

Louisiana Law Review

Volume 37 | Number 2

The Work of the Louisiana Appellate Courts for the

1975-1976 Term: A Symposium

Winter 1977

Procedure: Postconviction Procedure

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Louisiana State University Law Center

Repository Citation

Cheney C. Joseph Jr., *Procedure: Postconviction Procedure*, 37 La. L. Rev. (1977)

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POSTCONVICTION PROCEDURE

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APPEALING THE GUILTY PLEA

The defendant who enters a guilty plea may appeal his conviction and sentence just as the defendant convicted following trial.¹ The critical question is which issues are appealable following the plea of guilty. Earlier cases held that the guilty pleas did not waive jurisdictional defects but did waive most other complaints.²

In *State v. Torres*,³ following the defendant's guilty plea, the court refused to consider the merits of his complaint concerning the failure of the trial court to sustain a pre-trial motion to suppress. However, in *State v. Crosby*,⁴ the court distinguished *Torres* since in *Torres*, the "appeal record did not demonstrate that the plea bargain was conditioned on the accused's right to obtain appellate review of the constitutional invalidity of (what the state there stipulated to be) the principal evidence"⁵ against the defendant.

In *Crosby*, the court determined that it would not rigidly apply "the judicially created doctrine"⁶ that the guilty plea necessarily constitutes a waiver of all but jurisdictional defects since the Code leaves the court the flexibility to adopt procedures not in conflict with the Code.⁷ Thus, *Crosby* creates a qualified guilty plea which preserves for appellate review certain properly reserved pre-plea objections. The court recognized that judicial efficiency dictates such a "sensible procedure"⁸ when the trial would serve only as an expensive method of preserving the defendant's right to urge certain legal issues after conviction.

The sort of error envisioned is that which "represents a violation of a constitutional or statutory right which, for reasons beyond guilt or innocence, would mandate a reversal of any conviction resulting from a trial."⁹ To apply these limits to such appeals, the court vests the trial judge and the

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1. LA. CODE CRIM. P. art. 912; *State v. Coats*, 260 La. 64, 255 So.2d 75 (1971).
2. *State v. Coats*, 260 La. 64, 255 So.2d 75 (1971).
3. 281 So.2d 451 (La. 1973).
4. 338 So.2d 584 (La. 1976).
5. *Id.* at 587.
6. *Id.* at 590.
7. LA. CODE CRIM. P. art. 3. See *State v. Eros Cinema, Inc.*, 262 La. 706, 264 So.2d 615 (1972).
8. 338 So.2d at 590.
9. *Id.* at 591.

district attorney with the discretion to refuse to accept a qualified guilty plea.

With the limitations imposed by the court, the judicially created qualified plea of guilty should provide a workable procedure. There are many cases where the principal issue is the admissibility of certain critical evidence. For example, when a defendant is stopped for a traffic violation resulting in the impounding of his vehicle and consequent discovery of 1000 pounds of marijuana, the sole issue could be the validity of the seizure. If the evidence is admissible, the defendant may see no need to go to trial.

Prior to *Crosby*, the defendant, following an unsuccessful motion to suppress, could have accomplished the same result by waiving trial by jury,¹⁰ entering into stipulations that witnesses would testify as to certain facts, and agreeing with the district attorney to submit the case to the trial court for a verdict. Following a guilty verdict in such case, an appeal raising an assignment of error based on the denial of a motion to suppress would have been permissible.¹¹ The court's approach in *Crosby* is simply more direct and sensible.

APPELLATE REVIEW OF SENTENCE

In Louisiana, the traditional view is that as long as the sentence falls within statutory limits, the trial court's discretion is without review.¹² As the reporter's comment following Code of Criminal Procedure article 878 indicates, the court has not entertained "attacks on the nature and severity of sentences imposed unless the law upon which the conviction and sentence is based is found unconstitutional."¹³ However, in a series of recent cases the

10. LA. CONST. art. I, § 17; LA. CODE CRIM. P. art. 780.

11. The Fifth Circuit Court of Appeals has recognized such a procedure. In *United States v. Sepe*, 486 F.2d 1044, *aff'g* 474 F.2d 784 (5th Cir. 1973), the court disapproved of the use of conditional pleas of guilty, or *nolo contendere* to allow an appeal on non-jurisdictional grounds (such as the trial court's ruling on a motion to suppress). *See also* *United States v. Mizell*, 488 F.2d 97 (5th Cir. 1973).

However, in *United States v. Mendoza*, 491 F.2d 534 (5th Cir. 1974), in which the defendants unsuccessfully moved to suppress narcotics, the defendants did not plead guilty but followed a different procedure accomplishing substantially the same result. Defendants and the government filed a stipulation for the trial of the defendants, "which stipulation admitted in detail all the facts necessary to support a finding of guilt by the district court of the charges contained in the indictment." *Id.* at 536. In response to the stipulation, the trial court adjudged the accuseds guilty. They appealed, based upon the denial of their pretrial motion to suppress. On appeal, the court of appeals, although affirming the conviction, considered the merits of the defendants' contentions regarding the validity of the search and seizure.

12. *See* *State v. Pierson*, 296 So.2d 324 (La. 1974).

13. LA. CODE CRIM. P. art. 878, comment (a).

court discussed but avoided deciding whether it has the authority under Article 1, Section 30 of the 1974 Constitution to review the length of sentences imposed by trial courts.

In *State v. Bryant*,¹⁴ an aggravated rape case, in a special concurrence on rehearing, Justice Tate clearly expresses the view that the wording of section 20 of the Declaration of Rights of the Constitution of 1974 requires appellate review of the appropriateness of death sentences. In his view, the court must review the record in each case to determine whether the sentence of death in that case is "excessive, either as for the crime charged or as disproportionate to the crime proved."¹⁵

The Tate concurrence certainly foreshadowed the United States Supreme Court's approach in its latest round of death penalty cases.¹⁶ The Supreme Court clearly requires that state appellate courts review sentences of death to determine whether the sentence is disproportionate given the circumstances of the case and the character of the defendant.¹⁷

In Act 694 of 1976, the Louisiana Legislature clearly mandates that the court "shall review every sentence of death to determine if it is excessive."¹⁸ By employing the language of Article 1, Section 20 the legislature arguably has recognized the possibility that Louisiana's new constitution, as well as the federal jurisprudence, requires review of sentence at least in the area of death sentences.

Whether the court may review the length of a particular sentence as excessive in light of the facts and circumstances of the case is a more difficult question. In two recent opinions¹⁹ authored by Justice Calogero, the court avoided decision on that issue by determining that the sentences in question would not be considered "excessive" even if the court had the authority to decide that they were.

In two other cases,²⁰ the court avoided the issue on procedural grounds without reaching the fundamental question. In *State v. Anthony*²¹ and *State*

14. 325 So.2d 255 (La. 1976).

15. *Id.* at 267.

16. See *Roberts v. Louisiana*, 96 S.Ct. 3001 (1976); *Woodson v. North Carolina*, 96 S.Ct. 2978 (1976); *Proffitt v. Florida*, 96 S.Ct. 2960 (1976); *Jurek v. Texas*, 96 S.Ct. 2950 (1976); *Gregg v. Georgia*, 96 S.Ct. 2909 (1976).

17. See note 16, *supra*.

18. LA. CODE CRIM. P. art. 905.9.

19. *State v. McClinton*, 329 So.2d 676 (La. 1976); *State v. Whitehurst*, 319 So.2d 907 (La. 1975).

20. *State v. Anthony*, 332 So.2d 214 (La. 1976); *State v. Williams*, 322 So.2d 177 (La. 1975).

21. 332 So.2d 214 (La. 1976).

*v. Williams*²² the defendants challenged for the first time on appeal the length of their sentences on the ground that the sentences were excessive under the circumstances. In both cases, the court found that the failure to object at the time of sentence as required by article 841 precluded deciding whether the sentences constituted an excessive penalty. Even if the court can review the length of sentence, an "excessive" sentence is not an "error discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."²³ Thus, without contemporaneous objection²⁴ at sentencing and assignment of error, the issue is not before the court.

If the court decides that it has the authority and duty to review the length of sentences,²⁵ the record on which such complaints are to be reviewed will become a serious problem. Where there has been a trial, the circumstances of the offense will presumably have been presented by the testimony of witnesses. But the defendant's character may not have been placed at issue and little information on that critical issue may appear. In cases of guilty pleas, there will normally be no record regarding the character and propensities of the offender or the circumstances of the offense. There could be no basis in many cases for determining whether or not a sentence is excessive in the absence of a presentence report unless some sort of sentencing hearing is held. Under present law presentence investigations are not required in all cases²⁶ and, when conducted, their contents are not available to the defense.²⁷ If appellate review of sentencing is to be meaningful, access to presentence reports under court-controlled conditions will be necessary. If a sentencing hearing is required, the guidelines for such hearings must of necessity be delineated by the court in the absence of legislation. As in the case of the capital sentencing hearings,²⁸ some guidance must be given regarding the rules of evidence to be applied and the manner in which they are to be conducted.

If the court decides that Article I, Section 20 requires some form of review of the length of sentences, either appellate or supervisory, the writer urges the court to consider the extensive exercise of its rulemaking powers to create the review procedure.

22. 322 So.2d 177 (La. 1975).

23. LA. CODE CRIM. P. art. 920(2).

24. *Id.* art. 841.

25. Some authorities have written that they do. See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 63 (1974); Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 38 (1975).

26. LA. CODE CRIM. P. art. 875; cf. FED. R. CRIM. P. 32.

27. *Id.* art. 877; cf. FED. R. CRIM. P. 32.

28. *Id.* art. 905.

APPEAL—DEATH OF THE DEFENDANT

In *State v. Morris*,²⁹ the court held that the death of the defendant during the pendency of the appeal results in vacation of the conviction and dismissal of the indictment. Acknowledging the issue as *res nova*, the court adopted what it termed the majority view.³⁰ The logic supporting the court's position is compelling since the aims³¹ of the criminal law are really not served by affirming a conviction and sentence when the defendant has died. The court felt that a reversal requiring remand for a new trial could not conceivably result in a new trial, and the prosecution would ultimately be dismissed; even an affirmance would not result in the sentence being satisfied. Little would be accomplished by completion of the appellate process. Judicial efficiency dictates that the court's time not be spent on such litigation solely for the purpose of resolving the issues presented.

Accepting the need to dismiss the appeal, the court rejected the state's claim of mootness because of the surviving family's "interest in preserving unstained, the memory of the deceased defendant or his reputation."³² With deference, the writer feels that any harm done by conviction is irreparable and that dismissal of the prosecution due solely to the defendant's death does little to preserve the family's memory of the defendant. The issues can be posed more directly. The court should not resolve the merits of defendant's claim for the reasons discussed. Thus, a question of basic fairness arises. The defendant has lost his life and the appeal must be dismissed for reasons of judicial economy. In losing his life, he should not also forfeit his appeal.

The court creates a sort of judicial pardon as a result of the defendant's death following conviction but prior to the completion of appellate litigation. This is a clear, practical, and just view.

The logic of the decision may indicate similar results in other contexts. If the defendant's death occurs after conviction but prior to sentence, or after

29. 328 So.2d 65 (La. 1976).

30. See Annot., 9 A.L.R. 3d 462, 496 (1966); Annot., 83 A.L.R. 2d 864 (1962).

31. The court said: "The purposes for enforcement of criminal laws are the punishment and reform of the guilty and the protection of the public; the removal of the defendant by death prevents the execution of any sentence in furtherance of these objectives. Further consideration of such a case by the courts is pointless because an affirmance of the conviction would not enable the State to execute the judgment against the deceased. A decision of the appeal would not necessarily produce a vindication of the defendant; appellate disposition, even if reversible error is found, does not guarantee a judgment of acquittal. Often, the appeal results only in a new trial, for which the deceased would be unavailable." 328 So.2d at 67.

32. *Id.*

sentence but prior to appeal, arguably the same result should follow. The trial court's approach should be the same as the appellate court's. Where the defendant dies prior to sentence, or prior to appeal, the trial court, to be consistent with what appears to be the theory of *Morris*, should grant a new trial and dismiss the prosecution.

Whether the court's approach will be the same when the question is presented in connection with an application for supervisory writs or in connection with collateral attacks on convictions is questionable. However, after writs have been granted by the supreme court, the result may be the same since the court has agreed to hear the case. The same reasons of judicial efficiency dictate no resolution of the merits.³³

STATE'S RIGHT TO APPEAL PRETRIAL ORDERS

The Code of Criminal Procedure outlines several types of adverse judgments from which the state may appeal.³⁴ Under the Constitution of 1921, this article was read in light of the constitutional limitations on the appellate jurisdiction of the Supreme Court of Louisiana.³⁵ Thus, although article 912B purported to permit state appeals from all judgments quashing indictments such was never the case.³⁶ Under Article VII, Section 10 of the 1921 Constitution, there was no such right of appeal by the state in misdemeanor cases unless the motion to quash was based on a ruling declaring a state statute unconstitutional.³⁷ Thus, it has always been necessary to read article 912B against the constitution's limitations on the court's appellate jurisdiction.

In *State v. James*,³⁸ without either party raising the issue, the court found similar but even more extensive limitations on its appellate jurisdiction in Article V, Section 5 of the 1974 Constitution. The court noted that it has appellate jurisdiction where the defendant has been convicted of a felony, or, in misdemeanor cases, where a fine exceeding \$500 or imprisonment exceeding six months has actually been imposed. The court noted that the constitution gives the legislature of Louisiana a free hand to expand the defendant's rights to appeal to the supreme court.³⁹

33. But if the state files with the court a certified death certificate in opposition to the granting of writs, the writer cannot discern whether the logic of *Morris* dictates denial of writs, leaving the conviction intact, or granting of writs and summary reversal to dismiss charges.

34. LA. CODE CRIM. P. art. 912.

35. See *State v. Murphy*, 254 La. 873, 227 So.2d 915 (1969).

36. *Id.*

37. *Id.*

38. 329 So.2d 713 (La. 1976).

39. LA. CONST. art. V, § 5E.

In *James*, the court pointed to the absence of any other provision authorizing state appeals, or authorizing the legislature to expand the state's right to appeal. As in the prior constitution, there is a specific provision allowing the state to appeal a ruling declaring a statute unconstitutional.⁴⁰

Justice Tate, joined by Chief Justice Sanders and Justice Dennis, felt that the language of the constitution does not "prohibit the legislature from affording appellate review when sought by the *state* of pretrial rulings dismissing a prosecution."⁴¹ The language relied on by the majority does not, in their view, require that "the exclusive appellate jurisdiction of this court shall consist of the mandatory appellate review thereby provided."⁴²

The impact of *James* is to relegate the state to applications for supervisory review under Article V, Section 1 of the Constitution. *James* does not deal with the kinds of matters to be considered reviewable, only with the manner of seeking review. It may not be of great practical significance that *James* generally leaves the state only the right to seek discretionary writs rather than the right of appeal, since this has always been the state's remedy when a motion to suppress is sustained.⁴³ The writer is confident that the court carefully considers such matters upon the state's pretrial application. The critical determination in *James* may be the court's view that the constitution provides the exclusive parameters of its appellate jurisdiction with only such legislative flexibility as is specifically provided in the constitution.

40. *Id.* art. V, § 5(D)(1).

41. 329 So.2d at 717 (Emphasis supplied by the court). The opinion of Justice Tate was a concurring opinion since the court considered the state's contentions in view of their treatment of the appeal as an application for writs.

42. *Id.* at 718. It is noteworthy that Justices Tate and Dennis were both delegates to the constitutional convention.

43. See LA. CODE CRIM. P. art 703, comment (g).