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Criminal Law - Right of Defendant to Review - Defendant's Right to Appeal following Unsuccessful Application for Parole

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RECENT CASES

CRIMINAL LAW—RIGHT OF DEFENDANT TO REVIEW—DEFENDANT'S RIGHT TO APPEAL FOLLOWING UNSUCCESSFUL APPLICATION FOR PAROLE—The defendant was convicted of manslaughter in the first degree and sentenced to the state penitentiary. After his application for parole was denied, he filed an appeal to set aside the judgment and conviction. With two judges dissenting,[1] the Supreme Court of Kansas dismissed the appeal. Following the case of *State v. Mooneyham*,[2] the court found that by applying for parole the defendant recognized the validity of the judgment and acquiesced therein, thus prohibiting appellate review of his conviction. *State v. Irish*, 393 P.2d 1015 (Kan. 1964).

This case represents an extension of the principle by which a defendant may lose his right of appeal by impliedly acquiescing in his guilt.[3] In Kansas, as in many other states, a defendant has a statutory right to appeal from a criminal conviction.[4] As a result, appellate courts generally refrain from inferring that a defendant has waived his right to review unless his acts and the surrounding circumstances are clearly inconsistent with any other interpretation.[5]

There are many situations similar to the principal case where the actions of the defendant result in acquiescence in his guilt and loss of his right to appeal.[6] Although there is authority to the contrary,[7] the defendant waives his right to appeal by the payment

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1. The dissenting judges reasoned that it was wrong as a matter of principle and of law to say that a defendant acquiesced in the judgment and is denied the right to appeal as a result of his application for parole. His application for clemency was only the exercise of a statutory right of long standing. Justice Price, who dissented in the opinion of this case, but joined in the decision of State v. Mooneyham, *infra* note 2, declared that the decision had bothered him and he now is conviced that it was wrong State v. Irish, 393 P.2d 1015, 1016 (Kan. 1964).

2. 192 Kan. 620, 390 P.2d 215 (1964). The defendant was convicted of grand larceny. After his application for parole was denied he filed an affidavit intending to appeal his conviction. The Supreme Court of Kansas held that by voluntarily making application for parole he thereby waived any alleged trial errors and acquiesced in the judgment.

3. See, *e.g.*, People v. Brown, 345 Ill. App. 610, 104 N.E.2d 333 (1952); Bogue v. State, 185 Ind. 243, 113 N.E. 753 (1916); State v. Morse, 191 Kan. 328, 380 P.2d 310 (1963); State v. Goddard, 69 Ore. 73, 133 Pac. 90 (1913).

4. KAN. GEN. STAT. ANN. § 62-1701 (1949), "An appeal to the supreme court may be taken by the defendant as a matter of right from any judgment against him; and upon the appeal any decision of the court or intermediate order made in the progress of the case may be reviewed." For similar statutes see, N.D. CENT. CODE § 29-28-03 (1960); TEX. CODE CRIM. PROC. art. 813 (1950).

5. *E.g.*, State v. Conroy, 133 Iowa 195, 110 N.W. 437 (1907); State v. Harmon, 243 S.W.2d 326 (Mo. 1951); Village of Avon v. Popa, 960 Ohio App. 147, 121 N.E.2d 254 (1953).

6. See, *e.g.*, State v. Morse, *supra* note 3; Thomas v. Warden of the Md. Penitentiary, 233 Md. 607, 195 A.2d 612 (1963); State v. Boulton, 229 Minn. 579, 40 N.W.2d 417 (1949); State v. Barnhardt, 230 N.C. 223, 52 S.E.2d 904 (1949).

7. *E.g.*, People v. Shambley, 4 Ill. 2d 38, 122 N.E.2d 172, 173 (1954), "Based upon these decisions and upon a consideration of the practical aspects of the situation, we thank it only just and reasonable that the defendant be given an opportunity to clear his name of the charge he has steadfastly denied and, in view of his timely appeal, will not construe the payment of the fine as constituting a waiver of his right of review." Similar cases supporting this position are, Jackson v. People, 376 P.2d 991 (Colo. 1962); Village of Avon v. Popa, *supra* note 5.

of a fine which satisfies the judgment.[8] A few courts limit the waiving of an appeal to fines that are voluntarily paid.[9] Correspondingly, an appeal on the merits of the case will not be granted from a conviction precipitated by a plea of guilty.[10] Exceptions to this can be found where collateral questions, such as the validity of the statute, the sufficiency of the information, or the jurisdiction of the court are raised.[11] By accepting the benefits of a suspended sentence the defendant also waives his right to review because he cannot accept the benefits of a judgment and at the same time object to being bound by its undesirable portion.[12]

Where the defendant accepts a parole pending the determination of his appeal, he also waives the right to have his case reviewed, because by accepting the parole the question before the appellate court becomes moot.[13] Although this is the weight of authority, a few courts have held that even though the defendant is released from jail he is still entitled to remove the stigma of the conviction from his name.[14]

The payment of a fine, plea of guilty and acceptance of a suspended sentence, or parole are quite similar to the principal case. The main contention of these courts is that the right to appeal should not be allowed where the defendant has already received a benefit from an alternate remedy.[15] In the principal case, however, the defendant merely applied for a parole which was refused; thus he received no relief. The apparent reasoning of the court is that the mere application for a parole is inconsistent with any other alternative, even though the defendant receives no beneift. Under this holding an application for parole extinguishes one's right to appellate review.

It is difficult to understand how this court can call the right

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8. *E.g.*, City of Goodland v. Bair, 166 Kan. 228, 199 P.2d 807 (1948); State v. Boulton, *supra* note 6; Abbott v. State, 160 Neb. 275, 69 N.W.2d 878 (1955); Winkler v. State, 252 S.W.2d 944 (Tex. 1962).

9. *E.g.*, City of Denison v. McCord, 251 Iowa 1322, 105 N.W.2d 485 (1960); State v. Boulton, *supra* note 6. In State v. Osborne, 143 Me. 10, 54 A.2d 526, 527 (1947) the Supreme Judicial Court adopted this language: " 'The decisions are not uniform as to the right of the accused to review a sentence or judgment imposing a fine which has been paid. According to the weight of authority, however, where accused in a criminal case voluntarily pays the fine imposed on him, he waives his right to an appeal, or to a review by certiorari. Under this rule some authorities hold that there is no waiver if the payment of the fine is involuntary, as where the fine is paid under protest to prevent imprisonment under a void sentence, or where it is made under circumstances amounting to duress, or where it is paid by another person without accused's authority; but other authorities take the position that the payment of a fine, even under protest, amounts to an execution of the sentence and, as nothing is left for further controversy, accused is deprived of an appeal."

10. *E.g.*, Stephens v. Toomey, 51 Cal. 2d 864, 338 P.2d 182 (1959); Thomas v. Warden of the Md. Penitentiary, *supra* note 6.

11. FED. R. CRIM. P. 12(b)(2) (1961); People v. Kugelman, 188 Misc. 135, 67 N.Y.S.2d 372 (1947); State v. Rose, 42 Wash. 2d 509, 256 P.2d 493 (1953).

12. *E.g.*, Renado v. Lummus, 205 Mass. 155, 91 N.E. 144 (1910); State v. Barnhardt, *supra* note 6. *Contra*, State v. Heron, 92 Ariz. 114, 374 P.2d 871 (1962).

13. Nicholson v. State, 69 Okla. Crim. 158, 100 P.2d 896 (1940); State v. Goddard, *supra* note 3; Goss v. State, 107 Tex. Crim. 659, 298 S.W. 585 (1927).

14. United States v. Glass, 317 F.2d 200 (4th Cir. 1963); Dorsett v. State, 162 Tex. Crim. 512, 287 S.W.2d 655 (1956).

15. See, *e.g.*, State v. Dowd, 27 Ill. App. 2d 429, 170 N.E.2d 179 (1960); Wilhite v. Judy, 133 Kan. 589, 21 P.2d 317 (1933).

to appellate review and an application for a parole inconsistent. The former is an appeal for a review of the merits of the conviction, the latter a simple application for the grace of the state. How can a court of any conscience justify a refusal of the right of appeal on the ground that defendant has already requested mercy? It is the opinion of this writer that a court is unjustified in refusing a defendant the right of appeal merely because he has applied for parole.

EDWIN ODLAND

CITIZENS—EXPATRIATION[1]—DENATIONALIZATION OF NATURALIZED CITIZENS FOR CONTINUOUS FOREIGN RESIDENCE—Appellant, a German national by birth, emigrated to the United States with her parents in 1939 and became a citizen of the United States derivatively through the naturalization of her mother in 1950. After receiving a baccalaureate degree from Smith College in 1954, appellant accepted a scholarship for postgraduate study in Europe.[2] While in Paris, she became engaged to a German national whom she married in 1956. Since that time, except for two brief visits to the United States, appellant has resided in Germany.[3] In 1959 the United States Consulate in Dusseldorf refused to grant appellant an extension of her passport, declaring that she had lost her United States citizenship under the terms of section 352(a)(1) of the Immigration and Nationality Act of 1952.[4] The Board of Review on the Loss of Nationality in the State Department affirmed the Consulate's decision, and appellant challenged this ruling. Upon appeal the United States Supreme Court *held*, that section 352(a)(1)

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1. Expatriation has been defined as the voluntary renunciation or abandonment of nationality and allegiance. Perkins v. Elg, 307 U.S. 325, 334 (1939). Denationalization, on the other hand, denotes involuntary forfeiture of citizenship imposed by the sovereign. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 119 (1956). Many courts have used the terms interchangeably, and as a result, much confusion exists in the area. No attempt has been made to distinguish between the two concepts in this comment. For further discussion, see WEIS, *supra* at 119-122.

2. Brief for Appellant, p. 5, Schneider v. Ruck, 84 Sup. Ct. 1187 (1964).

3. Appellant is the mother of four sons, two of whom were born prior to the commencement of denationalization proceedings and are deemed native born, Immigration and Nationality Act § 301(a)(7), (b), 66 Stat. 235 (1952), 8 U.S.C. § 1401(a)(7), (b) (1958), but unless they come to the United States before attaining the age of twenty-three and reside here continuously for five years, they will lose their citizenship. The subsequent loss of their mother's citizenship does not affect their status provided they take up permanent residence in the United States before attaining th age of twenty-five. Section 355, 66 Stat. 272 (1952), 8 U.S.C. § 1487 (1958). The status of the two sons born subsequent to the commencement of these proceedings was dependent upon a favorable decision in this case. Brief for Appellant, *supra* note 2, at 6.

4. 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(1) (1958): "(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title. . . ." The exceptions comprised in section 353 relate, *inter alia*, to study abroad, ill health, and employment by the Government. See also Immigration and Nationality Act of 1952 § 352(a)(2), 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(2) (1958) which provides that a naturalized citizen may be expatriated for residing in any foreign state for a period of five years. In Lapides v. Clark, 176 F.2d 619 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 860 (1949), § 404(c) of the Nationality Act of 1940, 54 Stat. 1170, the predecessor of § 352(a)(2), was upheld. In view of the present decision, § 352(a)(2) appears clearly unconstitutional.