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Application of Ohio Post-Conviction Procedure - Effect of Prior Judgment On.; Coley v. Alvis

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CRIMINAL LAW—APPLICATION OF OHIO POST-CONVICTION PROCEDURE (Ohio Rev. Code § 2953.21 et seq.) —EFFECT OF PRIOR JUDGMENT ON.

Coley v. Alvis, 381 F.2d 870 (1967)

In the per curiam decision of *Coley v. Alvis*[1] the United States Court of Appeals for the Sixth Circuit reversed an Ohio District Court[2] decision dismissing Coley's petition for habeas corpus for failure to exhaust his state[3] remedies. The circuit Court remanded, stating that it would be futile for petitioner to attempt to void his conviction under the Ohio post-conviction statute because of the narrow limits placed on it by the state courts and that there was consequently no longer any effective state remedy.[4] Since the grounds that petitioner set forth to sustain his writ did not fall within any of the enumerated exceptions recognized by Ohio Supreme Court decisions, the court held that petitioner should be allowed to seek relief in the federal court without appealing the ruling on his writ to the Supreme Court of Ohio.

In considering this situation, the Circuit Court noted the earlier Ohio Supreme Court case of *State v. Perry*[5] wherein the Ohio post-conviction statute was construed to be usable only if the court that sentenced petitioner had no jurisdiction over his person or no jurisdiction to try him for the crime for which he was convicted.[6] "Conversely," the Ohio Supreme Court stated, "where a judgment of conviction is rendered by a court having jurisdiction over the person of defendant and jurisdiction of the subject matter, such judgment is not void, and the cause of action

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[1] 381 F.2d 870 (1967).

[2] United States Court for the Southern District of Ohio. Appellant was indicted in 1962 in Jackson County, Ohio for the crimes of breaking and entering in the night season and for grand larceny. Appellant subsequently was convicted of grand larceny and sentenced to the Ohio Reformatory for one to seven years.

[3] *Ex Parte Hawk*, 321 U.S. 114, 64 S. Ct. 448 (1944).

[4] See R. Messermann's article on post-conviction remedies at p. 12.08 of the Reference Manual for Continuing Legal Education, Ohio Legal Center Institute (1966), text on Criminal Law. In the article, entitled *Drafting the Petition: What is Actionable?*, the Ohio State University law professor gives an indication of what was initially expected of the then new statute (Ohio Rev. Code § 2953.21 et seq. (1966)).

[5] 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967).

[6] *State v. Perry, supra* note 5.

merged therein becomes res judicata as between the state and the defendant." [7]

Clearly, Ohio has not applied its post-conviction statute in the way other states have applied theirs, so as to make really meaningful use of this remedy. By applying the principle of res judicata to the post-conviction statute, Ohio has barred the petitioner from raising in any proceeding (except an appeal from the judgment of conviction) any defense or any claimed lack of due process that was raised or could have been raised by petitioner at the trial which resulted in his conviction.[8]

Since appellant's five issues raised on post-conviction appeal[9] were not within the exceptions set out by the Ohio Supreme Court in the *Perry* decision,[10] and since appellant could have raised them at the time of his plea of guilty, in *Coley* there was no longer any effective state remedy which appellant could exhaust.[11] Thus he was allowed to seek his writ of habeas corpus in federal court.[12] Yet it is exactly this clogging of the federal courts with habeas corpus proceedings that the post-conviction statutes were designed to curtail.[13] Moreover, on July 21, 1965, when the post-conviction statute became effective in Ohio, pursuant to amendment of Ohio Rev. Code § 2953.21,[14] there was discussion of how it should be applied,[15] and of how Ohio could profit from the mistakes made by other states in their application

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[7] *Perry v. Maxwell, Warden,* 175 Ohio St. 369, 195 N.E.2d 103 (1963); *Mills v. Maxwell, Warden,* 174 Ohio St. 523, 190 N.E.2d 264 (1963); *State v. Wozniak,* 172 Ohio St. 517, 522, 178 N.E.2d 800 (1961).

[8] *Coley v. Alvis,* n. 1, *supra.*

[9] The issues raised by him were: 1. that he was allowed only five hours counselling with his court appointed attorney before going to trial; 2. that the trial judge denied a continuance to enable adequate preparation for trial; 3. that the trial judge denied the issuance of defense subpoenas; 4. that his plea of guilty was involuntary and obtained under duress; and 5. that his court-appointed counsel was incompetent. (n. 1, *supra*)

[10] *Supra* note 5.

[11] But see *Knox v. Maxwell,* 13 Ohio Misc. 85 (1968), also reported at 41 Ohio Bar 15 (February 5, 1968) and also reported in 2 Crim. L. Reporter 1063 (1968) under the title, "Time Exhausts all Remedies."

[12] *Ex Parte Hawk, supra* note 3. There should be a caveat placed on this rule, incidentally, in light of the recent (January, 1968) case of *Dixon v. Florida,* 2 Crim. L. Reporter 1063 (1967), where the United States Court of Appeals for the Fifth Circuit stated that there may not be a need to exhaust state remedies when seeking federal habeas corpus if petitioner has been convicted a long time previously and has not yet been sentenced. It seems that while federal courts *can* be patient with state courts, there is a limit to their forbearance.

[13] 1 Akron Law Rev. 42 (1967).

[14] Page's Ohio Revised Code, Title 29, 1966 Supplement at p. 125.

[15] *Symposium on Post-Conviction Remedies,* 27 Ohio St. L. J. 237 (1966).

of post-conviction statute remedies,[16] thereby avoiding the problems which other states had encountered.[17] It would seem clear that the Ohio General Assembly intended that the remedy of post-conviction relief be a means whereby a petitioner could seek to set aside his conviction, ". . . if there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States. . . ." [18] But the courts' interpretation of the statute in the *Perry* case has frustrated this intention[19] except in the case where a judgment or conviction is void (within the meaning of § 2953.21) because it was rendered by a court without jurisdiction over the person of defendant or without jurisdiction of the subject matter.[20] Although *Perry* said, specifically, that a defect in jurisdiction would exist when defendant was not represented by counsel,[21] Coley could not avail himself of this exception, because his petition for post-conviction relief stated that his counsel was incompetent,[22] thereby admitting the physical existence of counsel at his trial.[23] "Under Ohio law [a] no-counsel claim would entitle [the] prisoner to a claim under the Ohio Post-Conviction Act, whereas [a] claim that his counsel [was] incompetent would merely entitle him to relief under state law providing for delayed appeal relief." [24]

Why have Ohio courts construed their post-conviction statute so strictly, when it appears that other states have not so construed theirs? The question remains unanswered. However, it appears that Ohio is among those states[25] which have enacted post-conviction remedy statutes only (or primarily) because compelled to do so by United States Supreme Court decisions[26] holding:

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16 *Ibid.*

17 *Ibid.*

18 Ohio Rev. Code Ann. § 2953.21 (1966).

19 *State v. Perry, supra* note 5.

20 *Supra* note 5, and see 226 N.E.2d 104, Syllabus 5.

21 *Supra* note 5.

22 *Supra* note 1.

23 But might it not be argued that incompetent counsel is in effect no counsel at all?

24 *Time Exhausts All Remedies,* 2 Crim. L. Reporter, 1063 (1967).

25 Ill. Ann. Stat., Ch. 38, § 122-1 (1963); Ore. Rev. Stat. § 138.510 to 138.680 (1963), Neb. Rev. Stat. § 145-1-5 (1965), Fla. Stat. Ann. Ch. 924 Rules of Crim. Procedure (1966 Supp.).

26 *Young v. Ragen,* 337 U.S. 235, 69 S. Ct. 1073 (1949), *Case v. Nebraska,* 381 U.S. 336, 85 S. Ct. 1486 (1965).

> ". . . that the federal courts would refrain from interfering in the administration of criminal justice at the state level *only* if the state courts provided relief similar to that available in federal courts." [27] (Emphasis supplied.)

Following this warning, the Illinois legislature responded immediately to enact the first state statute permitting a collateral attack, based on constitutional grounds, on a state conviction.[28] Illinois applies the doctrine of res judicata, as does Ohio, to embrace not only those issues which were adjudicated but also those which might have been adjudicated in the first trial.[29] However, the Illinois Supreme Court has recognized that a strict application of this rule would bar a substantial number of post-conviction proceedings, and has stated that, "its use cannot be an automatic barrier to an investigation of the alleged denials of constitutional rights if the purpose of the statute is to be served." [30]

Oregon has solved the res judicata problem by adopting a provision of the Uniform Post-Conviction Procedure Act (§ 8)[31] and then making an exception providing that "any ground alleged which could not reasonably have been raised in the prior proceeding would not be barred from consideration by res judicata if the petitioner could establish in fact that it could not reasonably have been raised." [32]

The 2d District Court of Appeal for the State of Florida made a policy decision in *Jones v. State*[33] which might well be accepted by any state enacting a post-conviction relief statute. The court declared that the Florida post-conviction relief act[34] was intended to be an effective method for collaterally attacking judgments of conviction,[35] to be more expeditious than habeas

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[27] *Supra* note 13, at 42.

[28] *Id.* at 43.

[29] *Supra* note 15, at 265.

[30] *Supra* note 15, at 265.

[31] Uniform Post-Conviction Procedure Act. § 8, 9 B.U.L.A.

[32] *Supra* note 15, at 293.

[33] 174 So.2d 452 (Fla. 1965).

[34] The Florida post-conviction statute was adopted by the Supreme Court of Florida in a per curiam order of April 1, 1963, and antedates Ohio's statute by two and one-half years. For the text of the Florida Criminal Procedure Rule No. 1, see Fla. Stat. Ann. Ch. 924 Appendix (1966 Supp.). There are several annotations here of Florida decisions under the post-conviction rule. They reveal an attitude of liberal application.

[35] *State v. Weeks,* 166 So.2d 892 (Fla. 1964); *Gideon v. Wainwright,* 153 So.2d 299 (Fla. 1963); and *Roy v. Wainwright,* 151 So.2d 825 (Fla. 1960).

corpus and the writ of coram nobis,[36] and to be given "broad application." [37]

The Ohio Post-Conviction Act was designed to give a petitioning prisoner a fast and efficient method to test the legality of his sentence.[38] "The enactment enables him to circumvent the crowded docket of those courts hearing habeas corpus petitions and return to the court which originally passed judgment on him." [39] But it would seem that this aim has not been achieved in Ohio because of the strict interpretation given the statute by Ohio courts.

Since *Coley* was decided on September 6, 1967,[40] the case of *Knox v. Maxwell*[41] has been heard in Ohio and reported in the Bureau of National Affairs Criminal Law Reporter.[42] The case indicates that before a petitioner can seek habeas corpus in federal court, not only must he seek appeal of the judgment and then utilize his post-conviction remedies under § 2953.21 et seq. (however illusory they may seem), but he must also exhaust the remedy of delayed appeal made available by § 2953.05.[43] The appeal procedure provided here is entirely discretionary with the court[44] and may not be, in actuality, an effective remedy. In fact it was not even mentioned as a state avenue of relief in the *Coley* case. From the well-written opinion of Justice Lambros[45] in *Knox* (which gives an excellent account of the history of Ohio post-conviction procedures) it appears that Ohio courts may well demand an additional knock on the local procedural door before sanctioning the opening of the federal habeas corpus door.

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[36] *Jones v. State, supra* note 33.

[37] *Supra* note 33.

[38] Reference Manual for Continuing Legal Education, Criminal Law §§ 12.01 and 12.07, *supra* note 4.

[39] *Supra* note 13.

[40] *Supra* note 1.

[41] *Supra* note 11.

[42] 2 Crim. L. Reporter, 1063, 2304 (1967).

[43] *Supra* note 11.

[44] The procedure reads, in part, "After the expiration of the thirty-day period or the ten-day period as above provided, such [delayed] appeal may be taken *only by leave of the court to which the appeal is taken.*" Ohio Rev. Code § 2953.05 (1966). (Emphasis supplied.)

[45] United States District Court, Northern District of Ohio, Eastern Division.