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Constitutional Law—Constitutional Right to Appellate Review in Forma Pauperis

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using the word "loiter" alone, did not establish a sufficiently specific standard of criminality.

From the point of view of the *Diaz* case, it is difficult to see how the Court could uphold Section 722-b attacked in *Johnson*, which similarly proscribes only, "loitering." No other words of Section 722-b purport to further define the act; no distinction between innocent conduct and conduct calculated to harm, both embraced in the term "loiter," is made. If Section 722-b is to be upheld, it must be on the rationale of the *Bell* case, that the nature of the place where loitering is prohibited is such that all, and any, manner of "loitering" may be prohibited. In both *Bell* and *Johnson*, unlike *Diaz*, the legitimate purposes of the place at which loitering was proscribed are limited. The clear intent of the legislature in the former cases is to insure that no other activities are there pursued.⁵⁰ In these circumstances, a distinction perhaps not clearly made by the court, statutes which proscribe "loitering" without further definition seem to sufficiently specify that which is made criminal.

Analysis of the *Caswell-Massey* case, and the *Johnson* case, reveals a further following of the principle enunciated in *Brewer*. In each case, the Court faced the question of whether the statute clearly reached the type of activity in which the defendant was engaged, and did so in words which, read in context, leave no doubt that his conduct is proscribed. The Courts' articulation of its reasoning may be open to some criticism, however, particularly in the *Johnson* case. After the *Diaz* case in 1958, it would appear that a "loitering" statute had to distinguish innocent from harmful conduct. Although the Court distinguishes *Johnson* from *Diaz* on grounds of the *locus* of the act, that distinction seems insufficient to vary the result of *Diaz* unless it is further made clear that the manner of loitering is not significant in all situations, *viz*: *People v. Bell*.⁵¹

CONSTITUTIONAL RIGHT TO APPELLATE REVIEW IN FORMA PAUPERIS

Appellant was convicted of first degree manslaughter.⁵² The minutes of the trial were not filed pursuant to Section 456 of the Code of Criminal Procedure.⁵³ While incarcerated, defendant prosecuted an appeal to the Appellate Division, *in forma pauperis*, and for assignment of counsel. No record of the trial was available to him, nor to the Appellate Court. The appeal was dismissed, since no record or brief had been filed with the court, and there

50. ". . . and who is unable to give satisfactory explanation of his presence. . . ." N.Y. PEN. LAW § 1990-a(2), *supra*; "Any person not the parent or legal guardian of a pupil . . .," ". . . without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof. . ." N.Y. PEN. LAW § 722-b, *supra*.

51. *Supra* note 44.

52. *People v. Pitts*, 6 N.Y.2d 288, 189 N.Y.S.2d 650 (1959).

53. Section 456 provides;

that upon a defendant's conviction for a crime, the court clerk, within two days after notice of appeal has been served upon him, shall notify the stenographer that an appeal has been taken. The stenographer shall within ten days of such notice deliver to the clerk a copy of the stenographic minutes of the trial which shall be filed in the clerk's office.

was no appearance by or for the defendant. Defendant's appeal to the Court of Appeals was granted because of the change in constitutional law brought about by the cases of *Griffin v. Illinois*,⁵⁴ and *People v. Pride*.⁵⁵

Defendant contended, that under the circumstances, his right to appellate review had been unconstitutionally denied. The *Griffin* and *Pride* cases decided, that a state violates the rights of due process and equal protection if it allows all convicted persons to have appellate review, except those who cannot afford to pay for the records of their trial. Formerly, the rule was, that it was within the discretion of the state to allow or disallow appeals, or to grant appeals on such terms and conditions as to the legislature seemed proper.⁵⁶ Therefore, it was held that an appeal *in forma pauperis* was a privilege and not a right, and refusing to grant one the right to thus appeal did not violate the requirements of due process.⁵⁷

A state is not required to provide appellate review, but if it does so, the grant must not be made in a discriminatory manner.⁵⁸ The ability to pay costs in advance, bears no rational relationship to a defendant's guilt or innocence, and cannot be used as an excuse to deprive a defendant of a fair trial.⁵⁹ Therefore, where an indigent defendant must have a transcript, the state must provide some means whereby the defendant and the appellate court will have access to such record.⁶⁰

The State is not required to assign counsel on appeal, or in any post-conviction proceeding in which a defendant is involved, irrespective of the merits of the appeal, except in first degree murder cases.⁶¹ However, if the defendant is incarcerated, he does not have access to the record of the trial, filed in the county clerk's office, pursuant to Section 456 of the Code of Criminal Procedure. Therefore, the court must assign counsel in order that someone may inspect the records for the indigent defendant.⁶² The Court held, that defendant was unconstitutionally denied his right to appellate review, since no record was filed under Section 456, until after his appeal had been dismissed by the Appellate Division, and since he was physically unable to inspect the record, even had it been properly filed.

RETROACTIVE CONSTITUTIONAL RIGHT TO APPEAL

Defendant was convicted for robbery in 1948 as a second offender, and appealed by right. He requested his appeal to be allowed *in forma pauperis*. This request was denied and the appeal subsequently dismissed for failure to

54. 351 U.S. 12 (1956).

55. 3 N.Y.2d 545, 170 N.Y.S.2d 321 (1958).

56. *State v. Edwards*, 157 Ohio St. 175, 105 N.E.2d 259 (1952), *cert. denied*, 343 U.S. 936 (1951).

57. *Clough v. Hunter*, 191 F.2d 516 (10th Cir. 1951).

58. *McKane v. Durston*, 153 U.S. 684 (1894); *Cochran v. Kansas*, 316 U.S. 255 (1942).

59. *Supra* note 54 at 17.

60. *Supra* notes 54 and 55.

61. *People v. Breslin*, 4 N.Y.2d 73, 172 N.Y.S.2d 157 (1958).

62. *People v. Kalan*, 2 N.Y.2d 278, 159 N.Y.S.2d 480 (1957).