Louisiana Law Review

Volume 26 | Number 3
The Work of the Louisiana Appellate Courts for the 1965-1966 Term: A Faculty Symposium
Symposium: Administration of Criminal Justice
April 1966

Procedure: Criminal Procedure

Dale E. Bennett

CRIMINAL PROCEDURE

*Dale E. Bennett**

RIGHT TO COUNSEL

In *Douglas v. California*[1] the United States Supreme Court held, with three Justices dissenting, that the "denial of counsel on appeal to an indigent would seem to be a discrimination at least as invidious as that condemned in *Griffin v. Illinois*," where the indigent defendant was denied a free transcript of the record which was essential to his appeal. The significance of counsel to assist with the appeal arises out of consideration of the appeal as "an inseparable part of the process through which the individual's guilt or innocence of the charges brought against him by the state is established."[2] The *Douglas* decision presented a practical problem for the majority of states which, like Louisiana, do not make provision for the furnishing of counsel to assist an indigent defendant with his appeal. The difficulty of formulating a statutory rule is illustrated by the fact that *Douglas* held that "equal protection" was denied by a California procedure under which the appellate court was to make a preliminary investigation of the record and determine whether there was any substantial basis for an appeal. The Supreme Court gave no indication as to what means, if any, may be properly adopted to protect the state from being required to appoint counsel to represent the defendant in taking frivolous appeals.

Present Louisiana procedures include no specific statutory provision concerning the right to counsel for appeals, but the Louisiana Supreme Court stands ready to enforce the defendant's right in a proper case. This is shown in *State v. Graves*,[3] where Justice Summers, writing for a unanimous court, states,

"Upon the authority of *Douglas v. California*, at this time we accept the proposition that an indigent accused is entitled to appointed counsel on appeal in felony cases, unless he has waived that right. Whatever considerations prompted our predecessors to refuse court-appointed counsel on appeal in *State v. Garcia*[4]

*Professor of Law, Louisiana State University.

1. 372 U.S. 353 (1963).

2. See footnote to Justice Traynor's concurring opinion in People v. Brown, 55 Cal.2d 64, 69, 357 P.2d 1072, 1075 (1960).

3. 246 La. 460, 165 So. 2d 285 (1964).

4. 144 La. 435, 80 So. 648 (1919).

must succumb to the authority of the *Douglas* case. In any event, in most instances, court-appointed counsel in this State, though there has been no specific statutory provision requiring them to do so, have usually continued to represent the indigent defendant on appeal — often at considerable personal expense and sacrifice. The quality of the gentlemen of the bar in this State has almost universally assured this right."[5]

It is important to note that the defendant's right to counsel, whether it be in connection with the trial or for the appeal, must be timely asserted. In *Graves* the Louisiana Supreme Court stated, "We entertain no doubt that Graves intentionally and completely waived counsel — not once, but at least twice. This waiver was in writing on one occasion and in open court on another occasion."[6] The court found that the waiver of counsel was intelligently made. The defendant's knowledge of the nature of the appeal was evidenced by his request for a full transcript of the proceedings. Under those circumstances the court concluded that the early offer of court-appointed counsel had been "deliberately rejected, we think, with the end in view of bringing about the situation which now exists."[7] Even if the delayed request for counsel was not a dilatory stratagem, it would still appear that the defendant should be bound by an intelligently exercised choice to proceed without counsel.

CHANGE OF VENUE

Louisiana's change of venue rule, which is an implementation of the defendant's basic right to be tried by an impartial tribunal, provides that the venue shall be changed "to an adjoining parish of the same judicial district, or to a parish of an adjoining district."[8] The constitutionality of this limitation was directly raised in *State v. Rideau*.[9] The original murder conviction had been reversed by the United States Supreme Court[10] on the ground of prejudice resulting from the broadcast by a local television station of an interview during which Rideau confessed to the crime. The Supreme Court reasoned that due process of law required a trial before a jury drawn from a community of

5. 246 La. 460, 467, 165 So. 2d 285, 288 (1964).
6. *Ibid.* The minutes of the court clearly show that the defendant had been offered, and had refused counsel to represent him on appeal.
7. *Id.* at 469, 165 So. 2d at 289.
8. LA. R.S. 15:293 (1950).
9. 246 La. 451, 165 So. 2d 282 (1964).
10. Rideau v. Louisiana, 373 U.S. 723 (1963)

people who had not seen and heard this televised interview. In conformity with that decision, both the defense and the prosecution requested a change of venue "to some community outside of the broadcast range" of the television station. In denying the motion the trial judge pointed out that the change of venue statute only authorized a transfer of the trial to an adjoining parish of the same judicial district, or to a parish of an adjoining district, and that all of the parishes within this area were also within the broadcast range of the television station. Thus, in his opinion, every citizen living within these parishes was automatically ineligible to sit as a juror and a judicial impasse had been reached. This ruling, if followed to its ultimate conclusion, would have placed Rideau beyond the authority of the Louisiana courts.

The Louisiana Supreme Court, which has constitutional supervisory jurisdiction over all inferior courts,[11] could have exercised that plenary authority in ordering the transfer of the case to a more distant court where prospective jurors would not be so directly influenced by the damaging television broadcast. However, Chief Justice Fournet chose to posit his decision upon a broader base, which could serve as a guide for future trial court change of venue decisions. In ordering the trial court to grant a change of venue to a parish outside the range of the television broadcasts objected to, the Chief Justice reasoned that the purpose of the change of venue statute is to insure the right of the accused to a speedy trial by an impartial jury in accordance with the United States Constitution and the Louisiana Constitution; "and when procedural legislation setting out the rules governing such change conflicts with these basic constitutional rights, to the extent the legislative enactments deprive an accused of due process of law, then they must yield."[12] The statute could not supersede our constitutional guarantee of "a speedy public trial by an *impartial* jury."[13]

It is worthy of note that the *Rideau* problem would not come up under the controlling change of venue article of the Louisiana State Law Institute's Code of Criminal Procedure Projet, which broadly authorizes the trial court to "transfer the case to *another* parish."[14] (Emphasis added.)

11. LA. CONST. art. VII, § 10.
12. 246 La. 451, 455, 165 So. 2d 282, 284 (1964).
13. LA. CONST. art. I, § 9.
14. Proposed Code of Criminal Procedure art. 623.

CHALLENGE OF JURY VENIRE — REQUIREMENT OF FRAUD OR IRREPARABLE INJURY

Article 203 of the Code of Criminal Procedure, which is to be continued in the new code,[15] "is a very important provision, for it prevents frivolous attacks upon venires resulting from good faith efforts by jury commissioners to comply wtih legal requirements for selecting juries."[16] This article is based upon a realization that jury commissioners are not trained legal technicians, that certain failures to comply with the letter of the law are expectable, and that such irregularities should not be a ground for setting aside the jury venires they prepare "unless some fraud has been practiced or some great wrong committed that would work irreparable injury."[17] The irregularity complained of in *State v. Clifton*[18] as a ground for setting aside a murder conviction was a harmless irregularity in the procedures followed by the jury commission in the selection of the general venire from which the grand jury and petit jury were drawn. Article 179 of the Code of Criminal Procedure requires that *at the time of the meeting* the jury commission shall select from those qualified to serve a list of three hundred names to compose the general venire. The appellant contended that the provisions of the law were not followed in this case because the members of the jury commission prepared lists in advance of the meeting of people they would recommend for inclusion on the general venire list. Each submitted his personal recommendations to the clerk of court who prepared a comprehensive master list from them. At the meeting, the commission simply went over the master list and made any changes they considered necessary. The court looked to the spirit of the law and upheld the actions of the commission because it felt there was "common deliberation" by the commission in selecting the general venire. The court concluded that although there had not been a full literal compliance with article 179, the procedure followed was a "substantial compliance" with the law:

> "In any event the final selection in this case was actually made by the body as a whole with the benefit of the ex-

15. LA. CODE CRIM. PROC. art. 419 (1928).
16. Exposé des Motifs for Title XI, Qualification and Selection of Grand and Petit Jurors (1965) Comment (a), p. 35.
17. LA. R.S. 15:203 (1950).
18. 247 La. 495, 172 So. 2d 657 (1965).

perience of the individual commissioners and the information they had previously compiled concerning persons they considered qualified as jurors. The final list, then, was made under their supervision after common deliberation regardless of the plans and preparations which preceded the meeting."[19]

The Supreme Court's practical approach to the jury commission procedures in *Clifton* is another in a long list of cases where the court has refused to invalidate jury commission procedures which, while they failed to follow the exact procedures set forth, had resulted in the preparation of the fair and qualified jury list which the law contemplates.

PRESENT INSANITY HEARINGS

A 1964 statute, dealing with procedures to be followed where a defendant has been committed to a mental institution because of lack of capacity to stand trial,[20] provides for a review of the defendant's record at least once a year to determine whether he is presently capable of standing trial. If the medical staff of the mental institution concludes that a defendant is presently capable of standing trial, this is reported to the committing judge. However, the final determination of present trial capacity is made by the committing court, and the 1964 statute expressly provided that all releases from the mental institution must be "upon the order of the court which committed the patient."[21] The recent case of *State ex rel. Caesar v. Gremillion*[22] focuses attention upon the significance of this provision. In 1956 Caesar, charged with aggravated rape, was found to be presently incapable of standing trial, and was committed by the Orleans Parish District Court to the East Louisiana State Mental Hospital at Jackson. In 1963 the hospital authorities reported to the committing court that Caesar presently had the mental capacity to proceed, but no action was taken by the Orleans Parish officials. In 1964 a writ of habeas corpus was issued by the judge of the Twentieth District Court, where Caesar was held in the mental hospital. Pursuant to this writ, Caesar was released from the mental institution to the local sheriff, to be held by him for the Orleans Parish authorities. A sanity hearing was subsequently held by the Orleans Parish Court, which again

19. 172 So. 2d 657, 660 (1965).
20. La. Acts 1964, No. 472, enacting a new LA. R.S. 15:271 (1964).
21. LA. R.S. 15:271C (1964).
22. 247 La. 1108, 176 So. 2d 394 (1965).

found Caesar to be presently insane and incapable of assisting with his defense; and ordered him recommitted to the state mental hospital at Jackson. Three months after Caesar's recommitment the hospital authorities again reported to the committing court that he was presently capable of standing trial. When no response was received to this communication, a second petition for habeas corpus was received and granted, which again ordered that Caesar be released from the mental institution and held by the local sheriff subject to further action by the Orleans Parish authorities. The Louisiana Supreme Court reversed the release order, holding that the Twentieth District Court was without jurisdiction in the matter. The reversal was based largely upon the express statement of paragraph C of the 1964 statute that "no patient who has been committed to a mental institution by court order pursuant to any civil or criminal proceedings shall be released therefrom . . . except upon order of the court which committed the patient."

It is important that the committing court should hold a hearing promptly upon receipt of a recommendation from the staff of the mental institution that the defendant has present capacity to stand trial. While the Louisiana Supreme Court held that the defendant's right to a prompt hearing was not enforceable by a writ of habeas corpus issued by the district court where he was held, the *Caesar* decision did not result in a complete denial of relief. The court ordered a prompt hearing as to Caesar's present mental capacity by the committing court, and pointed out that "in the event the judge finds him to be presently insane, Caesar has a right of appeal to this court for review of the ruling."[23]

APPEAL — DISMISSAL WHERE DEFENDANT A FUGITIVE

Article 548 of the Code of Criminal Procedure[24] provides that if the appellant is a fugitive from justice on the return date or the day fixed for hearing his appeal, the appeal will be dismissed. Is this provision intended to penalize the defendant, by loss of his appeal, where he escapes from the local jail pending the determination of his appeal; or is it a rule to assure the availability of the defendant on the day fixed for the hearing of his appeal?

23. 176 So. 2d at 399, relying upon State v. Hebert, 187 La. 318, 174 So. 369 (1937); and State v. Yaun, 237 La. 186, 110 So. 2d 573 (1959).

24. LA. R.S. 15:548 (1950).

If it is a penalty for breaking jail pending the appeal, it would appear to impose an unduly heavy sanction in cases where the appeal is from a conviction and long sentence for a major felony. In this regard it is significant that the Criminal Code provides appropriate penalties for the separate crime of escape.[25] *State v. Graves*[26] clearly shows that loss of the right of appeal was not intended as a sanction for escaping from jail. In *Graves*, the state moved to dismiss the appeal on the ground that the defendant had escaped from jail and had committed another felony while a fugitive from justice. The Supreme Court overruled the motion to dismiss, stressing the fact that, while the defendant was a fugitive when the state's motion was filed, he had been returned to the parish jail and "was not a fugitive from justice on the return day of his appeal or subsequently on the day fixed for hearing his appeal."[27] It is interesting to note that the defendant, although not represented by counsel, was not present at the hearing and only the state's attorney appeared. However, the defendant was not precluded from urging his appeal by reason of having been a fugitive from justice. Assuming that the defendant had been represented by an attorney on the appeal, there seems little practical reason for the general rule of article 548 that the appeal must be dismissed if the defendant is a fugitive from justice. The common law rule, that in a felony trial the defendant's presence is required at every important step in the trial proceedings, is well established by the Louisiana jurisprudence.[28] Also, a number of specific rules, requiring presence of the defendant at various stages of the trial, are set out in the Code of Criminal Procedure.[29] However, it is well settled that the defendant's presence is not required when motions are made and determined by the court outside of the jury's presence,[30] or where post-conviction motions are made and heard.[31] There will be many instances where the defendant's appeal can be heard and disposed of in his absence; and it appears illogical to declare an automatic dismissal of the appeal, regardless of its merits.

25. LA. R.S. 14:109 (aggravated escape) and 14:110 (simple escape) (1950).
26. 246 La. 460, 165 So. 2d 285 (1964).
27. *Id.* at 466, 165 So.2d at 287.
28. State v. Thomas, 128 La. 813, 55 So. 415 (1911); State v. Pope, 214 La. 1026, 39 So. 2d 719 (1949).
29. LA. R.S. 15:245, 15:257, 15:258, 15:265, 15:392, 15:396, 15:399 (1950).
30. State v. Fahey, 35 La. Ann. 9 (1883) (motion to quash the jury venire); State v. Pierre, 39 La. Ann. 915, 3 So. 60 (1887).
31. State v. Wyatt, 50 La. Ann. 1301, 24 So. 335 (1898) (motion for appeal); State v. Knox, 236 La. 461, 107 So. 2d 719 (1958).