the competency [\*\*\*5] of counsel is generally limited to what does appear in the record. See Comment, *Incompetency of Counsel as a Ground for Attacking Criminal Convictions in California and Federal Courts*, 4 U. C. L. A. L. Rev. 400, 416. Having "discharged" his counsel, appellant had no legal advice when he most needed it to assure that the record would show something indicative of incompetence beyond the mere fact that a defense had not been used. In these circumstances, we think it was the trial court's duty to put its own investigation of such an objection into the record, and thus prevent the appellant from being deprived of review on the matter. In other words, before continuing with the trial the court should have made it clear in the record whether the [\*20] appellant's action was an arbitrary failure to go forward or a legitimate claim of inadequate representation.

Such a record could have been made if the court had asked appellant's trial counsel why he had not filed notice of alibi or subpoenaed appellant's alleged witnesses. The right to counsel is important enough that in a situation such as this a reviewing court should have sufficient information in the record to determine whether [\*\*\*6] a claim of inadequate counsel is justified. We therefore reverse the judgment and remand the cause to the Court of Common Pleas for a reinvestigation, to be put on the record, of the appellant's claim of incompetent [\*\*744] counsel. If the claim is unfounded, that court may re-enter the judgment.

*Judgment reversed.*