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HIGHLIGHTS OF THE 1974 REGULAR SESSION

Legislative Symposium

THE ASSIGNMENT OF ERROR

Cheney C. Joseph, Jr.*

For some time the bill of exceptions procedure had been the subject of both academic and judicial criticism.¹ Many felt that its formalistic requirements became outmoded with the advent of modern recording and transcribing methods,² and that problems arising from the often harsh technical approach taken by the Louisiana supreme court³ could be mitigated by a simpler procedure. Accordingly, the 1974 Louisiana legislature, by Act 207, replaced the bill of exception with an assignment of error.⁴

The new procedure was made possible by amending article 843 of the Code of Criminal Procedure to provide for recordation of "all of the proceedings" in appealable cases tried in district court.⁵ In felony cases, the Code mandates a full record without motion of a party; in misdemeanor cases, a record of the proceedings must be taken only if requested by the court, the state, or the defendant. In addition to the statutory provisions, the new Louisiana Constitution clearly affords the accused the right to have a record of all of the "evidence" taken in cases in which he is "subjected to imprisonment or forfeiture of rights or property."⁶

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1. *See* State v. Barnes, 257 La. 1017, 245 So. 2d 159 (1971); Note, 46 TUL. L. REV. 1009 (1972).

2. *See* State v. Barnes, 257 La. 1017, 1063, 245 So. 2d 159, 175 (1971) (Dixon, J., dissenting); Bennett, *The 1966 Code of Criminal Procedure*, 27 LA. L. REV. 175 (1967).

3. *See, e.g.,* State v. Brown, 260 La. 535, 256 So. 2d 617 (1972); State v. Barnes, 257 La. 1017, 245 So. 2d 159 (1971).

4. La. Acts 1974, No. 207, *amending* LA. CODE CRIM. P. arts. 841-45, 851(2), 915(A), 916(1),(5), 920.

5. LA. CODE CRIM. P. art. 843, *as amended* by La. Acts 1974, No. 207: "On motion of the court, the state, or the defendant in misdemeanor cases in the district court in which the possible sentence may give the defendant the right to appeal, and in felony cases, the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel."

6. LA. CONST. art. I, § 19 provides: "No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by

As amended, article 843 is clearly broader than the state constitutional requirement in one respect. Article 1, § 19 of the Constitution of 1974 requires a record of *evidence* only. In contrast, the Code now mandates a record of "all the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, and charges by the court, and objections, questions, statements, and arguments of counsel."⁷ Most of the illustrative listings included in article 843 are not "evidence," although such matters are often the bases for errors complained of on appeal.

In another respect, however, the amended article is probably unconstitutionally restrictive. Although Article 1, § 19 of the 1974 Constitution clearly applies to city court proceedings and to unappealable cases tried in district court,⁸ the Code requires a record only in cases tried in district courts "in which the possible sentence may give the defendant the right to appeal."⁹ The differences in coverage can be explained by the fact that the amended code article was drafted by the Louisiana State Law Institute prior to the adoption of the new constitution. An additional amendment to include all district court and city court cases should be adopted.¹⁰

The simplified assignment of error procedure requires an objection contemporaneous with the ruling except when the ruling is made on a written motion.¹¹ The objective of article 841 is that the parties and the court be put on notice of the action sought or objected to. When a written motion is filed, this requirement is satisfied and the need for further oral objection is absent.

To formally present an objection to the appellate court, a party must file a written assignment of error to adverse rulings.¹² With one

law." See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 60-62 (1974) [hereinafter cited as Hargrave].

7. LA. CODE CRIM. P. art. 843, as amended by La. Acts 1974, No. 207.

8. See Hargrave at 60-62.

9. LA. CODE CRIM. P. art. 843, as amended by La. Acts 1974, No. 207.

10. An amendment has been proposed for the 1975 Regular Session of the legislature of Louisiana to broaden the coverage of article 843. La. H.B. 164, Reg. Sess. (1975).

11. LA. CODE CRIM. P. art. 841, as amended by La. Acts 1974, No. 207: "An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. Bills of exception to rulings or orders are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor. The requirement of an objection shall not apply to the court's ruling on any written motion."

12. LA. CODE CRIM. P. art. 844, as amended by La. Acts 1974, No. 207: "The party appealing shall designate, in writing, those errors which are to be urged on appeal. This assignment of errors shall be filed within the time specified by the trial judge. The trial judge may submit such per curiam comments as he desires."

exception, the written assignment is mandatory whether a written motion or oral objection has been made. Only those errors which are "patent on the face of the record" need not be included in an assignment of error.¹³

Due to the variety of local court practices, and to facilitate the submission of per curiam comments,¹⁴ the Code leaves to the sound discretion and rule making authority of the trial court the time and manner in which assignments of error are filed.¹⁵ The form of the assignment is governed by local and supreme court rules, but, unlike the formal bill of exception,¹⁶ the signature of the trial judge is unnecessary.

In addition to a written assignment of errors, the appellant must file a written designation of the portions of the record to be transcribed and lodged with the appellate court.¹⁷ The trial court sets the time for the filing of the designation, and local rules govern details and procedures.

The portions transcribed and submitted with the appeal are not limited to those errors designated by the appellant. Both the trial and appellate court possess authority to order transcription of any additional portions which either "feels are necessary for full and fair review of the assignment of errors."¹⁸ Since anything which the court "feels" is necessary may be ordered transcribed, the "full and fair review" language should not serve to limit the courts' power.

The appellee, in most cases the district attorney, may also have portions of the record transcribed and lodged with the appeal.¹⁹ There may be cases in which the district attorney wants to argue "harmless error" and feels that a full transcript of all the evidence is necessary;²⁰ he may also believe that the defendant's designated portions do not give the appellate court a full picture of the matters complained of.

13. See LA. CODE CRIM. P. art. 920(2). Art. 920(2) uses the expression "discoverable by a mere inspection of the pleadings and proceedings" rather than "error patent on the face of the record." See LA. R.S. 15:503 (1950) (repealed 1966).

14. See LA. CODE CRIM. P. art. 916, as amended by La. Acts 1974, No. 207.

15. LA. CODE CRIM. P. art. 844, as amended by La. Acts 1974, No. 207.

16. LA. CODE CRIM. P. art. 844 (as it appeared prior to Act 207 of 1974).

17. LA. CODE CRIM. P. art. 845, as amended by La. Acts 1974, No. 207: "The trial court shall specify the time within which the appellant shall, or the appellee may, designate in writing the portion of the record to be lodged with the appellate court. The trial court or the appellate court may designate additional portions which it feels are necessary for full and fair review of the assignment of errors.

18. *Id.*

19. *Id.*

20. See *State v. Anderson*, 254 La. 1107, 1140, 229 So. 2d 329, 341 (1969) (Barham, J., dissenting). See also Comment, 33 LA. L. REV. 82 (1972).

The question of free transcripts for the indigent defendant is not resolved by the provisions of article 845. Article 845 simply requires a designation; it does not deal with payment of the costs of transcription. The new constitution states that the matter of providing for the costs of transcription shall be "as provided by law." Under the bill of exceptions procedure, the Louisiana supreme court held that an indigent defendant is entitled, as a matter of federal constitutional right, to free transcription only of those portions of the record necessary to assure full and fair review of errors complained of in formal bills of exceptions.²¹ This position developed as a result of restrictions on the court's appellate jurisdiction in the Code of Criminal Procedure²² and the Constitution of 1921.²³ The old constitution limited the scope of appellate review in criminal cases to questions of law alone. Former article 920 further restricted the scope of appellate review to errors properly presented in formal bills of exceptions and to errors "discoverable by a mere inspection of the pleadings and proceedings."²⁴ Since only those matters were before the court, only such transcripts as were necessary for their review were required. Thus, the fact that a defendant with funds might be able to purchase, for appellate purposes, a full transcript of all proceedings was not significant. The additional transcript not provided for the indigent did not aid the defendant in having the supreme court review allegations of trial court error.

A similar approach to the amount of free transcript to which an indigent is entitled seems to be appropriate under the new assignment of error procedure.²⁵ The 1974 amendments to article 920 have not changed the principle involved²⁶ and the new constitution has not altered the scope of appellate review in criminal cases.²⁷ Except for

21. *State v. Gilbert*, 286 So. 2d 345 (La. 1973). See also *Mayer v. City of Chicago*, 404 U.S. 189 (1971); *Mack v. Walker*, 372 F.2d 170 (5th Cir. 1966); *United States ex rel Weston v. Sigler*, 308 F.2d 946 (5th Cir. 1962). A special statute governs Orleans Parish. See LA. R.S. 13:1373 (1950), as amended; LA. R.S. 13:1381.1 (Supp. 1972), as amended.

22. LA. CODE CRIM. P. art. 920 (as it appeared prior to Act 207 of 1974).

23. La. Const. art. VII, § 10 (1921).

24. LA. CODE CRIM. P. art. 920(2) containing this provision was not changed by Act 207 of 1974.

25. *But see Hargrave* at 60-62.

26. LA. CODE CRIM. P. art. 920, as amended by La. Acts 1974, No. 207: "The following matters and no others shall be considered on appeal: (1) An error designated in the assignment of errors; and (2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."

27. LA. CONST. art. V, § 5(c) provides in pertinent part with respect to the appellate jurisdiction of the supreme court in criminal cases: "In criminal matters, its appellate jurisdiction extends only to questions of law."

error discoverable on the face of the pleadings, without reference to the evidence, the supreme court remains limited in its appellate review to errors "designated in the assignment of errors." Louisiana has no procedure analogous to the doctrine of "plain error" such as is found in the federal rules.²⁸

To some critics, the effect of Act 207 of 1974 is insignificant. They argue that it does little more than to replace the bill of exceptions with an assignment of error, since both must be filed at the trial level and both serve to restrict the appellate jurisdiction of the supreme court. They contend that the assignment should be made to the supreme court and that the whole process should not preclude review of a point properly objected to either orally or by written motion.²⁹

Possibly such changes should be considered in the future. Nevertheless, the writer submits that Act 207 of 1974 has given some significant flexibility to the appellate review of criminal cases. It is hoped that the supreme court will treat the new procedure as a relaxation of the technicalities associated with the bill of exceptions.

OBSCENITY REGULATION

The landmark decision of the United States Supreme Court in *Miller v. California*¹ prompted the Louisiana supreme court to invali-

28. FED. R. CRIM. P. 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Perhaps as a consequence of the absence of the plain error doctrine, Louisiana courts have often been called upon to determine the scope of the exception as to errors "patent on the face of the record." See *City of Baton Rouge v. Norman*, 290 So. 2d 865 (La. 1974); *State v. Chighizola*, 281 So. 2d 702 (La. 1973); *State v. Davis*, 278 So. 2d 130 (La. 1973); *State v. Comeaux*, 277 So. 2d 647 (La. 1973); *State v. Raby*, 259 La. 909, 253 So. 2d 370 (1971); *State v. Austin*, 255 La. 108, 229 So. 2d 717 (1969), *appeal after remand*, 258 La. 273, 246 So. 2d 12 (1971); *State v. Palmer*, 251 La. 759, 206 So. 2d 485 (1968).

29. When a federal constitutional right is involved, the refusal of the supreme court to review the complaint on appeal spawns problems of collateral review. See *Flanagan v. Henderson*, 496 F.2d 1274 (5th Cir. 1974); *Lawrence v. Henderson*, 478 F.2d 705 (5th Cir. 1973); *State v. Woodfox*, 291 So. 2d 388 (La. 1974); *State v. Flanagan*, 250 La. 100, 222 So. 2d 872 (1969). The writer submits that the supreme court should be able, under the new procedure, to receive late filings of assignment of errors to avoid collateral litigation of constitutional issues. Art. 844 simply requires the filing of the assignment "within the time specified by the trial judge." The return date is not mentioned. The supreme court, in the exercise of its supervisory jurisdiction (LA. CONST. art. V, § 5(A)), should be able to authorize or order late filing of assignment of error. This is a logical and necessary approach when constitutional questions are properly raised at the trial level. See *State v. Moseley*, 284 So. 2d 749 (La. 1973).

1. 413 U.S. 15 (1973). See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973);