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Constitutional Law—Indigents' Waiver of Counsel on Appeal

Petitioner, P, was arrested and charged with murder. Because of his indigency, P secured court appointed counsel to represent him. He was convicted of voluntary manslaughter. There were no post trial motions filed on P's behalf, no appeal was taken from the judgment of sentence and the time for filing such appeals had expired. He thereafter petitioned for a writ of habeas corpus, asserting that his trial counsel had declined to undertake an appeal and that he had been without the funds or knowledge necessary to perfect an appeal in the absence of such assistance. P contended that although entitled to appellate review as of right, the refusal of his appointed counsel to undertake the appeal thus effectively prevented him from exercising that right. The lower court dismissed his petition without a hearing. Held, order vacated and case remanded for further proceedings. P may not be foreclosed from exercising his right to appellate review of his conviction if his failure to assert that right was the result of an unconstitutional deprivation of the assistance of counsel, and a hearing must be held to inquire into this question. Should it there be concluded that he had been denied his right to counsel for an appeal, he must be permitted an appeal as if timely filed, and counsel must be appointed to prosecute the appeal. Commonwealth ex rel. Robinson v. Myers, 215 A.2d 637 (Pa. 1966).

The main question in the principal case was whether or not P had waived his right to the assistance of counsel in securing appellate review. To this question it is necessary to inquire into all the circumstances attendant upon the failure to take a direct appeal. An opinion in an earlier Pennsylvania case enumerated the circumstances which should be determined in this type inquiry. These circumstances are as follows: whether the defendant was indigent at the conclusion of his trial; whether he was informed of his right to appeal by anyone; whether he independently knew of his right to appeal; whether he desired to appeal; whether he communicated a desire to his trial counsel that he wished to appeal; whether he communicated such a desire to the trial court; and what the reactions were of counsel or the court. Once these questions have been answered, then the hearing court can determine whether directly or indirectly, P was denied the assistance of counsel in perfecting his appeal, whether a denial of counsel was a factor in the failure to take an appeal or whether some other reason was in-


In *Douglas v. California*, 372 U.S. 353 (1963), the Court held that an indigent has the right to benefit of counsel on appeal. In the *Douglas* case the Court was dealing only with the *first appeal*, granted as a matter of right to rich and poor alike, from a criminal conviction. It was not decided in the *Douglas* case whether a state would have to provide counsel for an indigent seeking a discretionary hearing from a state's supreme court after an intermediate court had sustained his conviction, nor whether counsel must be appointed for an indigent seeking review of a state appellate court's action in the federal courts. In the *Douglas* case the Court did observe that a state can, consistently with the fourteenth amendment, provide for differences in appellate practices so long as the result does not amount to a denial of due process or an invidious discrimination. The Court said it could see no difference whether the issue was the right to a free transcript on appeal or an indigent's right to assistance of counsel on appeal. To the Court in either case the evil is the same: discrimination against the indigent.

The indigent had already been afforded some aid on appeal by *Griffin v. Illinois*, 351 U.S. 12 (1956), which held that Illinois was obligated to furnish a free transcript to an indigent on appeal. The Court stated that a state is not required by the federal constitution to provide appellate courts or a right to appellate review at all, but if a state does grant appellate review it cannot do so in a way that discriminates against some convicted defendants on account of their poverty.
Other cases seem to foretell that additional assistance to the indigent may yet appear. In United States ex rel. Mitchell v. Fay, 241 F. Supp. 165 (N.Y. 1965), the court held that New York's decisional rule as to indigent appeals, violates the constitutional rights of convicted indigents. The New York rule provided that trial counsel assigned to an indigent in a non-capital case had no responsibility for advising as to an appeal or filing a notice of appeal and that the indigent could not secure counsel for appeal except from the appellate court after timely filing of a notice of appeal.

A recent Oklahoma case reached a result contrary to that in the principal case. The Oklahoma case involved a proceeding for granting casemade (a casemade consists of those things which transpired in court during the trial, and which are not a part of the record) at public expense and allowing appeal to be filed out of time. The petitioner was represented at the trial court by counsel of his own choice. He stated in his petition that notice of intent to appeal was given. However, neither he nor his family could raise the funds for an attorney to perfect the appeal. After the time for appeal had expired, the petitioner filed a request for a casemade at public expense in the District Court of Oklahoma County, which was denied. The Oklahoma court, with little discussion, said that petitioner was not denied any constitutional rights; he merely failed to take advantage of them in apt time. Gaforth v. Oklahoma, 407 P.2d 1001 (Okla. 1965).

In Carrell v. United States, 344 F.2d 537 (1965), the defendant filed a motion for leave to file an appeal after the allowed time for appeal had expired. He claimed in substance that his trial counsel had failed to follow his instruction to file an appeal, of which failure the defendant said he had been unaware. The court remanded for a hearing to determine whether the defendant's failure to take a timely appeal was to be excused. The court said that the right to counsel is so critical to the basic right of appeal that one who is without counsel and urges the claim must be offered the assistance of counsel.

In another federal case, a prisoner petitioned for permission to appeal in forma pauperis after the time for instituting an appeal had expired. The petitioner had been represented at the trial by his own retained counsel, but the petitioner claimed that his counsel had never apprised him of his right to appeal. The court said that
if these allegations were true and unexplained, it would constitute such an extraordinary inattention to a client's interests as to amount to ineffective assistance of counsel. The opinion continued by saying that if the facts should be found to be as alleged, the court should by the expedient of vacating and resentencing, restore the prisoner to the status of one on whom sentence has just been imposed and who has ten days in which to institute an appeal. Dillane v. United States, 350 F.2d 732 (1965). The view of the court in the Dillane case could have far reaching effects if it were to be adopted by the United States Supreme Court. As to what extend such a holding would be applied is not known, but it has been held that the rule of Douglas v. California, supra, has a retroactive application. Ruark v. Colorado, 378 U.S. 585 (1964).

An intelligent waiver of counsel will probably continue to be accepted, but the failure to request counsel will probably not justify the failure of the court to provide counsel for the indigent on trial or appeal level. Day, The Right to Have Assistance of Council at All Appellate Stages, 52 A.B.A.J. 135 (1966). The future may see the Supreme Court requiring states to assume the indigent's burden at any appellate stage.

The West Virginia Supreme Court recognizes that the right of one accused of a crime to assistance of counsel is a fundamental right, essential to a fair trial and made obligatory upon the states by virtue of due process clause of the federal constitution; this right is not presumed to have been waived by failure of the accused to request counsel, by entry of a guilty plea or by reason of a record silent on the matter of counsel. For a waiver of counsel to be valid it must be made intelligently and understandingly. State ex rel. Stumbo v. Boles, 139 S.E.2d 259 (W. Va. 1964).

A West Virginia statute provides that a transcript shall be furnished indigent persons under conviction. W. Va. Code ch. 51, art. 7, § 7 (Michie 1961). In Linger v. Jennings, 143 W. Va. 57, 99 S.E.2d 740 (1957), the court regarded the statute as clear and free from ambiguity and acceptable without resorting to any rule of interpretation. In State ex rel. Legg v. Boles, 148 W. Va. 354, 135 S.E.2d 257 (1964), the court held that a convicted indigent defendant is entitled to a free transcript of the record of his trial, upon complying with the provisions of the statute, for use in seeking an appeal, and refusal to furnish such transcript violates the fourteenth amendment.
In a very recent West Virginia case the convicted indigent informed the clerk of the circuit court that he desired a free transcript for the purpose of seeking an appeal, but the clerk failed to furnish the duly requested transcript in sufficient time to enable the indigent to apply for an appeal. In a proceeding for habeas corpus it was asserted that the petitioning indigent was not entitled to relief in that he failed to satisfy the requirements of the statute which requires the filing of a written request setting forth the grounds upon which the appeal or writ of error would be sought. The court held that the provision requiring a written request setting forth the grounds for an appeal or writ of error is merely incidental to the main purpose of the statute and elimination or disregard of the provision would not defeat the legislative intent. In concluding the court said that the failure of the circuit court, acting by its clerk, to furnish a duly requested transcript in sufficient time to enable such indigent to apply for an appeal, constitutes a denial of due process of law guaranteed by the fourteenth amendment to the federal constitution and by Article III, sections ten and seventeen of the West Virginia Constitution. State ex. rel. Kennedy v. Bailes, 147 S.E.2d 391 (1966). W. Va. Code ch. 51, art. 7 § 7 (Michie 1961) was rewritten in 1965. The revision was an attempt to coordinate it with the federal decisions in the area. The petitioner's claim in the Kennedy case arose before the revision, and the 1965 amendment was not involved in the case.

No case could arise in West Virginia which would be identical with the principal case because there is no appeal as of right in West Virginia. However, the situation may very well develop in West Virginia in which a convicted indigent has not sought an appeal or writ of error within the permitted time because he was unaware of this right to seek an appeal. Then the question will be whether the indigent has waived this right to seek appeal or whether he has possibly been denied due process of law. Another question that will probably arise in the future is whether an indigent has the right to assistance of counsel on appeal when there is no appeal as of right.

Along with this question will come the problem of determining just when, if at all, the indigent is entitled to this aid. Should the assistance be offered to help the indigent seek the appeal, or should it be withheld until he has secured the appeal on his own efforts? Complete answers to these questions can only be found in future
litigation. Perhaps one can look to *Gideon v. Wainwright*, *Douglas v. California*, *supra*, and *Griffin v. Illinois*, *supra*, as guidelines to what the answers to these questions may be. From these cases it is seen that the Court is in favor of construing the Constitution so as to extend its protection to the indigent and to prevent discrimination against him.

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**Creditors' Rights—Tort Liability for Fraudulent Conveyance**

At the time *P*'s judgment against *D* was entered by a New York court, *D* owned real estate in Puerto Rico. *D*, the judgment debtor, transferred this property to a third party. *P* claimed that *D* conveyed this property for the purpose of hindering and defrauding *P* in the collection of his judgment. *P* brought this action for the damages which resulted from *D*'s alleged fraudulent transfer. *D* moved to dismiss *P*'s action on the ground that *P* had no lien on the property transferred. *Held*, order denying the motion to dismiss affirmed. At common law whenever one improperly interfered with the execution of a judgment he was liable for any damages he caused to the judgment creditor. *James v. Powell*, 266 N.Y.S.2d 245 (1966).

Courts generally agree that a general creditor, without a lien, cannot maintain an action for damages. This principle is based upon the legal right of one to use, enjoy or dispose of his property without restriction until some other person obtains an interest in the property which the law will protect. The law determines the time and manner in which the property of a debtor ceases to be subject to his disposition and becomes subject to the interest of his creditor. *Adler v. Fenton*, 65 U.S. (24 How.) 407 (1860). The dissent in the principal case stated that a general creditor or a judgment creditor without a lien on specific property has no cause of action against his debtor. This statement, in so far as it relates to general creditors, is supported by numerous cases.

In *Brunvold v. Victor Johnson & Co.*, 59 Cal. App. 2d 75, 138 P.2d 32 (1943), the court stated that it was settled law that no tort liability exists against those participating in a fraudulent transfer, at least where the creditor at the time of the transfer has not reduced his claim to judgment and holds no lien upon the