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The Appealability of a Conviction Based on a Plea of Guilty

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have withdrawn their certificate.[40] Or they could have sent a notice to management and to the regulatory agencies.[41]

The settled rule of statutory construction is that, where there is a special statutory provision affording a remedy for particular specific cases and where there is also a general provision which is comprehensive enough to include what is embraced in the former, the special provision will prevail over the general provision, and the latter will be held to apply only to such cases as are not within the former.[42]

The writer favors the result but not the approach taken in *Fisher*. Even though the existence of explicit liability under the Securities Act has been held not to negate implied liabilities arising from violations of section 10(b) of the Exchange Act and Rule 10b-5 thereunder,[43] it is felt that the accountant's liability should be based on section 11.

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THE APPEALABILITY OF A CONVICTION BASED ON A PLEA OF GUILTY

The defendant, represented by his court-appointed counsel, withdrew a plea of not guilty and entered a plea of guilty to a charge of burglary. He was found guilty and sentenced. The defendant then filed a notice of appeal. The trial court treated the notice as a petition for relief under Criminal Procedure Rule No. 1 and denied it as frivolous.[1] On appeal, the State moved to dismiss on the ground that the conviction was based on a plea of guilty. The Second District Court of Appeal *held*, motion denied: An accused in a criminal case has a right to appeal a judgment of conviction even though he has waived trial by jury and pleaded guilty. The supposed "rule" that a conviction based on a plea of guilty cannot be appealed finds no support in Florida other than in the dicta of cases which on appeal were decided on the full merits. *Ramey v. State*, 199 So.2d 104 (Fla. 2d Dist. 1967).[2]

By denying the State's motion to dismiss, Florida became part of the growing majority of jurisdictions that reject the rule that a conviction based upon a plea of guilty cannot ordinarily be reviewed on appeal. Only

40. *See* Wall Street Journal, Oct. 18, 1966, at 32, col. 2, *re* Continental Vending Machines, Corp.

41. *See* Wall Street Journal, Oct. 17, 1966, at 4, col. 2, *re* Public Bank of Detroit.

42. Montague v. Electronic Corp. of America, 76 F. Supp. 933, 936 (S.D.N.Y. 1948).

43. Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); *see also* J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

1. Brief for Appellant at 1, Ramey v. State, 199 So.2d 104 (Fla. 2d Dist. 1967).

2. Subsequently, the case was disposed of in a per curiam decision which affirmed the trial court's holding. Ramey v. State, 201 So.2d 270 (Fla. 2d Dist. 1967).

a few states have applied the rule without exception. An Ohio court applied the rule by refusing to consider the contention of a defendant who had pleaded guilty that the evidence was not sufficient to support the conviction.[3] A West Virginia court went far in applying the rule when, by *presuming* that the guilty plea was voluntary, it affirmed the conviction without reviewing the merits of the case.[4]

In other states which still apply the non-appealability rule, courts are slowly rendering the rule ineffective by making exceptions to it.[5] Since the rule is usually stated that a conviction based on a guilty plea cannot *ordinarily* be reviewed on appeal, a door is left wide open for exceptions. The most common one is that if the plea was not understandingly and voluntarily made, the conviction is appealable.[6] Since the effect of a guilty plea is to waive proof of any facts alleged in the indictment, another exception to the rule is that an appeal lies if the admitted facts do not constitute an indictable offense, or if the court lacks jurisdiction to try the defendant.[7] The constitutionality of the statute which the defendant is charged with violating may be questioned on appeal, despite a guilty plea.[8] Another exception is that a conviction can be reviewed because of an unreasonable or unauthorized punishment.[9]

Among the majority of jurisdictions that do not apply the non-appealability rule, there are states that have expressly rejected it,[10] as Florida has done in the instant case. The Supreme Courts of Indiana[11] and Maine[12] have unequivocally said that a conviction based on a plea of guilty is appealable.

Florida precedent, at first glance, seems to establish the non-appealability rule, and the instant case appears even to contradict a Florida Supreme Court holding.[13] However, after a review of Florida authority, the Second District Court concluded that the rule "has never been *authoritatively* announced by the Florida Courts."[14] The court was correct in that the rule had appeared only as dicta.

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3. State v. Hertz, 72 Ohio L. Abs. 509, 135 N.E.2d 781 (Ct. App. 1954).

4. Browsky v. Purdue, 105 W. Va. 527, 143 S.E. 304 (1928).

5. For example, a leading Maryland case, Lowe v. State, 111 Md. 1, 73 A. 637 (1909), which stood as authority for the rule in that jurisdiction for over fifty years, was recently made subject to exceptions. *See* Cohen v. State, 235 Md. 62, 200 A.2d 368 (1964).

6. State v. Stone, 101 W. Va. 53, 56, 131 S.E. 872, 873 (1926).

7. Cohen v. State, 235 Md. 62, 200 A.2d 368 (1964).

8. *See* United States v. Ury, 106 F.2d 28 (2d Cir. 1939).

9. Geeter v. State, 35 Ala. App. 207, 45 So.2d 167 (1950).

10. The appellate courts in Leasure v. State, 275 P. 2d 344 (Okla. Crim. Ct. App. 1954) (and cited authority therein) and Navarro v. State, 141 Tex. Crim. 196, 147 S.W.2d 1081 (1941) have done so.

11. Snow v. State, 245 Ind. 424, 199 N.E.2d 469 (1964); Kuhn v. State, 222 Ind. 179, 52 N.E.2d 491 (1944).

12. Berger v. State, 147 Me. 111, 83 A.2d 571 (1951).

13. State *ex rel.* Baggs v. Frederick, 124 Fla. 290, 168 So. 252 (1936).

14. 199 So.2d at 107.

In two cases, cited as authority by the state in the instant case, the Florida courts seemed to create a paradox.[15] After granting the appeal and deciding the case on the merits, the courts then stated that there could be no appeal of a conviction based on a guilty plea.[16] The court's action in *Perez v. State*[17] is typical. After the appeal was allowed and the case was decided on the merits, the court cited the non-appealability rule:

> We have fully examined the record, and the extensive brief which the appellant personally prepared and filed, and conclude that no showing has been made upon which this appellate court could or should disturb the adjudication of guilt of the offense of receiving and concealing stolen property which was entered pursuant to the defendant's plea of guilty to that offense. A judgment entered on a plea of guilty ordinarily can not be reviewed by appeal. . . .[18]

In the instant case the court's logic in simply rejecting the non-appealability rule and allowing the appeal is superior to the legal gymnastics previously indulged, as in *Perez*, to arrive at the same result.

The holding of the instant case appears at first to be in conflict with the Florida Supreme Court's decision in *State ex rel. Baggs v. Frederick*,[19] wherein the court said that "[t]he rule that . . . such plea of guilty cannot ordinarily be reviewed by appeal or writ of error, is sound. . . ."[20] However, the case involved an appeal from a justice of the peace court. The rule was held not to be applicable because the procedure of appeal to obtain a trial de novo of criminal charges originating in such inferior courts is "entirely statutory."[21] Thus, the rule appeared only as dicta. Furthermore, the Supreme Court recognized as an exception to the rule that an appeal granted by statute will be allowed despite a plea of guilty.

In the instant case the court observed that the appeal in question was also based on a statutory provision.[22] The court further pointed out that the "sound rule" stated in the *Baggs* decision was in no way supported by authority.[23] Therefore, because the Supreme Court stated the non-appealability rule only as dicta, and because the court recognized

15. Gibson v. State, 173 So.2d 766 (Fla. 3d Dist. 1965), Perez v. State, 151 So.2d 865 (Fla. 3d Dist. 1963).

16. The same paradox is to be seen in the following cases, not cited by the State: Gibson v. State, 196 So.2d 188 (Fla. 2d Dist. 1967); Clayton v. State, 188 So.2d 395 (Fla. 3d Dist. 1966); Cole v. State, 172 So.2d 607 (Fla. 3d Dist. 1965).

17. 151 So.2d 865 (Fla. 3d Dist. 1963).

18. *Id.* at 865-66.

19. 124 Fla. 290, 168 So. 252 (1936).

20. *Id.* at 292, 168 So. at 253.

21. *Id.*

22. 199 So.2d at 105. The court cited FLA. STAT. § 924.06 (1965), "An appeal may be taken by the defendant only from: (1) A final judgment of conviction. . . ."

23. *Id.* at 105.

an exception applicable also to the instant case, the *Baggs* decision was not controlling.

A recent Florida decision deserves special attention as its significance after the instant case is not yet known. In *Clayton v. State*,[24] the court again granted the appeal of a conviction based on a plea of guilty and decided the case on the merits. However, the court *restricted* the scope of the issues on appeal by denying the defendant the right to object to the sufficiency of the evidence. The court said:

> The judgment based on his plea of guilty was not appealable as to such matters. The adjudication of guilt was entered on the plea of guilty and not on evidence presented at a trial on the merits.[25]

An important question left unanswered by the instant case remains: Will an appeal of a conviction based on a plea of guilty be treated in all respects as if there had been no guilty plea, or will the defendant's admission of guilt limit the area of appeal open to him? The instant case stands only for the proposition that an appeal will not be denied the defendant.

It is submitted that the limitation imposed by *Clayton v. State*,[26] that the defendant cannot question the sufficiency of the evidence on appeal, should be maintained. Otherwise, judicial time and expense will be wasted in that the state will always have to prove that a defendant committed the acts which he is willing to admit having committed. The plea of guilty would have very little value. The instant case, with the *Clayton* limitation and other limitations that courts may make, will give rise to a new rule on the appealability of a conviction based on a plea of guilty. Hopefully, the new rule will be much clearer than its forerunner in that it will be based on the positive statement that an appeal is allowed, but that it will be limited in scope in accordance with the legal significance of the plea of guilty.

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24. 188 So.2d 395 (Fla. 3d Dist. 1966).
25. *Id.* at 396.
26. *Id.*