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ADMINISTRATION OF JUSTICE MEMORANDA

PUBLISHED BY THE INSTITUTE OF GOVERNMENT
University of North Carolina at Chapel Hill

May 1979 No. 79/03

THE *BUTLER* DECISION ON WAIVER OF *MIRANDA* RIGHTS

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In late April the United States Supreme Court invalidated the North Carolina rule that a defendant must expressly waive his *Miranda* rights before his statements are admissible in court. A waiver may sometimes be found, depending on the facts of the case, even when the defendant does not explicitly state that he does not want a lawyer. The case is *North Carolina v. Butler*, 25 Crim. Law Rptr. 3035 (U.S. Supreme Court, April 24, 1979).

In late December 1976 Willie Thomas Butler, reportedly known as "Top Cat", and a friend of his, Elmer Lee, entered a gas station in Goldsboro, pulled a gun on the attendant, forced him to drive away, and then shot him when he jumped from the car and tried to escape them. After returning to take the attendant's wallet, either Butler or Lee shot him again and left. Butler fled the state and eventually made his way to New York. There he was arrested by an FBI agent, questioned, and sent back to Wayne County for trial. In late 1977 he was convicted of kidnapping, armed robbery and a felonious assault, for which he received, respectively, a life sentence, a life sentence, and a five-year sentence, all to be served concurrently.

In response to questioning by the FBI agent in New York, Butler admitted that he and a friend had been drinking and had planned to rob a gas station, but contended that it was his friend who had pulled the gun and done the shooting. He later said that Elmer Lee had been present, apparently meaning that Lee was the friend. The trial judge found Butler's incriminating statements to be admissible, despite Butler's contention that he had not waived his *Miranda* rights. The FBI agent testified that Butler had been advised of his rights more than once, that he had been given the "Advice of Rights" form to read, and that he had claimed to understand the rights. However, Butler refused to sign the waiver form, saying that he would talk but that he was not signing any form. On those facts, the trial court found that Butler had waived his right to have counsel present at the interrogation and that his statements were voluntary and admissible.

In *State v. Butler*, 295 N.C. 250 (1978), the North Carolina Supreme Court held the statements inadmissible because Butler had not made an "express" or "specific" waiver of his rights. The simple failure to request an attorney,

even when combined with Butler's apparent understanding of his rights and his willingness to talk, was not a waiver. Something more affirmative on Butler's part was necessary. This decision was consistent with the earlier cases of *State v. Blackmon*, 280 N.C. 42 (1971) and *State v. Thacker*, 281 N.C. 447 (1972), though apparently North Carolina was the only jurisdiction to have such an express waiver rule.

On April 24th the United States Supreme Court rejected the express waiver rule of the North Carolina Supreme Court. The 5-3 majority held that a defendant may sometimes give up his right to an attorney without explicitly stating that he waives that right. Whether the defendant has given up the right must be determined by the particular facts and circumstances of each case. The North Carolina Supreme Court was too rigid in requiring that in each case the defendant expressly state that he did not desire to have a lawyer. Indeed, there was ample evidence to support the prosecution's argument that Butler had waived his right: he had been told of his rights; he had been allowed to read his rights and, since he had an eleventh grade education, was apparently able to understand what he read (note that this case preceded implementation of the statewide competency test); he expressed his willingness to talk; and he never asked for an attorney.

Officers should definitely continue to seek express waivers of *Miranda* rights from defendants. If the defendant specifically states that he waives his right to an attorney, it will be easier for the prosecutor to meet his burden of proof for having the confession admitted into evidence. The *Butler* case establishes, however, that there may be cases where the defendant does not say outright that he waives his right to a lawyer yet the statements he makes will be admissible because the rest of his conduct establishes a waiver.