Michigan Law Review

Volume 60 | Issue 8

1962

Federal Procedure-Appellate Practice-"Excusable Neglect" In Failing to Perfect Criminal Appeal Provides No Ground for Collateral Review of Conviction

H. C. Snyder Jr.
University of Michigan Law School

FEDERAL PROCEDURE—APPELLATE PRACTICE—"EXCUSABLE NEGLECT" IN FAILING TO PERFECT CRIMINAL APPEAL PROVIDES NO GROUND FOR COLLATERAL REVIEW OF CONVICTION—After the ten-day period for filing a notice of appeal from a federal criminal conviction had expired, defendant filed a motion under section 2255 of the Judicial Code[1] to set aside his sentence under a conviction for armed robbery. The motion was based on the improper admission of a confession given during an allegedly unlawful detention. The district court denied the motion on the ground that the error asserted did not amount to a denial of a constitutional right and that only constitutional defects are subject to attack after the time for an appeal has expired.[2] The District of Columbia court of appeals, sitting en banc, affirmed, three judges dissenting.[3] The majority held that the erroneous admission of a confession alleged by the defendant was not subject to a collateral attack, and therefore could only have been raised by direct appeal. "Excusable neglect," which had been alleged by the defendant, does not broaden the scope of the collateral remedy under section 2255 so as to be available as a substitute for an appeal.[4] On certiorari to the Supreme Court, *held*, writ dismissed as improvidently granted, three Justices dissenting. The writ had been granted upon the understanding that the question presented was whether the district court should have accorded petitioner a hearing under section 2255 when it appeared that no appeal had been perfected from the original judgment of conviction. After a thorough review of the record, including the trial transcript, it was concluded that "the file and records of the case conclusively show" that petitioner was entitled to no relief. *Hodges v. United States*, 368 U.S. 139 (1961) (per curiam).

The Court's decision that the defendant was entitled to no relief could have been supported by any one of three possible conclusions: that the facts alleged by the defendant did not amount to the unlawful detention proscribed by the *McNabb-Mallory* rule;[5] that if the facts had constituted such an unlawful detention, it would still be a non-constitutional ground

1 28 U.S.C. § 2255 (1958): "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is *otherwise subject to collateral attack*, may move the court which imposed the sentence to vacate, set aside or correct the sentence." (Emphasis added.)

2 United States v. Hodges, 156 F. Supp. 313 (D.D.C. 1957).

3 Hodges v. United States, 282 F.2d 858 (D.C. Cir. 1960).

4 The position of the dissenters was that the erroneous admission of the confession in this case was a constitutional defect but that unless it had been raised on appeal it could not be collaterally attacked. "Excusable neglect," however, was taken to relieve the bar to collateral review. *Id.* at 861.

5 Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

of attack and thus outside the scope of the collateral attack allowable under section 2255;[6] or that even if the facts did allege a constitutional defect, the failure to appeal, when an appeal could have cured the defect, precluded bringing the collateral attack.[7] Since the Court rejected the question whether the collateral review should have been allowed as not being presented in the case, it is apparent that the first conclusion was the one that decided the case,[8] leaving unanswered the underlying problem whether relief may be granted to those convicted of crimes who through no fault of their own are deprived of the right to appeal their convictions.

The same underlying question was presented in *United States v. Robinson*,[9] in which the defendant filed an appeal twenty-one days after being sentenced. The defendant alleged "excusable neglect" under rule 45(b) of the Federal Rules of Criminal Procedure[10] and asked that he be allowed to file his notice of appeal outside the time allowed by rule 37.[11] Although rule 45 prohibits "enlarging" the time for taking an appeal, the court of appeals had assumed that receiving a late application would not constitute such an enlargement.[12] The Supreme Court held, however, that rule 45 precludes the acceptance of late appeals on the ground that the time limit of rule 37 is "mandatory and jurisdictional," and the non-enlargement pro-

6 This ground emphasizes the distinction between confessions which are the product of "coercion" and those which are merely obtained during an "unlawful detention." *Compare* Fikes v. Alabama, 352 U.S. 191 (1957) *with* Mallory v. United States, *supra* note 5.

7 This was the position taken by the division of the circuit court which first heard the case. Two of those judges were among the dissenters on the rehearing en banc and argued that the "excusable neglect" urged by the petitioner was sufficient to waive the prerequisite appeal. The question of a federal doctrine of exhaustion of remedies is unsettled and its pursuit is beyond the scope of this note. Jordan v. United States, 352 U.S. 904 (1956), suggests that constitutional issues raised for the first time on collateral attack will not be barred simply because not raised on prior appeal. *But see* Larson v. United States, 275 F.2d 673 (5th Cir. 1960); Stephenson v. United States, 257 F.2d 175 (6th Cir. 1958); Smith v. United States, 187 F.2d 192 (D.C. Cir. 1950).

8 The three dissenting justices, however, assumed that the use of defendant's confession was a constitutional defect, and argued that the failure to appeal such a defect did not bar a collateral attack upon the conviction. 368 U.S. at 140.

9 361 U.S. 220 (1960).

10 "When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge . . . the period for taking an appeal."

11 FED. R. CRIM. P. 37(a):
"(1) Notice of Appeal. An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate . . . .
"(2) Time for Taking Appeal. An appeal by defendant may be taken within ten days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest or judgment has been made within the ten-day period an appeal from a judgment of conviction may be taken within ten days after entry of the order denying the motion . . . ."

12 Robinson v. United States, 260 F.2d 718 (D.C. Cir. 1958).

vision of the rule prohibits the circuit courts from taking jurisdiction of appeals after that time. Defendant's argument before the court of appeals in the principal case was based in part on a suggestion in *Robinson* that granting late appeals is unnecessary in view of the collateral remedies available to redress the denial of "basic right," including the remedy under section 2255.[13] The court of appeals held, however, that the "basic rights" intended by the Court were only those which had been traditionally redressed by collateral attack in habeas corpus, and its statutory counterpart, section 2255.

In general, the scope of review available by collateral attack, unlike the virtually unlimited scope of an appeal, is quite narrow. However, whereas review by appeal is limited to matters appearing in the record, a collateral review may consider matters extrinsic to the record and may be had "at any time." The collateral review under section 2255 was drafted into law in 1948 for the primary purpose of alleviating the habeas corpus case load in the federal district courts in districts where federal penitentiaries are located. It was also intended to provide a more convenient procedure for collateral review than had been theretofore available. It is generally stated that the scope of review available under section 2255 is the same as that available under habeas corpus procedure.[14] The main difference is that the statutory remedy must be brought in the sentencing court, is limited to persons "under sentence of a court established by Act of Congress," and, in most cases, the failure to exhaust this remedy will bar a petition for a writ of habeas corpus.[15] The scope of the review available in habeas corpus is said to be limited to review of "jurisdictional" defects, that is, lack of jurisdiction over the person or over the offense, or the unconstitutionality of the statute upon which a conviction is based.[16] The concept of "jurisdictional defects" has been expanded to include other infringe-

13 Robinson v. United States, 361 U.S. 220, 230 n.14 (1961): "The allowance of an appeal months or years after expiration of the prescribed time seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time, and to reduce a sentence within 60 days after the judgment of conviction becomes final; the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U.S.C. § 2255; and proceedings by way of writ of error *coram nobis*."

14 See United States v. Hayman, 342 U.S. 205, 210-19 (1952); Note, 73 HARV. L. REV. 1225 (1960); Note, 34 ST. JOHN'S L. REV. 81 (1959); Note, 59 YALE L.J. 1183 (1950).

15 28 U.S.C. § 2255 (1958): "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

16 See Sunal v. Large, 332 U.S. 174 (1947). See generally Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. REV. 26 (1945).

ments of "basic rights," such as denial of assistance of counsel,[17] mob domination of trial proceedings,[18] use of perjured testimony by the prosecution,[19] and, generally, where the writ is the only effective means of preserving the constitutional rights of the accused.[20] In addition, section 2255 may be used to obtain review of certain specified non-jurisdictional and non-constitutional bases of attack, particularly illegality of a sentence.[21] Thus far, however, the scope of section 2255 has remained narrower than the scope of a direct appeal, and the extension urged in the principal case would have been a monumental departure from these precedents.

The *Robinson* rule, strictly applying the time limitation for filing an appeal, and the rule laid down by the circuit court in the principal case, apparently mean that there may be a class of criminal convicts who have valid grounds for appeal, but who without fault of their own will be found to have waived their right to appeal by not having the required notice filed within the ten-day period allowed by rule 37. The right to an appeal from a criminal conviction, though relatively new in our jurisprudence,[22] has become a substantial right in present-day criminal procedure.[23] It would seem that waiver of a right so important to the personal liberty of the individuals involved should not lightly be assumed. If it can be assumed that there may be cases which will present instances of neglect which are in fact "excusable," the situation strongly suggests that some relief should be provided for the unwary convict with a meritorious claim to be asserted on appeal. Obviously such a suggestion raises a specter of manifold abuses by the criminal convicts who now deluge the courts with groundless petitions for collateral review.[24] But this alone is not sufficient reason for denying a particular petitioner relief from his "excusable" neglect and the loss of a possible right to preserve his freedom.

Two alternatives suggest themselves: the first would be to amend rule 45 to allow an enlargement of the time for filing notice of an appeal upon a showing of "excusable neglect," in much the same manner as attempted in *Robinson*. The appellant could be allowed a hearing before the district court, as was actually done in the *Robinson* case, in which he would have

17 Johnson v. Zerbst, 304 U.S. 458 (1938); United States v. Morgan, 222 F.2d 673 (2d Cir. 1955).

18 See Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915).

19 See Mooney v. Holohan, 294 U.S. 103 (1935). *Compare* Sears v. United States, 265 F.2d 301 (5th Cir. 1959), *and* Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), *with* Hodge v. Huff, 140 F.2d 686 (D.C. Cir. 1944), *and* Casebeer v. Hudspeth, 121 F.2d 914 (10th Cir. 1941).

20 Waley v. Johnston, 316 U.S. 101 (1942).

21 Ladner v. United States, 358 U.S. 169 (1958).

22 See Carroll v. United States, 354 U.S. 394, 400 (1957).

23 See concurring opinion of Mr. Justice Frankfurter in Griffin v. Illinois, 351 U.S. 12, 20 (1956).

24 See Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1948).

the burden of showing the excusability of his failure to file the notice within the allotted time. Some reasonable time limitation, consistent with a claim of "excusable neglect," could be established within which this petition would have to be brought.[25] Upon establishing the excusable neglect the appellant would be allowed to proceed with his appeal as in any other case brought within the initial time limit. The second possibility would be to allow a "broadening" of the scope of the collateral review available under section 2255, as urged in the principal case, to provide review for convicts who had failed, through no fault of their own, to give notice of appeal within the required time. If section 2255 were broadened to serve as an appellate vehicle for this class of convicts, the temptation to make use of this alternate method of appeal would be great and would inevitably lead to abuse. A court would be urged to make a more comprehensive inquiry into a petitioner's trial than is presently allowed by appeal, since the petitioners could logically raise all the grounds of attack within the scope of an appeal and could also bring in matters extrinsic to the record in accordance with the practice established for collateral review. This could conceivably lead to undermining the basic principle that only those matters raised at trial may be considered on appeal. The policy that the orderly administration of justice demands the prompt settlement of the merits of a person's conviction, which supports the present rule limiting the time for filing appeals, would not suffer the suggested relief to be extended so far. It would seem, therefore, that if relief is to be extended to the criminal convict who is deprived of an appeal, a modification of rule 45 would be the more practicable. Once the "excusable neglect" was established in the trial court hearing, the case would be sent up to the appellate court in the normal manner, where the scope and extent of review would be the same as the appellant would have had but for his delay in filing his notice of appeal, and the departure from existing practice would be minimized.

It is not to be assumed that opening the door to "excusably" late appeals will inevitably lead to an additional deluge of spurious attacks on criminal convictions. In the first place the grounds of appeal asserted would have to appear in the record as now required, and a defendant would be allowed but a single chance to have his conviction reviewed by this method.[26] Secondly, a defendant will have to prove that his neglect was in fact "excusable." It is clear that if the court or other agents of the government take affirmative action which positively prevents a de-

25 See Note, 39 TEXAS L. REV. 102 (1960), for a discussion of an analogous provision in Texas criminal procedure.

26 Clearly a standard would have to be established to curb successive applications asserting different contrived grounds for "excusable neglect." But compare the abuse-limiting method provided in § 2255, quoted note 15 *supra*.

fendant from bringing his appeal, it will serve to relieve the defendant from the requirement that his appeal be brought within the statutory time limit.[27] On the other hand, where a defendant has been simply indifferent toward his own rights, no relief should be provided. Between these extremes, it is submitted, neglect may be found which should be deemed "excusable." The interpretation of "excusable neglect" which has been developed so far under rule 45 seems to indicate that some degree of court responsibility for the neglect involved is required.[28] Thus, at the point at which a defendant's practical opportunity to appeal has been infringed, relief from the time limit should be afforded. In *Robinson* the Supreme Court observed that strong policy arguments supported greater flexibility with respect to the time for taking an appeal, but that the relief must be provided through the Court's rule-making process.[29] Hopefully, the possibility for great unfairness under the present rules will provide the stimulus for the Court to take such action.

H. C. Snyder, Jr.

27 In Dowd v. Cook, 340 U.S. 206 (1951), action of state prison officials preventing petitioner from sending appeal papers out of prison until after time for appeal had expired was held denial of equal protection of the law.

28 See Blunt v. United States, 244 F.2d 355 (D.C. Cir. 1957), and cases cited in annotation to FED. R. CRIM. P. 45, in 18 U.S.C.A. Appendix (Supp. 1961).

29 361 U.S. at 229.