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Constitutional Law--Criminal Procedure--Right to Counsel on Appeal

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instant case. In a Pennsylvania case,\textsuperscript{17} the plaintiff's husband was inserting a twenty-one foot pipe into a well, when the pipe came into contact with electric wires ten and one-half feet above his head. The wires were not insulated, but they were blackened by the weather so as to give the appearance of being insulated. In upholding a verdict for the plaintiff, the court said: "not possibly could the court have declared him to have been at fault as a matter of law."\textsuperscript{18} Likewise a verdict for the plaintiff was upheld in a Washington case,\textsuperscript{19} where the plaintiff's husband was holding a twenty-five foot television antenna which came in contact with an overhead wire and electrocuted him. The court felt that the question of whether the wires should have been a warning of danger to a reasonably prudent and cautious man was for the jury to decide.

These two cases represent the better view, inasmuch as there is a decided preference for allowing the question of contributory negligence to go to the jury. It should then follow that the dissenting judges were correct: the appellant's actions would indeed permit a reasonable mind to reach a conclusion other than that he was contributorily negligent. While a jury may deny Goetz recovery by reason of contributory negligence, it is not the Court's job to arrive at a similar finding of fact. The Court should first decide if any uncertainty as to what a reasonable man would do exists; if the Court decides that there is doubt, it should then permit the question to go to the jury. Such uncertainty seems present in the instant case.

\textit{Thomas L. Hindes}

\textbf{Constitutional Law—Criminal Procedure—Right to Counsel on Appeal.}—Petitioner, who had been represented by appointed counsel at his trial, requested that the trial court appoint counsel to perfect an appeal. The record shows no response to this request, and no appeal was taken. Petitioner then moved to vacate the sentence under Ky. R. Crim. P. 11.42 [hereinafter referred to as RCr 11.42].\textsuperscript{1} In overruling this motion, the trial court recited that it had previously appointed two attorneys to make an appeal if they decided one would be feasible. Petitioner appealed the denial of his motion, which had alleged substantive error. \textit{Held:} Reversed. \textit{Hammershoy v. Commonwealth,} 398 S.W.2d 883 (Ky. 1966). An indigent's right to assistance

\textsuperscript{17} Brillhart \textit{v.} Edison Light \& Power Co., 368 Pa. 307, 82 A.2d 44 (1951).
\textsuperscript{18} \textit{Id.} at 311, 82 A.2d at 48.

\textsuperscript{1} See note 8, \textit{infra}, for the text of this rule.
of counsel on appeal cannot be subject to a determination by court-appointed counsel that the appeal has merit, and if no appeal was taken because a court-appointed attorney decided the appeal was without merit, a motion to vacate judgment under RCr 11.42 is an appropriate remedy.

Two decisions handed down shortly after Hammershoy have so clouded this area of the law that a discussion of them becomes necessary.

In the first, an inmate of Eddyville penitentiary brought a motion under RCr 11.42, claiming he was denied an appeal and effective assistance of counsel on appeal. This man alleged that his appointed counsel had filed notice of appeal, but one hundred twenty-four days later informed him that he believed the appeal was without merit. The lower court denied a hearing on the RCr 11.42 motion and this determination was appealed. Held: Affirmed. Benoit v. Commonwealth, 402 S.W.2d 706 (Ky. 1966). On a RCr 11.42 motion, petitioner’s allegations that his attorney did not perfect an appeal, without allegations that an appeal was requested, are not sufficient to vacate the judgment.

In the second, another state penitentiary inmate brought a motion to vacate under RCr 11.42, claiming that his “court-appointed counsel ‘refused to appeal the case, or make a motion for a new trial.’” The opinion does not state whether he alleged that he had requested an appeal. Petitioner, without detailing specific allegations, made only a general averment of grave error in the original trial. The lower court denied a hearing on the motion to vacate. Held: Affirmed. Williams v. Commonwealth, 405 S.W.2d 17 (Ky. 1966). To reach a denial of appeal and a denial of assistance of counsel on appeal, allegations showing the potential success of an appeal are necessary.

The Substantive Right

If appeal from a criminal conviction may be taken of right, then an indigent is entitled to assistance of counsel in making such an appeal.3 The issue in these three cases becomes: Is it a denial of equal protection of the law when appointed counsel refuses to perfect an appeal which he believes is without merit? Hammershoy indicates it is:

If we are correct in our interpretation of Douglas v. California . . . and Lane v. Brown . . . the right of an indigent defendant in a criminal case to the assistance of counsel on appeal, secured by the Fourteenth Amendment, cannot be subjected to a determination by either a court

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2 405 S.W.2d 17 (Ky. 1966).
3 Douglas v. California, 372 U.S. 353 (1963); McIntosh v. Commonwealth, 368 S.W.2d 331 (Ky. 1963).
or state-provided counsel that the grounds for appeal are "meritorious" or "feasible." The opinion does not discuss how this "interpretation" was reached. However, the writer of the Hammershoy opinion dissented strongly in Williams, since he viewed the two Supreme Court cases as holding "that the right to an appellate review, with counsel, does not depend on the existence of meritorious grounds." If this interpretation of Douglas v. California and Lane v. Brown is correct, appointed counsel must perfect an appeal in every case where requested to do so, regardless of his belief in the merits. The majority opinion in Williams interprets Douglas v. California as holding merely that whether an indigent receives counsel on appeal cannot be left to the discretion of a state agency.

Actually Douglas, limited to its facts, has a narrow holding: if a non-indigent with his own attorney can obtain a full review as a matter of right, it is a denial of equal protection of the law to make the appointment of counsel to assist an indigent on appeal depend on a bare reading of the record. Although Hammershoy interpreted Douglas as prescribing an absolute right of appeal, the Douglas Court itself voiced approval of a federal procedure which provides: "An indigent must be afforded counsel on appeal whenever he challenges a certification that the appeal is not taken in good faith." If good faith in the appeal is required under Douglas, appointed counsel surely would not be required to perfect an appeal which had no merit. Lane v. Brown, cited in Hammershoy as likewise determinative, does not deal primarily with counsel, but with the existence of a right to appeal where an indigent could not afford the expense of preparing a record.

The argument of the dissent notwithstanding, Williams does not seem to conflict with Douglas. Moreover, even if the dissent in Williams should prove to be the correct interpretation of Douglas, much of the confusion attending these cases would remain. The outcome of the three cases depends as much on the procedural framework out of which they arose as on their substantive facts.

The Procedural Background

Each case was an appeal from denial of a hearing on a motion to vacate the judgment under RCr 11.42. This motion is a post-con-
viction remedy which replaces habeas corpus in certain situations. According to the plain language of the rule, it applies only where the judgment is subject to collateral attack.

At first blush RCr 11.42 would seem inapplicable here, since the issue was a failure to grant equal protection of the law in a proceeding which took place after the judgment. The defendants were not attacking the judgment collaterally, but were alleging that they had been denied a right to appeal the judgment.

The Court in *Hammershoy* granted relief under such a motion, relief which took the form of an order to the circuit court to appoint counsel to perfect an appeal or vacate the judgment. The inappropriateness of this procedure is obvious, for if the judgment were void, it should have been vacated unconditionally. In effect, an extension of time to appeal was granted, but through a rather awkward approach.

What is the justification of this awkward approach? *Hammershoy* says it is indicated by *Lane.* But in *Lane*, petitioner had unsuccessfully carried the refusal of an appeal to the highest court of the state. Against this background he brought a habeas corpus proceeding in the federal courts. The Supreme Court held this total denial of appeal to be a violation of equal protection of the law, so that the judgment would be void unless the state could somehow grant him an appeal. In short, declaring the judgment void conditionally was the only way to attack the state court's determination.

In the instant case, however, petitioner *Hammershoy* had a right to appeal and a right to assistance of counsel on appeal, but the time in which to appeal had run. What he sought, and what he received, was an extension of time in which to appeal, and the case had nothing whatsoever to do with the vulnerability of the judgment itself to collateral attack. Furthermore, he could also have attempted an appeal, despite the running of the allotted period.

The two subsequent cases have not clarified this procedure at all. In *Benoit* the Court simply put a tight procedural cap on the *Hammershoy* rule. It required allegations that petitioner had requested counsel to perfect an appeal. The facts in *Benoit* all but shout that petitioner's failure to request an appeal occurred because he thought his attorney was already making one. Nevertheless the Court required a specific allegation of such a request. *Williams* added the require-

(Footnote continued from preceding page) attack may at any time proceed directly by motion in the court which imposed the sentence to vacate, set aside, or correct it.”

9 398 S.W.2d 883.

10 McIntosh v. Commonwealth, 368 S.W.2d 331 (Ky. 1963).
RECENT CASES

The procedural confusion attending these cases could be dispelled by the approach mentioned in *Tipton*. If the time for appeal has run while an indigent is relying on appointed counsel to bring an appeal, and counsel did not bring an appeal because he felt it was without merit, then allow a late appeal to be made. The indigent could petition the sentencing court for a record and appointed counsel; if the court refused to grant them because time had run, he could seek mandamus from the Court of Appeals to force the trial court to grant him such assistance. Then, or after perfection of the appeal, if the Commonwealth argues that time for appeal has run, he could claim special facts justifying the late appeal. This would be more direct and sensible than the present, uncertain back-door approach to obtaining an extension of time in which to appeal.

Laura L. Murrell

**CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT—CRIMINAL PROSECUTION OF A CHRONIC ALCOHOLIC FOR PUBLIC DRUNKENESS.**—Joe B. Driver, 59, was arrested and sentenced for public drunkenness. Driver's first conviction for public intoxication occurred at the age of twenty-four, and he had been convicted of this same offense more than 200 times. The state court held that imposition of the sentence did not constitute cruel and unusual punishment even though defendant was allegedly an alcoholic.\(^1\) A petition for habeas corpus was denied in federal district court even though Driver was found to be a chronic alcoholic.\(^2\) From this denial, defendant appealed. *Held:* Reversed. The public appearance of a chronic alcoholic while intoxicated is a compulsive act symptomatic of the disease of chronic alcoholism, and to criminally punish one for such conduct is cruel and unusual punishment. *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

A general rule of the common law, and one usually followed under