

VOLUME NO. 37

OPINION NO. 36

ATTORNEYS - Right to assistance of counsel in misdemeanor cases; CONSTITUTIONAL LAW - Right to assistance of counsel in misdemeanor cases; COURTS - Right to assistance of counsel in misdemeanor cases; CRIMINAL LAW - Right to assistance of counsel in misdemeanor cases; CRIMES AND CRIMINAL PROCEDURE - Right to assistance of counsel in misdemeanor cases; JUSTICE COURTS - Right to assistance of counsel in misdemeanor cases; REVISED CODES OF MONTANA, 1947 - Sections 94-6513, 95-902, 95-1001, 95-1105.

- HELD: 1. Indigent defendants must be furnished counsel in all misdemeanor cases, except those in which the judge has weighed the seriousness and gravity of the offense and precludes any imprisonment upon conviction, and informs the defendant of this before trial.
2. Should counsel be appointed for an indigent defendant, the reasonable compensation for the services of appointed counsel and reasonable costs of the criminal proceeding are to be borne by the appropriate county, city, town, or state agency as designated by section 95-1005, R.C.M. 1947.

21 June 1977

Kenneth R. Wilson, Esq.
Miles City Attorney
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Dear Mr. Wilson:

You have requested my opinion as to the effect of the language contained in the uniform complaint used by law enforcement agencies of Montana addressing the defendant's right to assistance of counsel in misdemeanor cases, which reads as follows:

If the matter is one where you could be placed in jail upon conviction and if you are indigent you have the right to have the State of Montana appoint an attorney to represent you.

Under Montana law the right to assistance of counsel "in all criminal prosecutions" is guaranteed by Article II, section

24, 1972 Constitution of Montana. In addition section 95-1001, R.C.M. 1947 states:

Every defendant brought before the court must be informed by the court that it is his right to have counsel before proceeding and must be asked if he desires the aid of counsel. The defendant, if charged with a felony, must be advised that counsel will be furnished at state expense if he is unable to employ counsel. If the offense charged is a felony and if the defendant desires counsel and is unable to employ counsel a court of record must assign counsel to defend him. If the offense charged is a misdemeanor and if the defendant desires counsel and is unable to employ counsel a court of record, in the interest of justice may assign counsel to defend him. (Emphasis added.)

The Montana Supreme Court has not specifically defined the right to assistance of counsel in misdemeanor cases under either of these provisions of our law. The court did interpret section 94-6513, R.C.M. 1947 and Article III, section 16, 1889 Constitution of Montana, which were superceded by the above mentioned provisions of Montana law. State ex rel Johnson v. District Court, 147 Mont. 263, 410 P.2d 933 (1966). The court in Johnson held that neither the Constitution nor the general law of Montana required or allowed district courts to appoint and pay counsel for indigent misdemeanants. The only change to be found in the present Montana law is that section 95-1101, R.C.M. 1947, allows the appointment of counsel in misdemeanors, but there is no requirement that the court do so.

The United States Supreme Court on the other hand, has held that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972). This holding is based upon the Sixth Amendment to the Constitution of the United States, which guarantees the right to assistance of counsel "in all criminal prosecutions," as does the 1972 Montana Constitution.

The Court, in Argersinger, specifically declined to address the issue of right to counsel in misdemeanor cases where imprisonment was not involved. Nevertheless, there is a

great deal of restrictive language in the decision which indicates that a defendant may be tried for a misdemeanor without the assistance of counsel, if the judge precludes the possibility of imprisonment at the beginning of the trial, as evidenced by the following:

Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts. (Argersinger v. Hamlin, supra, 40.)

* * *

The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guarding hand of counsel" so necessary when one's liberty is in jeopardy. (Id. at 40.)

* * *

The fact that traffic charges technically fall within the category of "criminal prosecutions" does not necessarily mean that many of them will be brought into the class where imprisonment actually occurs. (Id. at 38.)

The argument can be made that the test under Argersinger is whether imprisonment is a possibility from a reading of the offense charged and the potential penalty involved. However, recent decisions of the United States Supreme Court clarify the holding in Argersinger.

Middendorf v. Henry, 425 U.S. 25, 47 L.Ed.2d 556, 96 S.Ct. 1281 (1976), addressed summary court martials of armed services personnel without the assistance of counsel. The Court held the Sixth Amendment right to counsel inapplicable because such proceedings were not "criminal prosecutions." However, the Court explained Argersinger, stating:

Argersinger v. Hamlin (citation omitted) held that the Sixth Amendment provision for the assistance of counsel extended to misdemeanor prosecutions in civilian courts if conviction would result in imprisonment. (Emphasis added.)

The use of the word "would" as compared to "could" or "may" indicates that the Court intended to extend the right to counsel in misdemeanor cases only to those in which imprisonment upon conviction is not precluded before trial. A further indication of this limitation is found in North v. Russell, _____ U.S. _____, 49 L.Ed.2d 534, 539, 96 S.Ct. _____ (1976), wherein the Court stated:

We assume police court judges recognize their obligation under Argersinger v. Hamlin (citation omitted) to inform defendants of their right to a lawyer if a sentence of confinement is to be imposed." (Emphasis added.)

Once it has been determined that an indigent defendant is entitled to appointed counsel, the issue arises as to who must pay for the services of appointed counsel and the reasonable costs incurred in the criminal proceeding. This is governed by section 95-1005, R.C.M. 1947, which states:

...such costs shall be chargeable to the county in which the proceeding arose, except that (a) in proceedings solely involving the violation of a city ordinance or state statute prosecuted in a municipal, city, or police court wherein costs shall be chargeable to the city or town in which the proceeding arose, and (b) in arrests in criminal proceedings by agents of the department of fish and game and arrests by agents of the department of justice, the costs (including attorneys' fees of attorneys appointed by the court for the defendant) must be borne by the state agency causing the arrest.

THEREFORE, IT IS MY OPINION:

1. Indigent defendants must be furnished counsel in all misdemeanor cases, except those in which the judge has weighed the seriousness and gravity of the offense and precludes any imprisonment upon conviction, and informs the defendant of this before trial. However, under section 95-902, R.C.M. 1947, the court must inform the defendant of his right to assistance of counsel at his own expense.

2. Should counsel be appointed for an indigent defendant, the reasonable compensation for the services of appointed counsel and reasonable costs of the criminal proceeding are to be borne by the appropriate county, city, town, or state agency as designated by section 95-1005, R.C.M. 1947.

Very truly yours,

MIKE GREELY
Attorney General