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Criminal Law

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porations organized under the laws of the state of Washington. The statute as a whole does not answer this question but arguably it would seem to be the intention of the draftsman to free all corporations from the case law restriction.

The problems caused by the 1947 amendment could have been easily prevented by clear draftsmanship. The amendment could have simply provided that the corporation could repurchase shares under the same circumstances and to the same extent as must exist for the lawful payment of dividends. It is to be hoped that in some future revision of the statute the legislature will take care to integrate the repurchase provisions into the main body of the act.

JOHN HOOVER

CRIMINAL LAW

Indigent's Right to a Free Transcript for Use on Appeal. The effect of *Griffin v. Illinois*,¹ a decision of the Supreme Court of the United States, on the present Washington rules for furnishing an indigent a free stenographic transcript for use on appeal was in issue in *In re Grady v. Schneckloth*.² Therein the petitioner made the bald assertion that the *Griffin* decision requires that the state furnish him, as an indigent, a free stenographic transcript of the trial proceedings for use on appeal. The Washington court rejected this contention and denied the application for a writ of habeas corpus.

In the *Griffin* case, after being convicted of armed robbery, the petitioners moved in the trial court that they be furnished with a free transcript for use on appeal. This motion was denied, as Illinois had no provision for furnishing a convicted indigent with a transcript at public expense in non-capital cases. This denial was affirmed on appeal to the state courts. The United States Supreme Court granted certiorari.³ In the Supreme Court, Illinois conceded that the petitioners needed a transcript to get an adequate review of the alleged trial errors, and the court was compelled to "assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript."⁴ Under those circumstances the court held that the petitioners had been deprived of the guarantees of the due process and

¹ 351 U.S. 12 (1955).

² 150 Wash. Dec. 806, 314 P.2d 930 (1957). For a subsequent case with practically identical facts see *In re Ross v Rhay*, 151 Wash. Dec. 379, 318 P.2d 975 (1957).

³ 349 U.S. 937.

⁴ 351 U.S. 12 at 16.

equal protection clauses of the Fourteenth Amendment. The court pointed out that while the due process clause does not require a state to provide appellate review, if the state does provide such a review, a denial of review to an individual because of his indigence is a denial of equal protection of the laws. However, the court cautioned that they did not hold that the state *must* provide a transcript in every case where a defendant cannot buy one, but that "the (Illinois) Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants."⁵

As the petitioner in *In re Grady* made no attempt to show that a transcript was necessary for an adequate review, but relied on the sole contention that the *Griffin* decision requires that a state furnish a convicted indigent with a free transcript as a matter of right, the Washington court was manifestly correct in concluding that the petitioner had been deprived of no constitutional right as interpreted by the *Griffin* case.⁶ The court went on to discuss the Washington statutory provision⁷ whereby an indigent may get a transcript at public expense, and pointed out that in many cases an indigent can perfect an appeal without the use of a transcript by employing either a "short record" or a "narrative statement." Apparently feeling that these provide an indigent with an adequate opportunity for review, the court concluded that "the very basis of the *Griffin* case is completely and entirely absent."⁸

It is submitted that the *Griffin* decision is not without effect on Washington law. In Washington a complete stenographic transcript is not required for the record on review.⁹ Illinois' provisions are substantially similar.¹⁰ The concession by Illinois in the *Griffin* case that it was sometimes impossible to prepare the record required for review

⁵ 351 U.S. 12 at 20.

⁶ The same contention was rejected in *People v. Lumpkin*, 158 N.Y.S.2d 610 (1956).

⁷ See note 11, *infra*.

⁸ 150 Wash. Dec. 806 at page 812.

⁹ Rule on Appeal 34, 34A Wn.2d 36. Rule 34 (3) (appeal on short record) provides that "... so much of the evidence as bears upon the question or questions sought to be reviewed may be brought before this by a statement of facts without bringing up the evidence bearing on rulings on which no error is assigned." Rule 34 (4) (appeal on agreed statement of facts) provides that the "... parties may prepare and sign a statement of the case showing how the question or questions arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the question or questions by this court..."

¹⁰ Ill. Rev. Stats. ch. 110 § 101.36 (S. Ct. Rule 36) 1956). § 101.36 (1) (d) (agreed statement of facts) provides that "in lieu of a report of proceedings, the parties may be written stipulation agree upon a statement of the facts material to the controversy and present the statement any judge qualified to certify to the correctness of a report of the proceedings in said case, for his certificate of correctness, and file the same..."

without the aid of a transcript¹¹ would probably hold true in Washington. This was not denied by the court in *In re Grady*. What of the adequacy of Washington law in a case where a transcript is required for an adequate review? In Washington, unlike Illinois at the time of the conviction of the petitioners in the *Griffin* case, a convicted indigent may be furnished with a transcript at public expense if in the opinion of the trial judge "justice will thereby be promoted."¹² This is a power given to the trial judge by statute.¹³ The Washington court has repeatedly held that an indigent has no right to a free transcript aside from this statute, and the statute gives the trial judges sole discretion, the exercise of which they refuse to review.¹⁴ Thus, in a non-capital case,¹⁵ whether an indigent will get a transcript at public expense lies in the undisturbed discretion of the trial judge.

Inasmuch as the *Griffin* case holds that if a transcript is required for an adequate review an indigent has a constitutional right to a transcript, it would appear that the trial judge may not justifiably refuse an indigent's request if, in fact, a transcript is required for an adequate review. A denial by the trial judge of an indigent's request for a transcript may involve a denial of a constitutional right, and, as such, *must* be subjected to a review.

The review must primarily involve an inquiry into the propriety of the trial judge's conclusion that a transcript is not required for an adequate review, such a conclusion being the only justifiable reason for denying the indigent's request. Two cases decided by the United States Supreme Court subsequent to the *Griffin* case reached this conclusion in dealing with a denial of the indigent's request in the Federal courts, and further indicated that the indigent must be furnished with adequate means of showing the appellate court that the trial judge's conclusion was erroneous.¹⁶ What this means is that it may be neces-

¹¹ See 351 U.S. 12 at 13 and 14.

¹² See RCW 3.32.240 which provides, *inter alia*: "That when the defendant in any criminal case shall present to the judge presiding satisfactory proof by affidavit or otherwise that he is unable to pay for such transcript, the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript fee therefore shall be paid out of the county treasury as other expenses of the court are paid."

¹³ RCW 2.32. See note 11, *supra*.

¹⁴ See *State ex rel. Marr v. Superior Court*, 163 Wash. 459, 1 P.2d 331 (1931); *State ex rel. Bird v. Superior Court*, 30 Wn.2d 785, 194 P.2d 374 (1948); and *In re Mason v. Cranor*, 42 Wn.2d 610, 257 P.2d 211 (1953). Cf. *State ex rel. Bird v. Superior Court*, 30 Wn.2d 110, 190 P.2d 762 (1948).

¹⁵ In capital cases a "proposed statement of facts" is furnished to the indigent at the expense of the county as an incident to an appeal *in forma pauperis* which is granted by the chief justice of the Supreme Court. See Rule on Appeal 47, 34A Wn.2d 53.

¹⁶ *Johnson v. United States*, 352 U.S. 565 (1957) and *Farley v. United States* 354 U.S. 521 (1957).

sary for the state to furnish the indigent with a transcript in order that the indigent may obtain an adequate review of the trial judge's denial of a transcript in the first instance!

It is interesting to note that the Illinois Supreme Court concluded that, as a practical matter, compliance with the *Griffin* decision involved furnishing all convicted indigents with a transcript for use on their appeal,¹⁷ and adopted a rule to that effect.¹⁸

VICTOR V. HOFF

Maximum Sentence for Felony Where No Penalty Provided by Prescribing Statute. *In re Klapproth v. Squier*, 50 Wn.2d 675, 314 P.2d 430 (1957), paved the way for a rash of applications for writs of habeas corpus during the past year. Therein the supreme court ruled that the maximum sentence that may be imposed for the crime of taking a motor vehicle without the permission of the owner (RCW 9.54.020) is ten years as provided by RCW 9.92.010, which states:

"Every person convicted of a felony for which no punishment is specially prescribed by any statutory provision in force at the time of conviction and sentence, shall be punished by imprisonment in the state penitentiary for not more than ten years. . . ."

RCW 9.54.020, making it a crime to take a motor vehicle without the permission of the owner, is one of a group of felony statutes that prescribe neither a maximum nor a minimum penalty, but provide only that the violator "shall be guilty of a felony."

The *Klapproth* decision expressly overruled *In re Macduff v. Cranor*, 42 Wn.2d 488, 256 P.2d 293 (1953), noted in 29 WASH. L. REV. 109, which held that the correct sentence to be imposed for a violation of RCW 9.54.020 was twenty years, under RCW 9.95.010 which provides:

"When a person is convicted of any felony, . . . the court shall sentence such person to the penitentiary . . . and shall fix the maximum term of such person's sentence only. . . . The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term. If the law does not provide a maximum term for the crime of which such person was convicted the court shall fix such maximum term . . . but in any case where the maximum term is fixed by the court it shall be fixed at not less than twenty years."

In re Macduff held that RCW 9.95.010, first enacted in 1935, impliedly overruled RCW 9.92.010, a 1909 statute. The *Klapproth* decision held that this was incorrect. The court concluded that the statutes can be read together by interpreting RCW 9.92.010 as fixing the maximum term for felonies where *no* term is fixed by the statute defining the crime. This interpretation endows such felonies with a "maximum provided by law" and takes them outside the scope of RCW 9.95.010. This leaves RCW 9.95.010 to apply only to felonies where the prescribing statute fixes a minimum term but not a maximum term.

As a result of the much needed *Klapproth* holding, the "not less than twenty year" maximum required by RCW 9.95.010 is limited to those felonies for which the defining statute provides only a minimum sentence—generally the more heinous felonies such as first degree arson and second degree murder. The maximum term for a violation

¹⁷ See the historical note to Ill. Rev. Stat. ch. 110 § 101.65-1 (S. Ct. Rule 65-1) (1956) pages 617 *et seq.*

¹⁸ Supreme Court Rule 65-1, Ill. Rev. Stat. ch. 110 § 101.65-1 (1956).

of those "statutory" felonies which provide that the violator "shall be guilty of a felony" is ten years.

Since the *Klapproth* decision at least five other writs of habeas corpus have been filed by persons convicted under statutes prescribing no penalty and sentenced to the "not less than twenty years" minimum. In each case, the supreme court, on the strength of the *Klapproth* holding, has directed a reduction in the sentence to a maximum of ten years.

Criminal Law—Waiver of Right to Counsel. The question of when an accused has competently and completely waived his right to counsel was before the court on four different occasions in 1957. In *In re Wilken v. Squier*, 50 Wn.2d 58 309 P.2d 746, the court held that when the accused had not been expressly informed of his right to have counsel furnished at public expense, he could not make a competent and complete waiver. In *In re Klapproth v. Squier*, 50 Wn.2d 675, 314 P.2d 430 the court wavered a bit from the *Wilken* holding, deciding that when the accused was not expressly informed of his right to have counsel, but had been repeatedly asked if he desired the aid of counsel, his refusal constituted a competent waiver. Finley, J. dissented, urging that because the accused had not been expressly informed of his right to have counsel there could be no competent waiver.

The subsequent cases of *In re Friedbauer v. State*, 151 Wash. Dec. 77, 316 P.2d 117, and *State v. Dechanne*, 151 W. Dec. 227, 317 P.2d 527, strongly reaffirmed *In re Wilkin v. Squier*, flatly holding that the accused *must* have been informed of his right to have counsel at public expense before he may be held to have made a competent waiver. As a result of these last two decisions, it may fairly be said that anything in the *Klapproth* case indicating that an accused may waive his right to counsel without being informed of this right has been overruled, and it must be taken as settled that unless the court informs the accused of his right to have counsel at public expense, there can be no competent waiver.

The *Wilken* case indicated that before an accused may be held to have waived his right to counsel the court must: (1) inform the defendant that it is his right to have counsel before being arraigned; (2) ascertain whether because of the defendant's poverty he is unable to employ counsel, in which event, the court must inform the defendant that the court shall appoint counsel for the defendant at public expense if he so desires; (3) ask whether the defendant desires the aid of counsel.

Juvenile Court—Delinquency Proceeding. *In re Lewis*, 151 Wash. Dec. 171, 316 P.2d 907, involved a review by certiorari of an order of the trial court declaring a fourteen year old boy to be a delinquent and directing that he be made a ward of the court. Relators were the parents of the child. Among other things, they claimed that it was error for the trial court: (1) to appoint a guardian *ad litem* for the child; (2) to appoint the guardian without notice to the parents; (3) to appoint a special prosecutor to represent the probation officer; and (4) to exclude the public from the hearing on the question of delinquency, over the objections of the parents. The supreme court, in an opinion by Justice Rosellini, affirmed the order of the trial court.

The court held that a delinquency proceeding is not criminal in nature since there is no issue of crime or punishment. WASH. CONST. art. I, § 10, provides, "Justice in all cases shall be administered openly, and without unnecessary delay." The court construed "Justice," as used in that section, to apply only to criminal prosecutions. Since this proceeding was not a criminal prosecution, it was not error for the trial court to exclude the public where the judge thought such exclusion would best protect the interests of the child.

RCW 13.04.070 provides in part that the parents of the child shall be notified of the proceedings, if they may be found, "...and in any case, the judge shall appoint

some suitable person or association to act in behalf of the child." Here the parents were notified of the proceedings concerning the child, but were not notified that the court was appointing a guardian ad litem for the child. Two earlier cases suggest, but do not hold, that the above section applies only when the parents are not present. *State ex rel. Raddue v. Superior Court*, 106 Wash. 619, 180 Pac. 875 (1919); *In re Jones*, 41 Wn.2d 764, 252 P.2d 284 (1953). The court here held that where the interests of the child and of the parents conflict, the trial court may appoint a guardian. The fact that the parents were given no notice of the appointment, if error, was held to be harmless, since the parents were given full opportunity to be heard on their motion to quash the appointment. The parents, in their brief, claimed that they had no knowledge of what occurred at the hearing appointing the guardian, or of the trial court's grounds for appointing the guardian.

The court also held that while it is the express duty of the probation officer to represent the interests of the child, this duty is exercised on behalf of the state and county. Therefore, when the county prosecutor declines to appear to represent the probation officer, RCW 36.27.030 gives the trial court authority to appoint a special prosecutor.

DOMESTIC RELATIONS

Direct Support by a Father As a Defense to His Liability For Non-Payment of Child Support Money. In the recent case of *Koon v. Koon*,¹ the Washington court held that a father who directly supported his two minor sons instead of paying child support money to their mother in accordance with the provisions of a divorce decree was not thereby discharged from liability for nonpayment of the money to the mother. The court considered itself bound to follow the earlier case of *Bradley v. Fowler*.² In that case a father who directly supported his children instead of paying child support money to their mother was held to be in contempt. The divorce decree there in question specifically provided that the father was to pay the support money even during those months when the children, who had been placed in the custody of their mother, were visiting with their father.

In following the *Bradley* case, the court distinguished the line of cases including *Ditmar v. Ditmar*,³ *State ex rel. Meins v. Superior Court*,⁴ and *Gainsburg v. Garbarsky*.⁵ Each of those cases had held a father who had directly supported his children instead of paying child support money to their mother to be free from liability for nonpayment. They were distinguished as cases involving the express or implied consent of the mother, as parent-trustee, to payment of support money in a manner other than directly to her.

The court's holding in the *Koon* case is bound to add to the confusion

¹ 50 Wn.2d 577, 313 P.2d 369 (1957).

² 30 Wn.2d 609, 192 P.2d 969 (1948).

³ 48 Wn.2d 373, 293 P.2d 759 (1956).

⁴ 159 Wash. 277, 292 Pac. 1011 (1930).

⁵ 157 Wash. 537, 289 Pac. 1000 (1930).