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Right To A Free Transcript In Louisiana Criminal Cases

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COMMENT

RIGHT TO A FREE TRANSCRIPT IN LOUISIANA CRIMINAL CASES

In 1956 the United States Supreme Court in *Griffin v. Illinois*[1] held that a state cannot deny an adequate appeal to an indigent defendant convicted of a felony by imposition of prohibitive costs.[2] This Comment will analyze *Griffin* and later decisions, considering their impact on Louisiana criminal procedure.

THE GRIFFIN DECISION

Although *Griffin* recognized that defendants have no constitutional right to appeal in criminal cases,[3] it held that a state which provides a criminal appellate procedure cannot preclude indigent defendants from obtaining an adequate appeal by imposing monetary requirements.[4] If adequate review requires a complete transcript of the proceedings, the state — at least in

1. 351 U.S. 12 (1956).

2. Mr. Justice Black, writing for the majority, stated: "Plainly the ability to pay cost [of a transcript] in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial . . . . Such a denial is a misfit in a country dedicated to affording equal justice to all and . . . there can be no equal justice where the kind of a trial a man gets depends on the amount of money he has." *Id.* at 17-19.

Stanley E. Qua, former Chief Justice of the Supreme Judicial Court of Massachusetts, has expressed the opinion that *Griffin* stands for the proposition that: "If a state provides for appellate review it cannot lay down a procedure that requires the payment of money which indigent persons may be unable to pay, unless it provides an alternative that affords an adequate and effective review to such persons." Qua, *Griffin v. Illinois*, 25 U. CHI. L. REV. 143, 146 (1957).

3. In the *Griffin* opinion the Court stated: "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." 351 U.S. 12, 18 (1956). For years McKane v. Durston, 153 U.S. 684 (1894), has been cited for the proposition that a state is not constitutionally required to provide appellate judicial systems. It is submitted, however, that since the *McKane* decision was rendered at a time prior to England's adoption of the first modern criminal appellate system in 1907 [7 Edw. VII, c. 23 (1907)], and only shortly after the United States' establishment of discretionary authorization of writs of error by Circuit Courts in criminal cases [20 Stat. 354, c. 176 (1879)], the rule of the *McKane* case may be subject to reconsideration today. Due process "is not a technical conception with a fixed content unrelated to time . . . . Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has evolved through centuries . . . 'due process' cannot be imprisoned within the treacherous limits of any formula . . . Due process . . . a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." Mr. Justice Frankfurter in Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951). Perhaps due process now requires states to provide more protection than a trial court's hearing and decision.

4. 351 U.S. 12, 19 (1956).

felony cases similar to those which were under consideration in *Griffin* — must provide a free transcript for the indigent appellant.[5] Whether a free transcript must likewise be furnished an indigent defendant convicted of a misdemeanor is open to some question. The answer may depend upon whether the Court rested its *Griffin* decision on "due process," "equal protection," or both; a clear indication is lacking.[6]

The Court in *Griffin* conceded that an appeal is a privilege granted by statute and not required by due process.[7] If the absence of a system of appellate review is not a denial of due process, then it is arguable that an inadequate system would not be a denial either.[8] Under this premise *Griffin* must be pitched on

5. However, it has recently been stated that "alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on a court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. 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 the conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues." Draper v. Washington, 83 Sup. Ct. 774, 779 (1963).

For discussion of the question when a complete transcript is necessary for an adequate appeal in Louisiana, see text accompanying notes 18-38 *infra*.

6. Nowhere in the opinion is the precise ground for the decision stated. The Court states: "The sole question . . . to [be decided] is whether due process or equal protection has been violated." 351 U.S. 12, 16 (1956). However, the Court concludes: "There can be no *equal justice* where the kind of trial a man gets depends on the amount of money he has." (Emphasis added.) *Id.* at 19.

Lane v. Brown, 83 Sup. Ct. 768 (1963); Burns v. Ohio, 360 U.S. 252 (1959); United States *ex rel.* Weston v. Sigler, 308 F.2d 946 (5th Cir. 1962) support the "equal protection" basis; however, State v. Delany, 332 P.2d 71 (Ore. 1958) supports the "due process basis. In Coppedge v. United States, 369 U.S. 438 (1962) the Court indicates *Griffin* rests on both due process and equal protection.

7. 351 U.S. 12, 18 (1956). *But see* note 3 *supra*.

8. *But see The Supreme Court's 1955 Term*, 70 HARV. L. REV. 90, 126-28 (1956): "The Court in *Griffin* may have emerged with a new concept of equal protection which will require a state to alleviate inequities even when they are not the product of discriminatory policies. But an implication that the failure to relieve inequities is equivalent to state enactment of a discriminatory policy would appear to have consequences unintended by the Court. . . .

"[T]he Court probably did not intend its opinion in *Griffin* to have such a sweeping effect. It seems more likely that the Court's conclusion was based upon a weighing of the seriousness of precluding certain defendants in criminal cases from obtaining appellate review against the value to Illinois of its practice of requiring payment for a record on appeal. This approach analyzes equal protection in terms traditionally relevant to problems of due process. Although five members of the Court felt that due process was not violated in this case inasmuch as a state may constitutionally abolish all appeals, this view overlooks the doctrine that a state may not attach arbitrary conditions to the grant of a privilege. Nevertheless, it would seem preferable to view the problem as one of equal pro-

equal-protection grounds. If misdemeanor appeals require a transcript, the indigent apparently would be denied the same protection given the more affluent of the same class-misdemeants — if he were not supplied a free transcript.[9]

If it is not a denial of equal protection to discriminate between indigent and non-indigent defendants, then *Griffin* rests on due process; the "traditional notions of fair play" embodied in due process may not require that provision for a free transcript be extended below felony cases.[10] Additional support for this proposition might have been gleaned by analogy from the pre-1963 right-to-counsel cases; these held that due process required free counsel to be furnished only if the indigent defendants were charged with *capital* crimes.[11] By analogy, it could have been argued that the free transcript requirement was lim-

tection, since the arbitrary condition in this case consisted of the denial of an opportunity to a particular group." *Cf.* Comment, 55 MICH. L. REV. 413, 414-20 (1957).

9. Qua, *Griffin v. Illinois*, 25 U. CHI. L REV. 143, 149 (1957): "As the separate opinion of Mr. Justice Harlan in the *Griffin* case points out, the Constitution applies to all cases, and there seems no logical reason why the rule should not apply to [misdemeanor] cases as well as to more important ones. Yet a requirement that the state provide a transcript costing possibly $200.00 for every indigent defendant charged with drunkenness, even though he might be committed for a couple of months to 'dry out,' to say nothing of charges of spitting on the sidewalk, parking in forbidden areas, and a host of others, seems almost *reductio ad absurdum*. . . . [S]uch a requirement might seriously impede the enforcement of ordinary state police regulations."

The *Griffin* dissenters, Justices Burton, Minton, Reed, and Harlan argued that all defendants should not be made economically equal, and pointed out that denial of bail to an indigent defendant is not a denial of due process. 351 U.S. 12, 28-29 (1956).

10. Comment, 25 U. CHI. L. REV. 161, 165 (1957). It is significant to note that the Supreme Court pointed out in *Griffin* that a state did not have to furnish a free transcript if other means of adequate appellate review are provided. 351 U.S. 12, 20 (1956).

If *Griffin* can be analyzed in terms of due process, it may be significant that some states which furnish free transcripts limit the right to felony cases; *e.g.*, Alabama, Massachusetts, Minnesota, Ohio, and Texas.

The latest statute dealing with the free transcript for the indigent defendant is Proposed Illinois Code of Criminal Procedure § 57-12 (tent. final draft 1963), which states: "(a) Upon imposition of any sentence in a criminal case a defendant may file in the trial court a petition requesting that he be furnished with a transcript of the proceedings at his trial. The petition shall be verified by the petitioner and shall state facts showing that he was at the time of his conviction and is at the time of filing the petition without financial means to pay for the transcript. If the trial judge who imposed sentence or in his absence any judge of the court finds that the defendant is without financial means with which to obtain the transcript of the proceedings at his trial he shall order the Official Court Reporter to transcribe his notes of the proceedings at the trial. The Report of Proceedings shall be filed with the clerk of the trial court."

It would seem that the proposed Illinois statute grants a defendant convicted even of a misdemeanor the privilege of requesting a free transcript.

11. Hamilton v. Alabama, 368 U.S. 52 (1961); Williams v. Kaiser, 323 U.S. 471 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945); Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

ited to felony cases as the right to counsel was limited to capital cases. However, in *Gideon v. Wainwright*[12] the United States Supreme Court held that "*any person* hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." (Emphasis added.)[13] *Gideon* involved a defendant charged with a non-capital felony. Thus, the distinction formerly drawn between capital and noncapital crimes in right-to-counsel cases is no longer viable. Does *Gideon* destroy the prior analogical reasoning in free-transcript cases? Due process decisions rest upon the weighing of a multiplicity of factors. In determining whether due process requires the furnishing of free transcripts in misdemeanor cases, the Supreme Court might consider that one court hearing is sufficient to protect the misdemeanant's interest in the small penalty which can be imposed upon him,[14] while felons, faced with graver penalties, must be permitted to pursue every available means of attacking their conviction. Further, since the volume of misdemeanor cases greatly exceeds that of felony cases, the Court may be moved by the pragmatic consideration that to require free transcripts in misdemeanor cases would impose an undue burden upon the public fisc.

Whether *Griffin* is retroactively effective is another unsolved mystery. Only the concurring opinion of Mr. Justice Frankfurter specifically endorsed such an application.[15] If *Griffin* is given retroactive effect, an indigent defendant convicted prior to *Griffin* and denied an appeal because he could not afford the necessary transcript can seek release through habeas corpus proceedings.[16] In Louisiana a writ of habeas corpus will not issue

12. 83 Sup. Ct. 792, 796 (1963).

13. *Id.* at 796.

14. This is because the right to appeal a misdemeanor conviction is dependent upon the sentence imposed. See, *e.g.*, LA. CONST. art. VII, § 10, wherein it is provided that the appellate jurisdiction of the Supreme Court is limited in criminal cases to instances in which the death penalty or imprisonment at hard labor may be imposed, or a fine exceeding $300 or imprisonment exceeding six months has actually been imposed.

It should be noted that if a trial judge does not want a defendant convicted of a misdemeanor to appeal, he can accomplish this desire by a penalty of less than $300 or six months.

15. 351 U.S. 12, 24-25 (1956). Former Chief Justice Qua of the Massachusetts Supreme Court expressed the same view: "I am . . . [unable] to adjust myself to the idea that the Constitution . . . gives a protection to a defendant . . . convicted on or after April 23, 1956, and denies that protection to a defendant convicted in the same circumstances on April 22, 1956." Qua, *Griffin v. Illinois*, 25 U. CHI. L. REV. 143, 150 (1957). *Accord*, Eskridge v. Washington, 358 U.S. 214 (1958).

16. If an indigent defendant has a right to a free transcript, but is denied it and imprisoned, a habeas corpus proceeding would be proper. LA. R.S. 15:116

unless the defendant has made a motion for a new trial which specifically alleges grounds rendering the verdict contrary to the law and evidence; in addition, he must have requested a free transcript.[17]

IMPACT OF GRIFFIN IN LOUISIANA

The indigent defendant's right to a free transcript arises only if the transcript is necessary for an adequate appeal. In *State v. Rideau*[18] the Louisiana Supreme Court denied a full stenographic transcript because a complete bill of exceptions, sufficient for an adequate appeal and available to the defendant, had been reserved to each alleged trial irregularity. Hence, *Griffin* will be applied in Louisiana only if the bill of exceptions will not afford an adequate basis for appeal.[19] Under Louisiana law a defendant cannot require the transcribing of any evidence pertaining to his guilt or innocence unless he can afford the cost of having it transcribed;[20] he must rely on his bill of exceptions. But in at least one instance — when the defendant alleges that there was "no evidence" to sustain his conviction—a bill of exceptions is not adequate for appeal.

The Louisiana Code of Criminal Procedure provides that a defendant has the right to move for a new trial[21] on the ground that the verdict is contrary to the law and evidence.[22] Although the Louisiana Supreme Court cannot review questions of fact in criminal cases,[23] it will order a new trial when the record reveals that there is *no* evidence to sustain the conviction,[24] on the

(1950) states: "Whenever any person shall have been sentenced by a district judge to an illegal imprisonment, such person shall have the right, subject to the provisions of Article 137, to have issued by the supreme court, or any justice thereof, a writ of habeas corpus." See also 28 U.S.C. § 2241 (1958).

In a recent case, arising after *Griffin*, a court required that the indigent be released, granted a new trial, or given a free transcript for his appeal. United States *ex rel.* Weston v. Sigler, 308 F.2d 946 (5th Cir. 1962).

17. See State v. Bueche, 243 La. 160, 142 So. 2d 381 (1962). See also text accompanying note 31 *infra*.

18. 242 La. 431, 137 So. 2d 283 (1962).

19. *Ibid., cert. granted*, 83 Sup. Ct. 294 (1962), discussed in *The Work of the Louisiana Supreme Court for the 1962-1963 Term — Criminal Law and Procedure*, 23 LA. L. REV. 398, 405 (1963). *Accord*, State v. Daley, 243 La. 760, 146 So. 2d 798 (1962). See also State v. Hayden, 243 La. 793, 147 So. 2d 392 (1962).

20. See text accompanying notes 29, 39 *infra*.

21. LA. R.S. 15:505 (1950).

22. *Id.* 15:509(1).

23. LA. CONST. art. VII, § 10.

24. Prior to State v. Gatlin, 241 La. 321, 129 So. 2d 4 (1961), rather than order a new trial, the Louisiana Supreme Court would discharge the defendant when there was no evidence to support the conviction. State v. Linkletter, 239 La. 1000, 120 So. 2d 835 (1960); State v. Daniels, 236 La. 998, 109 So. 2d 896

theory that such complete failure of proof presents a question of law.[25] The Court has held that no evidence exists if the prosecution has failed to submit any evidence of probative value,[26] or if there is complete lack of evidence of an essential element of the crime.[27] The proper procedure for presenting the issue of no evidence is to move for a new trial, reserve a bill of exceptions to the overruling of that motion, and attach thereto all the evidence introduced in the case.[28]

Under Article 500 of the Code of Criminal Procedure the bill of exceptions must show the circumstances in which, and the evidence upon which, the ruling complained of was rendered;[29] but under Article 555 other evidence relating to the guilt or innocence of the accused cannot be transcribed in the bill unless paid for by the defense.[30] These statutory provisions do not by their terms provide free transcripts to indigent defendants claiming there was no evidence of an essential element of the crime. It is submitted that *Griffin* compels the state to provide a free transcript in this instance. *State v. Bueche*[31] recently held that the mere allegation of "no evidence" of an essential element

(1959); State v. LaBorde, 234 La. 28, 99 So. 2d 11 (1958); State v. Sbisa, 232 La. 961, 95 So. 2d 619 (1957); State v. Harrell, 232 La. 35, 93 So. 2d 684 (1957).

25. For a discussion of these cases, see Comment, 19 LA. L. REV. 843 (1959).

26. State v. Linkletter, 239 La. 1000, 120 So. 2d 835 (1960); Mayerhafer v. Department of Police, 235 La. 437, 104 So. 2d 163 (1958); State v. LaBorde, 234 La. 28, 99 So. 2d 11 (1958).

27. State v. Sbisa, 232 La. 961, 965, 95 So. 2d 619, 622 (1957); State v. Daniels, 236 La. 998, 109 So. 2d 896 (1959).

28. State v. LaBorde, 234 La. 28, 32, 99 So. 2d 11, 12 (1958).

29. LA. R.S. 15:500 (1950); State v. Cooper, 241 La. 757, 760, 131 So. 2d 55, 56 (1961) ("evidence in a criminal case is part of the record when appended to and made part of a perfected bill of exceptions").

30. LA. R.S. 15:555 (1950).

Former LA. R.S. 15:332.2 (Supp. 1961) (repealed 1962) provided:

"A. In all felony prosecutions in the district courts of the state, the entire proceedings of the trial and the testimony shall be taken down and reported by the official court reporter or by a reporter designated by the trial judge for that purpose. In such cases, the reporter shall report verbatim, in shorthand, by stenography or stenotype, or by voice recording or any other recognized manner when the equipment therefor has been approved by the court, all proceedings of the trial, including the testimony of all witnesses, the other evidence introduced or offered, the objections thereto, and the rulings of the court thereon.

"B. Should an appeal be ordered or a writ of review granted, all such portions of the reported proceedings or testimony as may be requested by either party shall be transcribed by the reporter in such number of copies as is required by the appellate court, and shall be filed with the clerk of court for incorporation in the transcript of appeal." This provision was suspended by House Concurrent Resolution No. 93 of the 1960 Regular Session, and then repealed by La. Acts 1962, No. 449, § 1.

LA. R.S. 13:4529 (1950) applies to cost of appeal, and does not encompass the free transcript.

31. 243 La. 160, 142 So. 2d 381 (1962).

of a crime will not entitle the defendant to a free transcript; the defendant must point out the essential elements unsupported by proof.

Mr. Justice Frankfurter, concurring in *Griffin*, recognized that a free transcript should not be granted for a frivolous appeal.[32] Determining whether an appeal is frivolous necessitates an examination of defendant's good faith and the actual necessity for the transcript. The United States Supreme Court in *Johnson v. United States*[33] permitted these issues to be decided by the federal trial judge; however, *Coppedge v. United States*[34] later held that the trial court's determination of good faith is not conclusive, but is "entitled to weight."[35] In the latter case the court also stated that if the issues sought to be raised by the indigent are such that their substance cannot be ascertained adequately without a transcript, the would-be appellant must be supplied a transcript of sufficient completeness to enable him to attack the trial court's certificate of lack of good faith and establish his need for an appeal in *forma pauperis*.[36]

The net effect of the *Johnson* and *Coppedge* decisions is that the federal trial judge has no discretion to deny a free transcript to an indigent appellant on the ground that the appeal is frivolous,[37] the appellate court must have the transcript before it to review the trial court's determination of frivolity. The *Coppedge* rule in federal criminal appeals was made applicable to state procedures by *Draper v. Washington*;[38] discretion to deny

32. Mr. Justice Frankfurter stated: "When a state . . . gives leave for appellate correction of trial errors . . . it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." 351 U.S. 12, 24 (1956).

It is the position of one writer that: "As a matter of sound judicial administration it would seem that the trial judge should not have the final say as to whether his own alleged errors should be reversed. Very likely means can be devised whereby obviously frivolous appeals can be dismissed without the expense of a full transcript; but great caution should be exercised and the control should be in the appellate court, or at least not in the same trial judge." Qua, *Griffin v. Illinois*, 25 U. CHI. L. REV. 143, 149 (1957). See also Comment, 55 MICH. L. REV. 413, 422 (1957).

33. 352 U.S. 565 (1957). An appeal *in forma pauperis* is allowed in federal criminal trials pursuant to 28 U.S.C. § 1915(a) (1959). That statute also provides that the appeal *in forma pauperis* may not be taken if the "trial judge certifies in writing that it is not taken in good faith." See also Comment, 25 U. CHI. L. REV. 161, 168-69 (1957).

34. 369 U.S. 438 (1962).

35. *Id.* at 446.

36. *Ibid.*

37. See Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 159-60 (1957).

38. 83 Sup. Ct. 774 (1963).

a free transcript to an indigent on the ground that his appeal is frivolous cannot constitutionally lie with the state trial judge.

The present status of *Griffin* in Louisiana seems to be that a free transcript must be supplied indigent defendants convicted of felonies, and possibly misdemeanors, when they desire to appeal their convictions on grounds of "no evidence." Although the trial judge has no discretion to deny a transcript on the ground that the appeal is frivolous, the defendant has no right to a free transcript unless he has made a motion for a new trial which precisely indicates which elements of the crime went unproven.

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