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Criminal Procedure--Right to Transcript--In Forma Pauperis Appeal

Marshall Loy
University of Kentucky

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Recent Cases

Criminal Procedure—Right to Transcript—In Forma Pauperis Appeal.—Petitioner, a pauper, was convicted and sentenced to prison. His attorney withdrew from the case after the trial. The present attorney was appointed by the Court of Appeals. After petitioner’s motion to file in forma pauperis had been denied in the district court, the Court of Appeals allowed petitioner that part of the transcript which embraced the testimony and evidence of the government. Petitioner asked for the entire transcript, but the motion was denied by the Court of Appeals. The Supreme Court granted certiorari. Held: Entire transcript granted. Hardy v. United States, 375 U.S. 277 (1964).

Justice Douglas wrote the majority opinion of the court. His opinion only pertained to the right of an indigent on appeal when he had a different counsel than he had at the trial court. Justice Douglas believed the court-appointed counsel would be at a disadvantage in preparing a memorandum that revealed errors made at the trial, unless the counsel had a full transcript to aid in the preparation of his claim.

The more notable point of this case came from the concurring opinion of the Court. These four justices wanted to extend the allowance of a full transcript to all indigents on appeal even if the indigent had the same counsel as at the trial court. Justice Goldberg stated that any attorney who had to appeal with a claim based upon his memory could not be expected to act in the role of an advocate in an adversary system.

To allow a person’s financial status to interfere with his right for fair and equal justice is contrary to the American judicial system. It is not equal justice to require an attorney to argue for review of his client’s case without the benefit of a full transcript.

A federal statute allows indigents to appeal as a matter of right with the United States government bearing the expense. The only requirement of the statute is that the appeal be taken in good faith. This has been established in federal court. It would be difficult to meet this requirement when the trial court certifies the appeal is not taken in good faith, and petitioner does not have a transcript to point out the specific errors. Plain errors or defects affecting substantial rights

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may lead to a reversal of the conviction, even if they were not brought to the attention of the trial court.\(^4\) A certification by the district court that the claim is frivolous carries great weight in determining whether leave to appeal should be granted, but this certification is not conclusive.\(^5\) Counsel must be appointed for the petitioner if he challenges the certification of the trial court.\(^6\)

In a similar case where the prosecution had asked prejudicial questions the Court ordered a full transcript since the government failed to effectively controvert the claim of error. The Court ruled the defendant did not have an adequate opportunity to show the error was not frivolous.\(^7\)

In the principal case, the concurring Justices gave a strong indication of what their decision would be if an indigent defendant petitions the Supreme Court with the same attorney that represented him at the trial court. The four concurring Justices agreed that the indigent defendant should be granted a full transcript as a matter of course. Justice Douglas indicated he would also agree to the full transcript.

This decision is another step toward the equalization of due process for all defendants in criminal trials in federal courts. The federal judicial system will arrive at this equalization only when it accepts the view presented by the concurring opinion. Only then will all persons receive due process of law in the federal courts.

Appeal is not a matter of right in the state courts.\(^8\) A state can make an appeal a right, but they can only do it in a non-discriminatory fashion; therefore some form of appeal must be provided for indigent defendants.\(^9\) Kentucky has already solved the indigent problem by not only providing them with the right to appeal,\(^10\) but also furnishing them with the entire transcript of the trial.\(^11\)

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\(^{4}\) Fed. R. Crim. P. 52(b).
\(^{6}\) Ibid.
\(^{8}\) McIntosh v. Commonwealth, 369 S.W.2d 331, 335 (Ky. 1963).