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Constitutional Law—Right to Counsel on Appeal

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peal necessitating a transcript of the trial record.¹⁸ Defendant's motion that on account of his indigence he be supplied with a free transcript was denied.¹⁹ The district attorney then moved to have the return served or, upon failure of that, to have the appeal dismissed.²⁰ The latter motion was granted.

The Court held that section 49 of the Buffalo City Court Act, inasmuch as it requires the payment of a fee prerequisite to obtaining a transcript for review, is ineffectual in the case of a indigent, and a copy of the transcript must be provided to the defendant.²¹

In New York, the right of appeal in criminal matters is guaranteed to all defendants as protection against error.²² The federal Constitution, in both the equal protection and the due process clauses,²³ has recently been interpreted to prohibit a state that has granted the right of appellate review from discriminatory treatment of indigent defendants by failing to provide, without charge, the papers necessary for the defendant to commence his appeal.²⁴

That it is a burden to provide a record of trial for appellate review has long been recognized in New York. In the past, other devices have been used to alleviate this situation.²⁵ The decision in the instant case is in accord with sound local and national policy, in that it reaffirms the principle of equal treatment for all.

Right to Counsel On Appeal

In *People v. Breslin*,²⁶ decided this term, it was held that an indigent defendant does not have a constitutional right to the appointment of counsel upon an appeal after trial. The defendant appealed to the Court of Appeals after the Appellate Division had affirmed his conviction for larceny, without

18. *People v. Giles*, 152 N.Y. 136, 46 N.E. 326 (1897).

19. The Buffalo City Court Act §49 (1909) as amended 1956 requires that a fee of \$.20 per folio of one hundred words be paid in advance to the stenographer to make a return of the evidence upon appeal.

20. N. Y. CODE CRIM. PROC. §761.

21. N. Y. CODE CRIM. PROC. §§756, 757 provide generally that a return must be made to the appellate court and this can be enforced by an order of the court. The effect of this case is that failure of the defendant to pay a required fee will not excuse compliance with these sections of the Code of Criminal Procedure.

22. N. Y. CODE CRIM. PROC. §517; *People v. Rirnauer*, 77 Misc. 387, 136 N.Y.Supp. 833 (1912).

23. U. S. CONST. Amend. XIV, §1.

24. *Griffin v. Illinois*, 351 U.S. 12 (1955).

25. *Labianca v. Digianna*, 137 Misc. 725, 244 N.Y.Supp. 437 (Sup.Ct. 1930). Return of evidence not required by Supreme Court judge on appeal from City Court of Buffalo where the reasons for the decision were fully contained in a letter of the trial judge.

26. 4 N.Y.2d 73, 172 N.Y.S.2d 157 (1958).

COURT OF APPEALS, 1957 TERM

opinion.²⁷ Counsel assigned for appeal to the Court of Appeals by the Court argued that the Appellate Division had erred in refusing to assign counsel in that court.

The cases decided up to this time in the federal courts and the courts of other states do not require that in all instances counsel be provided an indigent appellant in criminal matters.²⁸ In two cases the Supreme Court of the United States has decided that failure to provide counsel at trial in behalf of an indigent is not a deprivation of constitutional rights.²⁹ The leading Supreme Court case holding that counsel must be provided at trial can be distinguished from the last mentioned cases on the grounds that the offense was a capital one, the state of Alabama required assignment of counsel, and the defendants were being tried in a place not their home for a crime repulsive to the local populace.³⁰ From these cases it can be seen that the Supreme Court will require assignment of counsel at trial only when the particular facts demand that this be done for justice.

The Circuit Courts of Appeal have decided that counsel need not be assigned on the appellate level without enunciating any clear rationale for so holding.³¹ An argument *a fortiori* from the Supreme Court cases discussed above may be the underlying reason.

*Griffin v. Illinois*³² and *People v. Pride*,³³ a recent U. S. Supreme Court case and a recent New York Court of Appeals case, respectively, which require that a transcript of the trial record be supplied to an indigent defendant for purposes of appeal, can be distinguished from the instant case on the ground that they involve a more elementary step in appellate review than the appointment of counsel, that is, an opportunity for an appellate tribunal to examine the record for merit. However, as pointed out in the dissent in the instant case, this seems to be placing a burden on the comparatively small number of appellate judges which the court refuses to place on the entire bar.

The Court was faced with a recent decision of its own holding that it was error not to appoint counsel to an indigent appellant under certain circum-

27. *People v. Breslin*, 2 A.D.2d 876, 156 N.Y.S.2d 1000 (1956).

28. *Betts v. Brady*, 316 U.S. 455 (1941); *Bute v. Illinois*, 333 U.S. 640 (1947); *People v. Logan*, 137 Cal.App.2d 331, 290 P.2d 11 (1955); *State v. Lorenz*, 235 Minn. 221, 50 N.W.2d 270 (1951).

29. *Betts v. Brady*, *Bute v. Illinois*, *supra* note 28.

30. *Powell v. Alabama*, 287 U.S. 45 (1932).

31. *Mellott v. Underwood*, 192 F.2d 1020 (6th Cir. 1951), *cert. denied sub nom.* *Mellott v. United States*, 343 U.S. 967 (1952); *Gorgano v. United States*, 137 F.2d 944 (9th Cir. 1943); *Lovvorn v. Johnston*, 118 F.2d 704 (9th Cir. 1941), *cert. denied* 314 U.S. 607 (1941).

32. 351 U.S. 12 (1955).

33. 3 N.Y.2d 545, 170 N.Y.S.2d 321 (1958); see next preceding casenote.

stances.³⁴ In that case the defendant needed counsel assigned to examine the record of the trial, which was inaccessible to him on account of his imprisonment. That case relied on the New York Constitution. The majority of the Court distinguished it as another case dealing with the right of an indigent to a free transcript of the trial proceedings.

It would seem that the decision that the Court has reached is within the framework of existing case law, but it also seems proper to note again the underlying rationale of the *Griffin* case: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."³⁵

Admissibility of Confession Obtained Prior to Arraignment

In *People v. Spano*,³⁶ the defendant was surrendered to the police by his attorney pursuant to a bench warrant issued on an indictment for murder in the first degree. He was taken into custody at 7:15 P.M. and arraigned the next morning. Before his arraignment, however, Spano had been questioned for several hours by the police, and contrary to the instructions of his attorney, had made a complete confession. At the trial the confession was admitted into evidence. The defendant was convicted and sentenced to death.

On appeal the defense argued that even though the confession was voluntarily made it should not have been admitted into evidence because Spano's detention by the police was illegal. The majority affirmed the conviction and pointed out that even if the detention had been illegal (a fact not established) the confession would be admissible since it was voluntarily given.³⁷

The dissent agreed that the test of voluntariness is still valid but argued that it was not controlling in the case at bar. Judge Desmond, writing for the dissent, maintained that the confession should have been excluded since it was extracted in the very course of *judicial proceedings*, and that therefore the defendant was deprived of his constitutional right to counsel and his privilege against self-incrimination.

The argument based on the right against self-incrimination was disposed of by the majority by pointing out that it is available only in cases where incriminating disclosures have been extorted by the constraint of legal process.³⁸

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

35. *Griffin v. Illinois*, 351 U.S. 12, 19 (1955).

36. 4 N.Y.2d 256, 173 N.Y.S.2d 793 (1958).

37. N. Y. CODE CRIM. PROC. §395; *Stein v. New York*, 346 U.S. 156 (1953).

38. *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926); *Adams v. New York*, 192 U.S. 585 (1904).