Louisiana Law Review

Volume 32 | Number 2
The Work of the Louisiana Appellate Courts for the 1970-1971 Term: A Symposium
February 1972

State v. Barnes - Procedural Technicalities or Justice?

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NOTE

STATE V. BARNES—PROCEDURAL TECHNICALITIES OR JUSTICE?

The defendant appealed from a conviction for possession of marijuana relying on various bills of exceptions reserved in the trial court. On the original hearing the supreme court found no merit in the bills reserved. On rehearing the court refused to decide the merits of the issues presented, on the ground that the bills of exceptions relied on did not meet the requirements of article 844 of the Code of Criminal Procedure.[1] Even though the clerk had placed a notation on the bills of exceptions to the page in the transcript where the bills were reserved, the court *held*, that evidence merely placed physically in the record before the supreme court cannot be considered unless it is attached to or made a part of the formal bills of exceptions. *State v. Barnes*, 257 La. 1017, 245 So.2d 159 (1971).

The bill of exceptions has its roots in the common law.[2] Since no transcript of the early common law trial was usually taken, the bill of exceptions served the important purpose of preserving the evidence surrounding the objection for the appellate judge's review.[3] In time this formality became entrenched in Louisiana jurisprudence.[4] Since no complete transcript of

1. LA. CODE CRIM. P. art. 844 provides:

"A. The appellate court shall consider only formal bills of exceptions which have been signed by the trial judge in conformity with Article 845. In a case where the death sentence has been imposed, the appellate court, to promote the ends of justice, may consider bills that have not been timely signed by the trial judge.

"B. A formal bill of exceptions shall contain only the evidence necessary to form a basis for the bill, and must show the circumstances and the evidence upon which the ruling was based. When the same evidence has been made part of another bill of exceptions, the evidence may be incorporated by reference to the other bill. Evidence as to guilt or innocence can only be taken down and transcribed as provided by law."

2. State v. Pitre, 106 La. 606, 31 So. 133 (1902).

3. "When a defense objection was overruled, the defendant then reserved a bill, the trial stopped, a reporter was called, and the evidence surrounding the bill was taken down. Under such circumstances, the rule became well established that the evidence surrounding the objection and the bill be included in the formal bill of exception [*sic*]. If the evidence was not there, within the bill, it was not in the record, supposedly. As time passed and the evidence began to appear in the record on appeal as a transcript of the entire testimony, the rule nevertheless received continued enforcement." State v. Barnes, 257 La. 1017, 1063, 245 So.2d 159, 175 (1971) (dissenting opinion).

4. *See, e.g.*, State v. Callihan, 257 La. 298, 242 So.2d 521 (1970); State v. Garner, 255 La. 115, 229 So.2d 719 (1969); State v. Moye, 250 La. 117, 194 So.2d 717 (1967); State v. Honeycutt, 218 La. 362, 49 So.2d 610 (1950); State v. Pitre, 106 La. 606, 31 So. 133 (1902); State v. James, 106 La. 462, 31 So. 44 (1901).

the trial was required, Act 113 of 1896 was passed to insure that the evidence relating to the bill of exceptions would be preserved.[5] From the beginning, the Louisiana Supreme Court has strictly applied this statute, and a formal bill of exceptions is required before it will review the alleged error.[6]

Article 844(B)[7] of the Code of Criminal Procedure is the present statutory basis for requiring inclusion of the evidence in the formal bills of exceptions as a prerequisite for appellate review. Failures to properly "perfect or preserve" bills of exceptions have taken a wide variety of forms. These include such technical defects as an attorney reserving a bill of exceptions in the trial court, duly preparing the formal bill and then failing to get the trial judge's signature.[8] In *State v. Holmes*[9] a bill of exceptions was reserved, but the attorney failed to state in his objection the reason the charge was erroneous. As a consequence, the court refused to review the bill. A frequent and more substantial basis of refusals by the supreme court to review errors is the failure of counsel, after reserving a bill of exceptions, to take further action in perfecting a formal bill. As the court stated in *State v. Miller*:[10]

> "It is well settled that the mere minute entry showing the reservation of a bill of exception [*sic*] in a criminal case cannot receive consideration in this court. The bill must be written out and signed by the judge."[11]

It is important for the supreme court to have the facts and

5. "Be it enacted by the General Assembly of the State of Louisiana: That on the trial of all criminal cases in this State, appealable to the Supreme Court, when an objection shall be made and a bill of exception [*sic*] reserved, the court shall at the time and without delay order the clerk to take down the facts upon which the bill has been retained, which statement of facts shall be preserved among the records of the trial; and if the case be appealed, the clerk shall attach to the bill of exception [*sic*] a certified copy thereof, which shall be taken by the appellate court as a correct statement upon which the exception is based." La. Acts 1896, No. 113, § 1.

6. *See* State v. Cole, 161 La. 827, 109 So. 505 (1926); State v. Carmouche, 141 La. 325, 75 So. 68 (1917); State v. Varnado, 131 La. 952, 60 So. 627 (1913); State v. Haines, 51 La. Ann. 731, 25 So. 372 (1899). *See also* LA. CODE CRIM. P. art. 844, comment (a).

7. See note 1 *supra*.

8. *E.g.*, State v. Cummings, 217 La. 672, 47 So.2d 41 (1950); State v. Miller, 146 La. 236, 83 So. 539 (1919).

9. 224 La. 941, 71 So.2d 335 (1954); *accord*, State v. Linam, 175 La. 865, 144 So. 600 (1932); State v. Ricks, 170 La. 507, 128 So. 293 (1930).

10. 146 La. 236, 83 So. 539 (1919).

11. *Id.* at 237, 83 So. at 539; *accord*, State v. Clark, 220 La. 946, 57 So.2d 904 (1952); State v. Cummings, 217 La. 672, 47 So.2d 41 (1950); State v. Smith, 149 La. 700, 90 So. 28 (1921); State v. Haines, 51 La. Ann. 731, 25 So. 372 (1899).

circumstances surrounding the ruling complained of. If there is a failure to include this evidence and information in the bill of exceptions, the supreme court has consistently held that nothing is presented for review.[12]

Notwithstanding this *stricti juris* interpretation in dealing with bills of exceptions, there are instances where, in the interest of justice, the court has relaxed its standards. One such case in which this occurred is *State v. Reed*.[13] The trial judge, complying with the defense counsel's request, ordered the testimony "taken down."[14] The stenographer failed to record some of the bills, and the testimony and objections to some of the rulings were omitted; other bills were so ineptly done that the record was in no form to enable the court to review the objections. Nevertheless, the court concluded:

> "Counsel for the defendant apparently did all they were required to do to preserve defendant's right of appeal. They dictated their objections and bills to the stenographer and had no reason at the time to suspect that her shorthand notes when transcribed would not correctly set forth the proceedings."[15]

In another instance, *State v. Alexander*,[16] the trial judge failed to certify at the foot of each bill his reason for not furnishing a per curiam as he was required by statute to do. However, the court still considered these bills.

Probably the most recent and clearest example of the court's departure from its *stricti juris* rule is the 1971 capital case of *State v. Square*.[17] In *Square* counsel reserved a bill of exceptions to the trial judge's denial of his request to employ a private physician, but failed to perfect it. The supreme court recognized this case as an exception to the rule of article 844(A) requiring that only formal bills of exceptions may be considered on appeal.[18] It demonstrated the liberal approach traditionally taken

12. State v. Thomas, 224 La. 431, 69 So.2d 738 (1953); State v. Jouvet, 224 La. 15, 69 So.2d 741 (1953); State v. Varnado, 131 La. 952, 60 So. 627 (1913); State v. Pitre, 106 La. 606, 31 So. 133 (1902).

13. 180 La. 741, 157 So. 547 (1934).

14. *Id.* at 745, 157 So. at 548.

15. *Id.* at 746, 157 So. at 548.

16. 216 La. 932, 45 So.2d 83 (1950).

17. 257 La. 743, 244 So.2d 200 (1971).

18. *Id.* at 768, 244 So.2d at 209. LA. CODE CRIM. P. art. 844(A): "In a case where the death sentence has been imposed, the appellate court, to promote the ends of justice, may consider bills that have not been timely signed by the trial judge."

in capital cases by considering the bills on appeal even though they were never presented to the trial judge for signing.[19]

In *Barnes* the defendant's formal bills of exceptions failed to make reference to the part of the transcript which would show the circumstances and nature of the ruling complained of. However, the clerk placed a notation on the bills signifying the page of the transcript where the bills were reserved.[20] In determining that this notation by the clerk did not make the relevant portion of the transcript a part of the record, and therefore refusing to review it, the court concluded that there had been a failure to perfect the bills of exceptions and that it had no authority to consider them "since defense counsel did not make the general charge, by attachment or otherwise, a part of Bill of Exceptions No. 17."[21]

Apparently in *Barnes* the court was somewhat troubled about the correctness of its original decision on the merits. In fact, it is for that reason that a rehearing was granted. On original hearing, the court had only considered the soundness of the judge's charge without raising any question as to the form or sufficiency of the formal bills of exceptions. Not until rehearing did the court interpret the bills of exceptions in a way which would preclude its review. The supreme court, however, has somewhat liberalized its application of article 844 requirements by allowing the incorporation of the evidence into the bills by reference. The *Barnes* decision recognized this when it stated:

> "[W]e have squarely held that this Court can look only to what is contained in the *formal* bills of exceptions for

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19. "This case does not, in the strict sense, fall within the exception contemplated by the article [844] since it does not present a situation where a bill has been prepared and tardily presented to the judge for signing; but, instead, the case at bar presents a situation where, although the bill was reserved, it has never been either prepared or tardily presented for signing by the Judge as Article 844 contemplates. In capital cases, however, this Court has been particularly solicitious in preventing a technicality from depriving a defendant of a review of the trial court proceedings . . . . We will therefore pass upon the [exception]. In so doing we are not approving the applicability of Article 844 to this fact situation." State v. Square, 257 La. 743, 768-69, 244 So.2d 200, 209 (1971).

20. "The page number referred to at the top of the page on which each bill of exceptions appears, is . . . placed there by the clerk for the convenience of this Court, in accordance with the requirements of our Rule I, Sec. 13." State v. Barnes, 257 La. 1017, 1044, 245 So.2d 159, 168-69 (1971).

21. *Id.* at 1038, 245 So.2d at 166.

> the reason that evidence, to be considered by us, *must be contained in a bill of exceptions*, attached thereto, or incorporated in such bill by reference."[22]

Incorporation by reference, as well as physical attachment of the pertinent part of the transcript, makes the record of what happened fully and readily available to the reviewing court. It is difficult to see why the same liberality should not apply where the complete transcript is before the supreme court and a clerk's notation on the formal bills of exceptions calls attention to the portion of the transcript where the *pertinent* evidence and other information are to be found. What difference should it make whether the notations were placed there by the defendant or the clerk? It would take little more effort for the court to look to the page in the transcript referred to if it had been placed there customarily by the clerk than it would had the defendant incorporated it into his bill. The reference is before the court in either case.

The supreme court's holding that the bill of exceptions was inadequately presented could be condoned if there had not been references to page numbers on the bills of exception. Obviously, with its heavy docket, the supreme court would find it impossible to read the entire transcript of every case before it in search of the evidence supporting the bills of exceptions. In attempting to justify its decision, the court also emphasized the fact that none of the bills referred to the place where the evidence surrounding the reservation could be found, but only to the page where the bill was noted. This reasoning seems overly technical. Clearly, the evidence around the reserving of a bill can be found by simply turning a page when a complete transcript is before the court, because the supporting evidence will be found immediately preceding the reservation of the bill.[23] Justice Dixon very ably summed this point up in his dissent, noting that when a complete transcript is before the court the only utility in having such a restrictive interpretation of article

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22. *Id.* at 1039, 245 So.2d at 167, *citing* supporting jurisprudence. (Court's emphasis.)

23. It is important to remember, as pointed out by Justice Barham in his dissent in State v. Garner, 255 La. 115, 127, 229 So.2d 719, 724 (1970), that "[a]rticle 2 of the Code of Criminal Procedure states: 'The provisions of this Code are intended to provide for the just determination of criminal proceedings. *They shall be construed to secure simplicity in procedure, fairness in administration*, and the elimination of unjustifiable delay.' (Emphasis supplied.)"

844 is to trap the unwary civil lawyer not accustomed to the perfection of appeals in criminal cases.[24]

Also dissenting, Justice Tate pointed out that articles 843 and 844 should not be subjected to such hypertechnical interpretation. The rationale of these articles is that even though everything is transcribed in most judicial districts, some districts do not require such transcription. Therefore, it appears that the intention behind article 843[25] was to make sure that as much of the evidence as is necessary for appellate review be placed before the court.

Interpreting these articles in such a restrictive and artificial way may also raise a question of due process,[26] since the enforcement of a procedural forfeiture must serve a legitimate state interest. In *Henry v. Mississippi*,[27] relied upon by Justice Tate, there was apparently a legitimate state interest to protect; there the objection at trial would have given the judge an opportunity to correct his ruling and proceed without using tainted evidence, thus preventing the possibility of reversal and another trial. In *Barnes*, however, the legitimate state interest is difficult to ascertain. The defendant reserved bills of exceptions at trial, giving the judge a chance to reconsider his rulings. He perfected bills of exceptions and included everything he thought necessary to preserve the question on appeal. A complete transcript of pertinent evidence and procedures followed was before the supreme court. These factors prompted Justice Tate's criticism on the grounds that the decision offends funda-

24. "There is no longer any utility in the perpetuation of the rule that the formal bill of exceptions must contain within it the evidence surrounding the ruling complained of. The record before us is complete. It is correctly and efficiently indexed. The only utility of the rstrictive [*sic*] rule is to trap the unwary civil lawyer unaccustomed to the perfection of appeals in criminal cases. The rule, in my opinion, is antiquated and outmoded, serving no useful purpose today. I find no reasonable relationship between the rule and its stated objective. I cannot subscribe to it. The rule should be changed to insure for the defendant a fair chance that his points on appeal will be reviewed." State v. Barnes, 257 La. 1017, 1066-67, 245 So.2d 159, 177 (1971) (dissenting opinion).

25. LA. CODE CRIM. P. art. 843: "When a bill of exceptions is reserved, the clerk or the court stenographer shall immediately take down the objection, the ruling, and the facts upon which the objection is based. The matters, so taken down, shall be preserved among the records of the trial, shall constitute the bill of exceptions, and shall be a basis for a formal bill of exceptions."

26. Henry v. Mississippi, 379 U.S. 443 (1965); *accord,* Terry v. Peyton, 433 F.2d 1016 (4th Cir. 1970); Gann v. Smith, 318 F. Supp. 409 (N.D. Miss. 1970); Roper v. Beto, 318 F. Supp. 662 (E.D. Tex. 1970); United States *ex rel.* Sanders v. Ziegler, 319 F. Supp. 492 (E.D. Pa. 1970).

27. 379 U.S. 443 (1965).

mental notions of fairness and that it was reached by applying outmoded technicalities.[28]

Technical constructions which deprive a diligent defendant of his right to appellate review raise substantial questions as to the soundness of Louisiana's bill of exceptions procedures. The answer may be a more liberal approach by the supreme court, legislative simplification of the bill of exceptions procedures, or perhaps adoption of the federal system which has done away with bills of exceptions altogether. Under Rule 51 of the Federal Rules of Criminal Procedure, the only requirement for an appeal is the filing of a simple notice of appeal.[29] Accordingly, the federal rule "was intended to take the place of more complicated procedures to obtain review, and the notice should not be used as a technical trap for the unwary draftsman."[30] Even though much simplification has been accomplished, many of the other requirements for appeal that have long been recognized by appellate courts are still maintained. For example, the court will not review an error on appeal that was not objected to previously at trial.[31] Although technical omissions in the notice of appeal will not deprive appellant of his right of review, "[w]here the appeal is taken specifically only from one part of the judgment the appellate court has no jurisdiction to review the portion not appealed from."[32] There is still

28. "This conviction, and especially the judicial review of it, offends fundamental notions of fairness. The majority avoids facing the substantial contentions that may justify a reversal, through applying outmoded technicalities." State v. Barnes, 257 La. 1017, 1048, 245 So.2d 159, 170 (1971) (dissenting opinion).

29. 28 U.S.C. § 2107 (1964); Martin v. United States, 263 F.2d 516 (10th Cir. 1959).

30. Donovan v. Esso Shipping Co., 259 F.2d 65, 68 (3d Cir. 1958); *accord*, Jones v. Chaney & James Constr. Co., 399 F.2d 84 (5th Cir. 1968).

31. "In Yeater v. United States, 397 F.2d 975 (9th Cir. 1968) this court said: [We rest] our affirmance of the conviction upon the well-established rule of appellate review that defenses not raised in the district court will not be considered on appellate review. . . . 'The very purpose of such a rule is to enable the court to consider it below—to prevent error—to avoid appeal.' Grant v. U.S., 291 F.2d 746 (9th Cir. 1961). An important reason for the Rule 51 principle is the avoidance of delay. If the lower tribunal is given a fair opportunity to consider and decide the question, there will frequently be no necessity for an appeal, which, when it occurs, results in delay. Another reason is that of fairness to the lower tribunal. A reversal of a decision of a lower court, in a case in which that court did not have a fair opportunity to weigh the conflicting considerations which are presented to the Court of Appeals, is an affront to the dignity of the lower court." United States v. Fix, 429 F.2d 619, 620 (9th Cir. 1970).

32. Donovan v. Esso Shipping Co., 259 F.2d 65, 68 (3d Cir. 1958); *accord*, Gannon v. American Airlines, Inc., 251 F.2d 476 (10th Cir. 1958); Carter v. Powell, 104 F.2d 428 (5th Cir. 1939), *cert. denied*, 308 U.S. 611 (1939).

a time limitation for filing a notice of appeal[33] as there is in many jurisdictions outside the federal area. To keep the federal appellate court from having to read the entire transcript, something was needed to direct the court's attention to the pertinent portions of the record.[34] This was achieved by a document known as the appendix: "It is exactly what its name implies: an addendum to the briefs for the convenience of the judges."[35] In essence, under the federal rules, the entire record is always before the appellate court for reference and examination.[36]

Probably the best solution of the bill of exceptions' "trap for the unwary civil lawyer" is through the supreme court's inherent power to relax its rules and adopt a more flexible interpretation of article 844. These procedures could be liberalized by the court to allow consideration of bills of exceptions in cases such as *Barnes* where the complete transcript is before the court and the pertinent material is located, whether by specific defense incorporation by reference or by a clerk's notation on the bill of exceptions. Therefore, it appears that this particular injustice can be remedied more suitably by the court itself, keeping in mind legislative modification as a last resort.

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33. FED. R. APP. P. 4(b).

34. *Symposium on the Federal Rules of Appellate Procedure—The Appendix to the Briefs: Rule 30 of the Federal Rules of Appellate Procedure*, 28 FED. B.J. 116 (1968).

35. *Id.—The Federal Rules of Appellate Procedure*, 28 FED. B.J. 100, 108 (1968).

36. FED. R. APP. P. 30(b).