

August 2015

# Duty of Trial Judge When Defendant Objects to Competency of His Counsel; State v. Deal

Nicholas T. George

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>



Part of the [Criminal Law Commons](#)

---

## Recommended Citation

George, Nicholas T. (1970) "Duty of Trial Judge When Defendant Objects to Competency of His Counsel; State v. Deal," *Akron Law Review*: Vol. 3 : Iss. 1 , Article 5.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol3/iss1/5>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact [mjon@uakron.edu](mailto:mjon@uakron.edu), [uapress@uakron.edu](mailto:uapress@uakron.edu).

## RECENT CASES

## CRIMINAL LAW—DUTY OF TRIAL JUDGE WHEN DEFENDANT OBJECTS TO COMPETENCY OF HIS COUNSEL

*State v. Deal*, 17 Ohio State 2d 17 (1969)

Deal, the defendant, was indicted on three counts of armed robbery. He was represented by a lawyer appointed by the trial court. After the state had rested its case the defendant, in open court, attempted to discharge his counsel. At this point the court recessed the jury and Deal placed his complaint in the record. He gave his reasons as the following:

“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.”<sup>1</sup>

The court rejected the defendant’s complaint, deeming it “belated and unreasonable in view of the fact that defendant had not indicated any dissatisfaction with his counsel until the state had rested.”<sup>2</sup> The jury returned and the trial then proceeded. When asked if he wished to take the stand, the defendant 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.”<sup>3</sup> Closing arguments were waived and the case was then submitted to the jury, which found the defendant guilty. With a new attorney the defendant appealed to the Franklin County Court of Appeals who subsequently affirmed. The Supreme Court reversed, per Justice Schneider, and remanded the case to the Court of Common Pleas for re-investigation.

Since the decision in *Powell v. Alabama*<sup>4</sup> many cases have been adjudicated setting forth various substantive rules defining and determining the competency of counsel. On first impression one would view the *Deal* case as following this line—i.e. the Supreme Court reversed on the ground that defendant was indirectly denied the right to counsel. Indirectly, because if de-

<sup>1</sup> *State v. Deal*, 17 Ohio State 2d 17 (1969).

<sup>2</sup> *Id.* at 18.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158 (1932).

fendant's counsel was incompetent, the effect of such incompetency would be comparable to having no counsel at all. But after carefully analyzing *Deal* one will realize that the Supreme Court was not speaking in terms of substantive denial of counsel as guaranteed by the Sixth and Fourteenth Amendments. In effect, they were setting forth a procedure that the trial court must follow if the defendant alleges an objection to the competency of his counsel. This procedure involves the following considerations:

1. *When must the defendant object to the competency of his counsel?*

The Supreme Court considered an objection to be timely lodged if made when the state rested its case. The court distinguished the *Deal* case from *Tompsett v. Ohio*,<sup>5</sup> where the defendant made his objection for the first time on appeal. The failure to object at trial was deemed by the appellate court to indicate that the defendant acquiesced in the performance of his counsel. In order for a defendant to preserve his objection to counsel on appeal the law currently requires that defendant assert his objection at some time during the trial. This rule must be modified in light of the recent Cuyahoga County Court of Appeals decision in *State v. Cutcher*.<sup>6</sup> There the defendant moved for a new trial on the ground of inadequate and ineffective representation by counsel. The motion was made at the end of the trial. The appellate court ruled that such objection was timely. It then found that defendant was denied adequate counsel and reversed the conviction. Thus, it would seem that the latest time that one could object and preserve such right for appeal would be on a motion for new trial at the trial level. To raise such an objection *initially* on appeal would seem to be too late in light of the *Tompsett* holding, which is still considered good law today.

2. *May the defendant allege such incompetency in general terms or must he state the specific instances?*

The defendant should specify the ways in which his attorney has failed to properly represent him. In *Deal* the defendant specifically complained of the following: (1) His counsel did not file notice of alibi defenses; (2) His counsel did not subpoena wit-

<sup>5</sup> *Tompsett v. Ohio*, 146 F. 2d 95 (C.A. 6th Ohio 1944).

<sup>6</sup> *State v. Cutcher*, 17 Ohio App. 2d 107 (1969).

nesses that the defendant felt were necessary for his defense. Justice Schneider noted: "His (defendant's) objection was specific, not vague or general."<sup>7</sup> Judge Corrigan in *Cutcher* noted, "Present counsel for the defendant cites several instances in the course of the trial which he argues demonstrate inadequate and ineffective representation by the trial court defense counsel."<sup>8</sup> Therefore, rather than *generally* allege that his lawyer is inadequate the defendant would be more prudent to cite specific acts and/or omissions demonstrating incompetency.

3. *What is the duty of the trial judge when the defendant objects to the competency of his counsel?*

In the principal case the court declared:

"In these circumstances we think it was the trial court's duty to put its own objection into the record. . . . In other words, before continuing with the trial the court should have made it clear in the record whether the appellant's (defendant's) action was an arbitrary failure to go forward or a legitimate claim of inadequate representation."<sup>9</sup>

Obviously, from the quoted statement, Justice Schneider felt that the Supreme Court had no way of knowing whether or not the objection was valid. The record failed to reveal why there was no alibi defense filed or why there were no defense witnesses called. The record being silent, one could hypothesize that appointed counsel talked to defendant's witnesses and felt that their testimony would be of no avail. Moreover, it is possible that after appointed counsel investigated the alibi defense he found it useless. It is here, to this third issue, that the force of the Supreme Court's decision must be guided. It is fundamental in reviewing procedures that the reviewing court is limited to what does appear in the record. It must logically follow that if a defendant objects to the inadequacy of counsel on the grounds that his counsel failed to do certain necessary things, and if the record does not reveal whether defendant's counsel did or did not do them—or whether he was justified in not doing them—then such a record is worthless. For under these circumstances the reviewing court cannot determine whether or not defendant's counsel was competent.

<sup>7</sup> *State v. Deal*, *supra* note 1, at 19.

<sup>8</sup> *State v. Cutcher*, *supra* note 6, at 108.

<sup>9</sup> *State v. Deal*, *supra* note 1, at 19.

## RECENT CASES

83

The Supreme Court opinion addressed itself to this situation, stating that when a defendant objects to the competency of his counsel the trial judge must immediately stop the proceedings. The judge must then conduct an investigation to determine whether or not the defendant's claims are legitimate. The results of this investigation must then be placed in the record of the trial proceedings. This procedure will guarantee the defendant's "right to counsel safeguards" at the trial level. If the trial judge does find defendant's claims to be legitimate, he will be able to rectify the situation immediately by either appointing new counsel or declaring a mistrial.<sup>10</sup> Since all of this will be done at the trial level, the defendant will avoid wasting time and incurring unnecessary expense.

Lastly, if the trial judge's investigation discloses that the defendant's claim is without merit, the appellate court will have an opportunity to review such a finding, since the investigation (the manner in which it was conducted and the means by which the trial judge reached his decision) will appear in the record. The importance of this procedure becomes evident when one considers the action taken by the Franklin County Court of Appeals, which affirmed the defendant's conviction on the basis of a record which failed to reveal whether or not defendant's claims of inadequate representation were legitimate. Particularly in view of the vast number of cases which have declared the substantive law on what constitutes competent representation by counsel, *State v. Deal* is a welcome decision. It is obvious that justice cannot be served when a defendant makes a timely objection to the adequacy of his counsel and the trial judge overrules the objection without investigating its validity.

NICHOLAS T. GEORGE

---

<sup>10</sup> This is not intended to suggest that these are the only proper courses open to the trial judge.