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Constitutional Law- Equal Protection - Right to Counsel in Appeal by Indigent Person

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CONSTITUTIONAL LAW—EQUAL PROTECTION—RIGHT TO COUNSEL IN APPEAL BY INDIGENT PERSON—Following his conviction for assault with intent to commit rape, defendant gave notice of appeal. Declaring he was indigent but with meritorious grounds for prosecuting an appeal, he petitioned the appellate court for the appointment of counsel to present his case by brief and oral argument. No information concerning the defendant's age, education or experience was given by the petition, nor were specific grounds for review alleged. Appeal is a matter of right in criminal cases in the jurisdiction.[1] *Held,* petition denied, two judges dissenting. No action

[1] Ore. Rev. Stat. (1958) §138.020. See also State v. Ellis, 156 Ore. 83, 66 P. (2d) 995 (1937). Although there is power to appoint counsel in lower court cases, Ore. Rev. Stat. (1958) §135.320, there is no such power granted by statute in cases involving an appeal from non-death sentence convictions. See Ore. Rev. Stat. (1958) §138.020.

will be taken until a transcript of the record is filed. The court will then appoint counsel if an examination of the record and of any other information concerning the appeal received discloses issues requiring the aid of counsel for their adequate presentation. *State v. Delaney,* (Ore. 1958) 332 P. (2d) 71.

The Fourteenth Amendment has not been construed to require a state to provide appellate review in a criminal case.[2] If, however, a state declares an appeal to be a matter of right, either through constitutional or statutory provision, the appellate proceedings are subject to the safeguards of the due process and equal protection clauses.[3] In *Griffin v. Illinois*[4] a divided Supreme Court declared that a state cannot limit exercise of the right of appeal[5] by requiring that the appellant incur expenses beyond his means, when this denies him an adequate review.[6] The refusal of the state to furnish a transcript requested by an indigent was deemed a denial of both equal protection and due process. Although such a transcript is not generally necessary for an appeal to be taken, appeals have, in recent years, not been brought without one. And in *Griffin,* the review without a transcript was limited to an examination of the indictment, arraignment, plea, verdict and sentence.[7] Prior to *Griffin* most cases involving the right to counsel arose under due process and concerned appointment of counsel at the trial level.[8] They made it clear that a state need not furnish counsel to an indigent person in every criminal case,[9] but only when this was necessary under the circumstances to assure a fairly conducted trial.[10] Thus the due process clause has been invoked sparingly in these cases.[11] Convictions have not been voided because of lack of counsel absent special circumstances, such as the extreme nature of the offense,[12] youth[13] or

2 See Reetz v. Michigan, 188 U.S. 505 (1903); McKane v. Durston, 153 U.S. 684 (1894).

3 Griffin v. Illinois, 351 U.S. 12 (1956); Frank v. Mangum, 237 U.S. 309 (1915); Reid v. Sanford, (N.D. Ga. 1941) 42 F. Supp. 300. Cf. Lovvorn v. Johnston, (9th Cir. 1941) 118 F. (2d) 704. The Griffin decision has been the subject of much editorial comment. See, e.g., comments, 55 MICH. L. REV. 413 (1957), 1956 UNIV. ILL. L. FORUM 501.

4 351 U.S. 12 (1956).

5 The right to appeal was given by Ill. Rev. Stat. (1953) §771.

6 In Burns v. State of Ohio, (U.S. 1959) 79 S. Ct. 1164, the Court extended the Griffin rationale to hold that even where appeal is not a matter of right a state may not deny an indigent the opportunity to invoke the discretion of the appellate court and to have his application for appeal considered on the merits by requiring that his motion for leave to appeal be accompanied by the payment of a docket fee.

7 Griffin v. Illinois, note 3 supra. See also comment, 55 MICH. L. REV. 413 at 415 (1957).

8 See cases collected in 55 A.L.R. (2d) 1077.

9 E.g., Betts v. Brady, 316 U.S. 455 at 471 (1942).

10 Betts v. Brady, note 9 supra; Powell v. Alabama, 287 U.S. 45 (1932).

11 In Bute v. Illinois, 333 U.S. 640 at 659 (1948), the Supreme Court stated that "the procedure followed by Illinois should [be upheld] . . . unless [it] . . . violates 'the very essence of a scheme of ordered liberty' and its continuance 'would violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

12 E.g., Williams v. Kaiser, 323 U.S. 471 (1945).

13 E.g., Wade v. Mayo, 334 U.S. 672 (1948).

mental incapacity,[14] which allowed the Court to find that the defendant clearly could not handle his defense adequately without assistance.[15] The court in the principal case correctly declares that the *Griffin* case requires the state to furnish to indigent defendants only the necessities for an adequate review. The court finds that a denial of counsel is not necessarily a denial of adequate review; unlike the Illinois defendant, the defendant in the principal case still may be able to have all the elements of his trial reviewed. Although this decision is not contrary to the *holding* of the *Griffin* case, it seems that the implications of that case suggest a reappraisal of an indigent person's right to counsel.[16] Clearly, the tone[17] of the majority opinion in *Griffin* suggests that the protections of the Fourteenth Amendment are denied whenever it is more difficult for an indigent than for a wealthy person to secure the legal rights granted by the state.[18] The inherent difficulty of handling criminal cases, even after procedural difficulties are met, should be clear. The lawyer, having more time than the court to study the individual case and working under the impetus of the adversary system, should be able to apprise the court more readily of possible errors in the trial of the case. The Oregon court fears that the indigent person will be too inclined to appeal if the state automatically supplies an attorney for the appeal.[19] However, for the court first to hear the case to determine whether there is merit in the appellant's contention that he is entitled to an appeal makes a mockery of the idea of a right to counsel. Once it is admitted that the defendant cannot ably present his appeal, how can it be said that he would ably persuade the court that he merits one?[20]

Gertrude S. Rosenthal, S.Ed.

14 E.g., Marino v. Ragen, 332 U.S. 561 (1947).

15 See Betts v. Brady, note 9 supra; Uveges v. Pennsylvania, 335 U.S. 437 (1948).

16 The New York Court of Appeals has recently been confronted with this question. In People v. Kalan, 2 N.Y. (2d) 278, 140 N.E. (2d) 357 (1957), the court held that the refusal to assign counsel where an indigent prisoner was unable to obtain or inspect a transcript violated the due process and equal protection guarantees of the New York Constitution. However, in People v. Breslin, 4 N.Y. (2d) 73, 149 N.E. (2d) 85 (1958), where an indigent did obtain a transcript and a review of his case on the record of the trial, the court held appointment of counsel unnecessary. See also Johnson v. United States, 352 U.S. 565 (1957), holding that in the federal courts an indigent prisoner seeking appellate review must be furnished with counsel.

17 "Despite excessively broad language, a careful reading of the *Griffin* opinion reveals the care with which the Court avoided any reference to the counsel problem." Comment, 25 UNIV. CHI. L. REV. 161 at 170 (1957).

18 See also Burns v. State of Ohio, note 6 supra, where the Court at 1169 states: "The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."

19 The New York court was similarly troubled. See People v. Breslin, note 16 supra, at 87-88.

20 See the opinion of Justice O'Connell, dissenting in the principal case at 82. "The premise is that a mentally competent person, although untrained in the law, is capable of adequately presenting to this court a sufficient description of his claims to enable us to safeguard his constitutional rights. I cannot agree with this premise."