UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 43 | Number 3 Article 8

4-1-1965

Constitutional Law -- Right to Counsel and Transcript on Appeal -- Waiver -- Retroactivity -- Post-Conviction Hearing Act

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Constitutional Law—Right to Counsel and Transcript on Appeal—Waiver—Retroactivity—Post-Conviction Hearing Act

Following his conviction in 1959, the defendant gave notice of appeal in open court. Two months later the defendant again appeared in open court, and expressed a desire to withdraw his appeal. Although he had been represented by his own counsel at the trial, the defendant was indigent the second time he appeared in court, was without counsel, and had not been furnished a transcript of his trial even though he had asked the clerk of court for one. Four and one-half years later, the defendant filed a petition for a post-conviction hearing under the North Carolina Post-Conviction Hearing Act.[1] At the post-conviction hearing the defendant asserted a denial of his constitutional rights to have counsel on appeal and a transcript of his trial furnished by the state. The judge, however, ruled that the defendant had waived his right to a transcript by the withdrawal of his notice of appeal.[2] This ruling was reversed in 1964 by the North Carolina Supreme Court in *State v. Roux*.[3] Accordingly, the case was remanded to the superior court with an order that the defendant be permitted to appeal to the supreme court with appointed counsel.

Decisions of the United States Supreme Court dealing with the rights of an indigent appealing his conviction would seem to require such a holding. The principles set forth by these decisions also indicate that the North Carolina Supreme Court was correct in first ruling on whether the defendant had been denied the right to counsel and a transcript before deciding whether there was a waiver of the right to appeal. In *Douglas v. California*,[4] the Supreme Court held that the equal protection clause requires that an indigent have the benefit of counsel when the merits of his one and only appeal as of right are decided. *Douglas* applies to appeals from criminal convictions in the superior courts of North Carolina, because a defendant has as a matter of right only an appeal to the

[1] N.C. GEN. STAT. §§ 15-217 to -222 (1953, Supp. 1963). See generally 29 N.C.L. REV. 390 (1951).

[2] Although the defendant asserted a denial of counsel, the judge apparently did not rule on this question.

[3] 263 N.C. 149, 139 S.E.2d 189 (1964).

[4] 372 U.S. 353, 357 (1963).

supreme court.[5] Therefore, the court in *Roux* correctly held that the defendant as an indigent had a constitutional right to have counsel appointed to represent him on appeal.

The court in *Roux* held that under *Griffin v. Illinois*[6] the defendant had a constitutional right to a free transcript of his trial. However, in *Draper v. Washington*[7] the Supreme Court established that an indigent defendant's right to a transcript is not absolute, but depends upon the circumstances of the particular case.[8] Where the indigent needs a transcript of his trial in order to prepare an adequate record for appeal, the state must provide him with "means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant . . . ."[9] Assuming that the defendant in *Roux* needed a transcript of his trial in order to prepare a record for appeal, the court was correct in holding that he had a constitutional right to a free transcript.[10]

The court in *Roux* was then faced with the question of whether the purported waiver of appeal by the defendant constituted a waiver of the constitutional rights to counsel and transcript. The court ruled that the defendant's withdrawal of his notice of appeal did not constitute a waiver of his rights of counsel and transcript.[11] The Supreme Court has recognized that constitutional rights may be waived by an individual,[12] but has made it clear that the waiver

[5] N.C. GEN. STAT. § 15-180 (1953) provides: "In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the Supreme Court; and the appeal shall be perfected and the case for the Supreme Court settled, as provided in civil actions."

[6] 351 U.S. 12 (1956).

[7] 372 U.S. 487 (1963).

[8] Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If, for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be provided.
Id. at 495-96.

[9] *Id.* at 496.

[10] See also N.C. GEN. STAT. § 15-4.1 (Supp. 1963), which provides: "When an appeal is taken under this section the county shall make available trial transcript and records required for an adequate and effective appellate review."

[11] 263 N.C. at 157-58, 139 S.E.2d at 195.

[12] See, *e.g.*, Carnley v. Cochran, 369 U.S. 506 (1962); Moore v. Michigan, 355 U.S. 155 (1957); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938); Patton v. United States, 281 U.S. 276 (1930).

of constitutional rights will not be lightly inferred[13] and that the Court will indulge every reasonable presumption against the waiver of fundamental constitutional rights.[14] In *Carnley v. Cochran*[15] the Court held that before there could be a waiver of the right to counsel in state criminal proceedings the state must have offered counsel to the indigent defendant. The Court said: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."[16]

Although *Carnley* involved the right to counsel at the trial level and was based on the due process clause[17] whereas *Douglas* involved the right to counsel on appeal and was based on the equal protection clause,[18] this distinction should make no difference in the application of the *Carnley* test of waiver to the right recognized in *Douglas*.[19] The defendant in *Roux* was not informed of his right to appointed counsel on appeal. Furthermore, his request for a transcript had been denied. Under the test of waiver formulated by *Carnley,* he did not waive his right to counsel and a transcript.

After holding that the defendant had not waived the right to counsel and a transcript, the court in *Roux* ruled that he had not waived his right to appeal when he had voluntarily and without duress withdrawn his prior notice of appeal. Although the court apparently based this holding on a finding that the defendant had not "intelligently and understandingly" waived the right to appeal,

[13] Smith v. United States, 337 U.S. 137 (1949).

[14] See Emspak v. United States, 349 U.S. 190 (1955); Smith v. United States, 337 U.S. 137 (1949); Glasser v. United States, 315 U.S. 60 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938); Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937); Hodges v. Easton, 106 U.S. 408 (1882).

[15] 369 U.S. 506 (1962).

[16] *Id.* at 516.

[17] *Id.* at 512-13.

[18] 372 U.S. at 358.

[19] In this tradition, our own constitutional guaranties of due process *and* equal protection *both* call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. *Both* equal protection *and* due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice . . . ." Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Griffin v. Illinois, 351 U.S. 12, 17, 18 (1956). (Emphasis added.)

the result should be the same regardless of the nature of the purported waiver of appeal—*i.e.*, without attempting to apply the *Carnley* test of waiver. Once a state grants the right to appeal a criminal conviction,[20] an indigent defendant is entitled under *Douglas* and *Griffin* to have this appeal decided with the aid of appointed counsel and a transcript furnished by the state.[21] A holding that an indigent defendant, uninformed of his rights under *Douglas* and *Griffin*, has waived the right to appeal is a denial of these rights, since the appeal is in effect being decided without the defendant having the benefit of counsel and a transcript. In short, where an appellate court finds that an indigent defendant was not offered counsel and a transcript following his conviction in the trial court, it apparently need not inquire further, since any adverse determination of the defendant's right to appeal would necessarily be an unconstitutional denial of the right to counsel on appeal and a transcript.

Roux also involved the retroactive application of *Douglas*, decided in 1963. In holding the defendant was entitled to counsel on appeal in 1959, *Roux* implicitly held *Douglas* to be retroactive. Retroactivity was not discussed in *Roux*, however; nor has it been in Supreme Court decisions applying *Douglas*. The result in *Roux* apparently follows the application that the Supreme Court has given to *Douglas*. In three instances[22] the Supreme Court has vacated the judgment of a state court where the indigent defendant's appeal without counsel occurred prior to the time of the decision in *Douglas*. In each of these cases, however, the defendant's appeal was decided in the state court during the interval between the state court's decision on the appeals of the petitioners in *Douglas* and the decision of the Supreme Court in *Douglas*. Because the decision

[20] The Supreme Court has recognized that the right to appeal is not a constitutional right and that the right depends on the state's having provided for appellate review. See *id.* at 18; Reetz v. Michigan, 188 U.S. 505, 508 (1903); McKane v. Durston, 153 U.S. 684, 687 (1894).

[21] The holding in *Douglas* is expressly limited to apply only to the first appeal which is granted as a matter of right from a criminal conviction. The Court stated that it was not dealing with a denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the initial appeal granted as a matter of right. 372 U.S. at 356. In a state having two levels of appellate review, the above statement in the text should be limited to this extent.

[22] Daegele v. Kansas, 375 U.S. 1 (1963) (memorandum decision); Ausbie v. California, 375 U.S. 24 (1963) (memorandum decision); Tabb v. California, 375 U.S. 27 (1963) (memorandum decision).

in *Douglas* would have to apply back to the time the right was denied the petitioners in *Douglas* in order to assure equal protection of the law,[23] these cases cannot be considered conclusive as to the retroactivity of *Douglas*. In *Smith v. Crouse*,[24] however, the indigent defendant's petition for appointment of counsel for appeal had been denied some four months before the petitioners in *Douglas* had appealed to the state court without counsel. In a memorandum opinion,[25] the Supreme Court cited *Douglas* and reversed the state supreme court's ruling[26] that *Douglas* was not retroactive; the effect appears to be a retroactive application of *Douglas*. In all four of these cases the Court declined to write an opinion;[27] thus the full import of the decisions is not clear.[28]

Unquestionably, many inmates of North Carolina prisons were indigent at the time of their trial and were not offered counsel for appeal following their convictions. Under the retroactive application given *Douglas* in *Roux*, these individuals have been denied a constitutional right, *i.e.*, the right to counsel on appeal.

A simple and effective means of asserting the denial of this right is found in the North Carolina Post-Conviction Hearing Act,[29] as applied in *Roux*. General Statutes section 15-217 provides that no action shall be commenced under the act more than five years after the judgment resulting from an allegedly unconstitutional conviction unless the petitioner shows the delay was not caused by laches or negligence on his part.[30] One who was denied counsel

[23] See United States *ex rel.* Durocher v. La Vallee, 330 F.2d 303, 310 n.4 (1964).

[24] 378 U.S. 584 (1964) (memorandum decision).

[25] *Ibid.*

[26] Smith v. Crouse, 192 Kan. 171, 386 P.2d 295 (1963).

[27] The Supreme Court has treated cases involving lack of counsel at the trial level arising after the decision in Gideon v. Wainwright, 372 U.S. 335 (1963), in the same manner. In Pickelsimer v. Wainwright, 375 U.S. 2 (1964), the Court vacated and remanded ten pre-*Gideon* convictions back to the state court "for further consideration in light of *Gideon v. Wainwright*."

[28] In this respect a statement from Mr. Justice Harlan's dissenting opinion in Pickelsimer v. Wainwright, 375 U.S. 2 (1964), seems appropriate: "In the current swift pace of constitutional change, the time has come for the Court to deal definitively with this important and far reaching subject [*i.e.*, retroactivity of decisions]."

[29] N.C. GEN. STAT. §§ 15-217 to -222 (1953, Supp. 1963).

[30] N.C. GEN. STAT. § 15-217 (Supp. 1963). It has been held that a state may attach reasonable time limitations on the assertion of constitutional rights under a post-conviction hearing act and that a provision similar to § 15-217 is constitutional. United States *ex rel.* Dopkowski v. Randolph, 262

in proceedings occurring more than five years before the decision in *Douglas* in 1963 should not be barred by section 15-217, since one could hardly be considered negligent in failing to assert the denial of a right that neither he nor anyone else knew existed prior to 1963. If a time limitation must be placed on the use of the act in this situation, it is suggested that the limitation should run from the time of the *Douglas* decision in 1963 and should certainly be no shorter than the five-year period of section 15-217. Defendants who were denied counsel on appeal less than five years before 1963 raise a different question, namely whether they should have the suggested five-year period beginning in 1963 or only such part of the statutory five-year period as remains after 1963. Although there is some authority indicating that the defendant would have only that part of the five-year period remaining in 1963,[31] it would be more in keeping with the purpose of the act to allow such a defendant the full five-year period beginning in 1963.[32] Of course, defendants who were denied counsel subsequent to 1963 call for an ordinary application of the act and thus pose no problem.

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F.2d 10 (7th Cir.), *cert. denied,* 359 U.S. 1004 (1959). Although such provisions have in some instances been given a strict interpretation, see, *e.g.,* United States *ex rel.* Lilyroth v. Ragen, 222 F.2d 654 (7th Cir.), *cert. denied,* 350 U.S. 939 (1956), the post-conviction hearing acts should not be construed so strictly that their purpose is defeated. See People v. Reeves, 412 Ill. 555, 107 N.E.2d 681 (1952). Accordingly, it has been held that a defendant is not barred by such a time limitation if he is feeble minded, Jablonski v. People, 330 Ill. App. 422, 71 N.E.2d 361 (1947), or if the asserted grounds for relief were fraudulently concealed from him. See Merkie v. People, 15 Ill. 2d 539, 155 N.E.2d 581, *cert. denied,* 359 U.S. 1015 (1959). However, a defendant's incarceration will not alone be sufficient to prevent the running of the limitation. See United States *ex rel.* Lilyroth v. Ragen, *supra;* People v. Austin, 329 Ill. App. 276, 67 N.E.2d 883 (1946).

[31] See United States *ex rel.* Lilyroth v. Ragen, *supra* note 30, where the defendant was in Indiana in prison when the Illinois Post-Conviction Hearing Act was enacted. He was returned to Illinois and imprisoned for a parole violation when only two months of the five-year limitation remained. It was held that he was barred by the time limitation because he did not file the petition for review under the Post-Conviction Hearing Act within the two-month period.

[32] See State v. Cruse, 238 N.C. 53, 76 S.E.2d 320 (1953) (purpose of the act is to provide an "adequate, simple and effective" post-conviction remedy); State v. Miller, 237 N.C. 29, 74 S.E.2d 513 (1953) (purpose of the act is to provide an "adequate and available" post-conviction remedy).