TIME FOR TAKING APPEAL UNDER FEDERAL RULES OF CRIMINAL PROCEDURE JUDICIALLY EXTENDED

Boruff v. United States
310 F.2d 918 (5th Cir. 1962)

Boruff appeared with assigned counsel at his trial and when sentenced, but neither counsel nor the court advised him of his rights with respect to appeal and his right to have counsel assigned for appeal. Approximately four months after sentencing, Boruff filed notice of appeal.[1] The trial court allowed the appeal but reserved the question of timeliness to the court in the instant case. The court of appeals held that Boruff was deprived of his right to the assistance of counsel and that therefore the ten day limitation on filing notice of appeal set forth in Rule 37(a)(2)[2] of the Federal Rules of Criminal Procedure did not begin to run until he was actually advised of his rights concerning appeal. Consideration on the merits revealed that venue was clearly improper and the case was remanded for a judgment of acquital. The dissenting judge, relying on the interpretation given Rule 45(b)[3] in *United States v. Robinson*,[4] took the position that the limitation began to run when Boruff was sentenced, and that due to the jurisdictional and mandatory nature of the ten day limitation, the only relief available was collateral attack.[5]

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[1] Boruff v. United States, 310 F.2d 918 (5th Cir. 1962).

[2] Fed. R. Crim. P. 37(a)(2):
Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment had been made within the 10 day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant.

[3] Fed. R. Crim. P. 45(b):
Enlargement. When an act is required or allowed to be done at or within a specific time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified time period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any actions under Rules 33, 34, and 35, except as otherwise provided in those rules, or the period for taking an appeal.

[4] 361 U.S. 220 (1960), noted in 48 Calif. L. Rev. 333 (1960). The Court held that Rule 45(b) prohibited enlargement of limitation where notice of appeal was filed late due to excusable neglect.

[5] Boruff v. United States, *supra* note 1, at 924.

The jurisdictional and mandatory view of the limitation taken by the dissenting judge was traditional when the present rules were adopted. There was no uniform notion as to the limitation's proper length.[6] Rather the limitation seems to have been arbitrarily set on the theory that appeal, as a separate action, was strictly a statutory right and that expediency and procedural convenience could therefore be paramount.[7] The separate action concept is the reason for regarding the limitation on notice of appeal as jurisdictional in nature[8] and transfer of jurisdiction to the appellate court as the first step in taking an appeal.[9] As a manner of describing the finality attributed to the limitation on filing notice of appeal when appeal was a matter of statutory grace, the term "jurisdictional" was conveniently appropriate. Thus, at the time the rules were adopted, it could be said that the limitation on notice of appeal effectively denied jurisdiction to the appellate court.

Since adoption of the rules, the right to appeal has taken on a constitutional character and assistance of counsel has become a constitutional requisite in protecting the right.[10] This does not conflict with the view that Congress may abolish the appellate procedure in the federal courts. As long as Congress provides an appellate process for men of means, the federal constitution requires that it also be available to indigents. The indigent defendant's right to appeal rests on the doctrine of *Griffin v. Illinois*.[11] Though *Griffin* is a state case, its legal reasoning is applicable in the federal courts through fifth amendment due process of law.[12] An in-

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[6] Brunyate, "The American Draft Code of Criminal Procedure, 1930," 49 L.Q. Rev. 192, 204 (1933): "According to English ideas the period is a long one; but it is perhaps not an unreasonable compromise between the two days or three days allowed in California and Massachusetts respectively, and the eight months of West Virginia, the year of Montana, Wisconsin and Wyoming, and the two years of Kansas."

[7] See Ray v. United States, 301 U.S. 158, 163 (1937); 48 Calif. L. Rev. 333, 335 (1960).

[8] 48 Calif. L. Rev. 333, 335 (1960).

[9] See Orfield, Criminal Appeals in America 140-41 (1939).

[10] United States v. Johnson, 238 F.2d 565 (5th Cir. 1956) (dissenting opinion), *rev'd*, Johnson v. United States, 352 U.S. 565 (1957).

[11] 351 U.S. 12 (1956).

[12] *Id.* at 17: "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Accord,* Burns v. Ohio, 360 U.S. 252 (1959). In United States v. Johnson, *supra* note 10, at 567, Judge Frank said, "It would seem clear that the *Griffin* doctrine, via the due process clause of the Fifth Amendment, applies as well to a poor man's appeal from a Federal conviction." In Coppedge v. United States, 369 U.S. 438, 456 (1961), Mr. Justice Stewart said in reference to the right to appeal in forma pauperis: "the statutory safeguard against over indulgence in free frivolous appeals cannot be allowed to impinge upon the fundamental right of every litigant, rich or poor, to equal consideration before the courts." See Ridge, "The Indigent Defendant: A Procedural Dilemma for the Courts," 24 F.R.D. 243, 251 (1960).

digent's appeal is to be as adequate and effective as an appeal by a man of means.[13] The limitation on filing notice of appeal makes notice the *sine qua non* of appeal. Therefore, in order that the opportunity to appeal be adequate and effective, the opportunity to file notice of appeal must be equal. The cases relied upon by the dissent did not involve the instant constitutional question: the defendants were either represented by retained counsel, as in *Robinson,* or the limitation on filing notice of appeal was not in issue.[14] Though some cases cannot be reconciled with the instant case, [15] the cases relied upon by the dissent do not refute the conclusion that the limitation on filing notice of appeal may no longer be regarded as wholly mandatory and jurisdictional where the indigent defendant's constitutional right to equal opportunity of appeal has been violated. This is true because appeal is now considered a continuation of the criminal prosecution[16]—an integral part of the trial system of adjudication[17]—which is fundamental to due process of law. The limitation on filing notice of appeal is no different from any other procedural rule. Where it offends the Constitution it must yield.

Having decided that the Constitution required that Boruff be granted an appeal, the majority had to interpret the rules to obtain the required result. The majority held that not being advised by assigned counsel was equivalent to not being represented by counsel within the meaning of Rule 37(a)(2).[18] The next question was whether the limitation had run. A

Equal access to justice is clearly a present day standard which applies to the right to appeal.

[13] Coppedge v. United States, 369 U.S. 438, 447 (1961).

[14] Assigned counsel and the limitation in Rule 37(a)(2) are the key factors which combine to raise the constitutional question in the instant case. Where counsel is retained, the question of equal opportunity of appeal is not raised. Where the limitation is other than the limitation in Rule 37(a)(2), there is no question regarding the right to appeal. *Supra* note 3. Cases not containing both key factors are distinguishable from *Boruff*. Robinson v. United States, 260 F.2d 718, 721 n. 1 (D.C.Cir. 1958), *rev'd,* United States v. Robinson, 361 U.S. 220 (1960) (retained counsel); United States v. Smith, 331 U.S. 469 (1947) (Rule 33; mandamus setting aside order for new trial after case was affirmed on appeal); Hodges v. United States, 282 F.2d 858, 861 n.4 (D.C.Cir. 1960) (retained counsel); Marion v. United States, 171 F.2d 185, (9th Cir. 1948) (retained counsel). See generally 4 L. Ed. 2d 1854 (1959) [construction and application of Rule 45(b)].

[15] By way of dictum in *Coppedge, supra* note 13, at 442 n. 5, the court said in reference to Rule 37(a)(2):

> The statutory purpose of this provision may, however, not be achieved when the defendant appears at sentencing with counsel. If neither counsel, whether retained or court appointed, nor the district judge imposing sentence, notifies the defendant of the requirement for filing a prompt notice of appeal, the right of appeal may be irrevocably lost.

See also United States v. Parker, 208 F. Supp. 920 (D. Mass. 1962).

[16] Johnson v. United States, 352 U.S. 565 (1957), explained in Application of Dinerstein, 258 F.2d 609, 611 (9th Cir. 1958).

[17] Griffin v. Illinois, *supra* note 11, at 18.

[18] 310 F.2d at 921.

finding that the limitation had run would have necessitated interpreting Rule 45(b) concerning enlargement. The specificity of Rule 45(b) would have required finding it unconstitutional as applied.[19] Holding that the running of the limitation was postponed avoided a ruling on Rule 45(b) by allowing Boruff's notice of appeal to fall within the ten day limitation. However, the court did not expressly reconcile the language of Rule 37(a)(2) which states that the limitation begins to run upon entry of judgment.[20] It appears that the majority interpreted "entry of judgment," as used in Rule 37(a)(2), to presume that the indigent defendant is advised of his rights concerning appeal by either court or counsel and where this presumption is unfounded, the limitation does not begin to run.[21] Though this interpretation was not expressed by the drafters, it produces an outcome in harmony with the intended purpose and construction of the rules.[22]

How was the district court expected to know that Boruff was not represented by counsel within the terms of Rule 37(a)(2) when assigned counsel appeared with him at sentencing? The majority found that the district court had an affirmative duty under Rule 44 to inquire as to the intentions of assigned counsel to advise on rights concerning appeal.[23] This finding is well supported.[24] Assignment of counsel alone does not

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[19] Rule 45(b) specifically states that "the court may not enlarge . . . the period for taking an appeal." These words have been given their clear meaning. United States v. Robinson, *supra* note 4.

[20] *Supra* note 2.

[21] In Dodd v. United States, 321 F.2d 240, 245 (9th Cir. 1963) the court said:
The framers of Rule 37 undoubtedly believed that where the defendant was represented by counsel at the trial, the counsel would advise the defendant of his right to appeal and either prepare the notice for him or advise him that by filing a simple statement in writing stating in substance, 'I appeal from the judgment and sentence,' he could preserve his right to appellate review. Hence no provision appears in Rule 37 covering the situation where the defendant was represented by counsel at the trial.

[22] Fed. R. Crim. P. 2:
Purpose and Construction. These rules are intended to provide for the determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

[23] 310 F.2d at 921. Fed. R. Crim. P. 44:
Assignment of Counsel. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

[24] The affirmative duty is best summed up by Ridge, *op. cit. supra* note 12, at 251:
(T)he first step in due process seemingly places responsibility on the District Court to see that an indigent defendant is represented by counsel in connection with his right to appeal . . . (I)t appears that the first procedural step, after trial, conviction and sentence of an indigent defendant in the District Court, is for the trial judge to determine whether trial appointed counsel has advised the indigent defendant of his right to appeal

meet the constitutional mandate to equalize the opportunity for noting an appeal. Indigent defendants appearing with assigned counsel have less opportunity for filing notice of appeal than any other class of defendants.[25] There is a much greater likelihood that assigned counsel, as compared to retained counsel, will terminate their services upon sentencing,[26] as the frequency of pro se notices of appeal substantiates.[27] The practice of assigning counsel before trial and again by the appellate court after notice of appeal is filed contributes to the likelihood that the assistance of assigned counsel will lapse upon sentencing as it did in the instant case.[28] The affirmative duty is well within the anticipation of the drafters of the Federal Rules of Criminal Procedure.[29] In order to afford equal opportunity to appeal, the trial court must affirmatively inquire into intentions of assigned counsel at sentencing.

The court might have reached the result it did on the ground of official interference with filing notice of appeal or incompetency of assigned counsel. Intentional prevention of timely notice by the state through one

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and made known to him any "possible error" committed at the trial which that counsel might consider as the basis for appeal, before he is permitted to withdraw from the case, or the defendant is allowed to reject such counsel and proceed pro se.

See Von Moltke v. Gillies, 332 U.S. 708, 722-26 (1948); Hodges v. United States, 282 F.2d 858, 862 (D.C.Cir. 1960) (separate opinion); Willis v. Hunter, 166 F.2d 721, 722-23 (10th Cir. 1948); Boykin v. Huff, 121 F.2d 865, 870 (D.C.Cir. 1941); State v. Frodsham, 139 Mont. 222, 232-33, 362 P.2d 413, 418 (1961).

[25] Defendants with retained counsel have the opportunities with which the court must provide the indigent. Defendants without counsel will be advised by the court of the right to appeal and may have the court note an appeal automatically under Rule 37(a)(2). Whether indigents who do not waive the right to counsel are represented with respect to their right to appeal depends on what the attorneys appearing at sentencing include within their obligations to represent indigent defendants. Assigned counsel may not consider advice on the right to appeal as part of their obligations, Ridge, *op. cit. supra* note 12, at 251. In fact, an attorney may appear with an indigent defendant at sentencing without representing him at all. Gadsden v. United States, 223 F.2d 627 (D.C.Cir. 1955).

[26] Appointed counsel are often young, unpaid and lacking in experience and enthusiasm. Erwin, "Uncompensated Counsel: They do not Meet the Constitutional Mandate," 49 A.B.A.J. 435 (1963). Cost of appeal is frequently prohibitive due to the heavy personal sacrifice involved, 109 Cong. Rec. 230 (daily ed. Jan. 14, 1963) (remarks of Senator Hruska), and representation often terminates upon sentencing. Ridge, op. *cit. supra* note 12, at 251.

[27] See Coppedge v. United States, *supra* note 13, at 446; Fallen v. United States, 306 F.2d 697, 706 (5th Cir. 1962) (dissenting opinion), *cert. granted,* 374 U.S. 826 (1963) (No. 811, 1962 Term; renumbered No. 210, 1963 Term).

[28] Coppedge v. United States, *supra* note 13, at 446; Johnson v. United States, *supra* note 16, at 566.

[29] Fed. R. Crim. P. 57(b) provides:

Procedure not Otherwise Specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

of its officers or agents has been held sufficient reason not to give the limitation effect.[30] The government has the duty to provide means of affording adequate and effective review to indigent defendants and it cannot avoid performing that duty through the negligent or intentional acts of its own agents or officials. Turning to the instant case, the district court judge, a governmental official, failed to fulfill his duty to advise Boruff of his rights concerning appeal, a duty which arose because assigned counsel, a quasi-governmental official, failed properly to represent Boruff. In a recent state case the limitation ran after assigned counsel, without informing the defendant, decided that no appeal should be taken. Default in filing notice of appeal was attributed to the state because a statute placed the responsibility on court appointed counsel to take the necessary procedural steps to effectuate an appeal.[31] Default in filing notice of appeal in *Boruff* can be attributed to the federal government, because Rule 37(a)(2) specifically recognizes the duty of the government to advise indigent defendants not represented by counsel of their rights concerning appeal and effectively delegates such duty by implication to assigned counsel where the indigent is represented.[32]

Boruff was entitled to be represented by a competent attorney. Misconduct amounting to a breach of a legal duty faithfully to represent the client's interests has been said to be sufficient to show incompetency.[33] But the showing usually required is that the trial be so fundamentally unfair as to amount to a farce and a mockery of justice.[34] Boruff's counsel apparently properly preserved the question of venue,[35] but his erroneous decision not to appeal, implied in his letter to the district court, suggests a question of competency.[36] The question before the court might have been the competency of the representation rather than the presence or absence of representation. Interestingly, the court did not consider the question of competency in its opinion. The low standard of competency makes it questionable whether Boruff's counsel would have been found incompetent. Hence, it may be concluded that the court, by leaping over the question of competency to a finding of no representation, effectively raised the constitutional standard for attorney conduct.

The question remains whether the limitation will be tolled under the doctrine of the instant case where assigned counsel's conduct does not

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[30] Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951).

[31] Coffman v. Bomar, 220 F.Supp. 343 (D.Tenn. 1963).

[32] See note 21, *supra.*

[33] Kennedy v. United States, 259 F.2d 883, 886 (5th Cir. 1958), *cert. denied,* 359 U.S. 994 (1959).

[34] Darcy v. Handy, 203 F.2d 407, 427 (3d Cir. 1953), *cert. denied,* 346 U.S. 865 (1954).

[35] 310 F.2d at 922. Boruff's counsel raised the question of venue by motion at the outset of the trial, but the district court erroneously submitted the question to the jury.

[36] 310 F.2d at 920. Boruff's assigned counsel wrote a letter to the district court explaining what took place between himself and Boruff concerning Boruff's right to appeal. Part of this letter is found in the instant case.

constitute such blatant abandonment of the indigent defendant. If an indigent defendant is advised in good faith that he has no cause for appeal but not of the limitation, should the limitation be tolled until the indigent is so advised? It has been said that the indigent defendant is entitled to the advice and judgment of assigned counsel and nothing more,[37] but it is clear that his right to appeal still exists even if counsel believes appeal should not be taken.[38] Therefore, such a defendant is entitled to be advised of his right to appeal and of the cruciality of the limitation as well as of the merits of the appeal. However, an indigent defendant afforded professional judgment as to the merits of the appeal comes closer to receiving equal justice than Boruff, who had no advice on the merits or procedure of appeal. Whether or not equal opportunity of appeal is sufficiently denied to toll the statute is not clear. In order to avoid any question of equal opportunity in this situation, it is counsel's duty to advise the court at the time of sentencing of his intention not to note an appeal. The court could then note an appeal if the indigent defendant desired. If, after sentencing, assigned counsel decides not to note an appeal, he should be bound to advise the indigent defendant of the limitation and how to note an appeal pro se.[39]

A different problem is presented where assigned counsel intends to file notice of appeal but neglects to do so in time. The indigent defendant is entitled to equal opportunity and no more. The only distinction with respect to equal opportunity between retained and assigned counsel turns on whether the latter has greater propensity to be negligent than the former. Such a fine line would be difficult to draw. The limitation would not be tolled.

Departure from the traditional view espoused by the dissent is a prudent recognition of change in the law and of the lack of magic in classifying the limitation as jurisdictional. The Federal Rules of Criminal Procedure have no more force and effect than statutes and must be interpreted consistently with the growth of the law.[40] In *United States v. Robinson,* the court suggested leaving problems relating to inconsistencies and obscurities in the rules to the rule making process,[41] but the courts, not Congress, have traditionally taken the strides toward equality of justice.[42] There is still far to go to achieve equality under the law with respect to those afflicted with poverty.[43] In *Coppedge v. United States* it was said:

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[37] Lewis v. United States, 294 F.2d 209, 211 (D.C.Cir. 1960).

[38] Thompson v. Johnston, 160 F.2d 374, 378 (9th Cir. 1947) (dissenting opinion).

[39] *Supra* notes 21, 24.

[40] Gallagher v. United States, 82 F.2d 721 (8th Cir. 1936).

[41] *Supra* note 4, at 229.

[42] See, *e.g.,* Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1962); Coppedge v. United States, 369 U.S. 438 (1961); Griffin v. Illinois, 351 U.S. 12 (1956); Johnson v. United States, *supra* note 16; Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).

[43] United States v. Johnson, *supra* note 10, at 572.

> When society acts to deprive one of its members of his life, liberty or property, it takes most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measure by which the quality of our civilization may be judged.[44]

The courts have an affirmative duty to keep the rules from operating to defeat their purpose. It is shockingly unfair to allow the rights of an indigent to be lost when the court should be aware of the indigent's ignorance and peril. The proposed federal public defender system would help to solve the problem, for the compensation it provides would eliminate the primary factor which causes the disparity between the representation afforded by retained and assigned counsel.[45] The solution which avails of immediate implementation, simplicity and economy of administration, is founded on the district court's affirmative duty to inquire and advise, not only of the rights concerning appeal, but also of the right to assigned counsel on appeal. Without knowledge of the right to assigned counsel, the right to appeal may seem meaningless and go unexercised. "The prevention of undue restraints on liberty is more important than mechanical and unrealistic administration of the federal courts."[46]

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[44] *Supra* note 13, at 449.

[45] 109 Cong. Rec. 227 (daily ed. Jan. 14, 1963).

[46] Wade v. Mays, 334 U.S. 678, 681 (1948).