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State v. Fordsham, 362 P.2d 413 (Mont. 1961)

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RECENT DECISIONS

FAILURE OF COURT APPOINTED ATTORNEY TO FILE TIMELY NOTICE OF APPEAL DEPRIVES THE SUPREME COURT OF JURISDICTION BUT IT MAY CONSIDER THE MERITS IN INTERESTS OF JUSTICE—Defendant was indicted for kidnapping arising out of the 1959 riots at the Montana State Prison. The defendant was without funds and the court, at defendant's request, appointed counsel for him. Following conviction and imposition of sentence, the record for appeal was prepared at the request of defendant's counsel. Notice of appeal, however, was not filed until about twelve days after expiration of the six month statutory limitation. On appeal to the Montana Supreme Court, *held,* appeal dismissed. Failure to file notice of appeal within six months from the date judgment was rendered deprives the Supreme Court of jurisdiction to entertain the appeal, but in the interests of justice the Court will consider the merits. State v. Fordsham, 362 P.2d 413 (Mont. 1961).

Although the court dismissed the appeal it nevertheless considered the defendant's claims of error on the basis that it was incumbent on the court to do so in the interests of justice when the late filing was the act of a court-appointed attorney. The court was confronted with the question of whether an appellate court may consider a late appeal in spite of the rule that filing a late appeal is a jurisdictional defect which may not be rectified by the court.[1]

The court stated:[2]

> We do not wish to be understood as establishing a precedent because we are mindful of the multitude of decisions of this court and other courts, state and federal which hold that appeals not taken within the statutory time should be dismissed, regardless of the excuse for delay.

The general rule as laid down by cases in nearly every jurisdiction, including Montana,[3] is that a late appeal will not be heard.[4] The rationale behind this rule is that statutory provisions limitating the time for taking an appeal are mandatory and jurisdictional and not merely procedural; therefore, there must be strict compliance with the statute in order to give the appellate court jurisdiction to entertain the appeal. Even where the failure to file timely notice of appeal was due to the neglect of a court-appointed attorney, the appellate courts have refused to hear the appeal.[5] The right to appeal is a creature of statute and is therefore not necessary to insure due process of law under the Constitution of the United States.[6]

[1]State *ex rel.* Treat v. District Ct., 124 Mont. 234, 221 P.2d 436 (1950).
[2]Instant case at 419.
[3]Note 1, *supra.*
[4]*In re* Hanley's Estate, 23 Cal. App. 2d 120, 142 P.2d 424 (1943); 24 C.J.S. *Criminal Law* § 1711 (1941).
[5]Savage v. State, 155 Tex. Crim. 576, 237 S.W.2d 315 (1951); People v. Cox, 120 Cal. App. 2d 246, 260 P.2d 1050 (1953); 12 AM. JUR. *Constitutional Law* § 638 (1938).
[6]In Reetz v. Michigan, 188 U.S. 505 (1903), the court said, "Due process of law is not necessarily judicial process, nor is the right of appeal essential to due process of law." In McKane v. Durston, 153 U.S. 684 (1894), the court said, "A review by an appellate court of the final judgment in a criminal case, however grave the offense of which accused is convicted, was not at common law and is not now a necessary element of due process." Due process of law is provided for under the Mon-

In the leading case of *State ex rel. Treat v. District Court*,[7] the Montana court was confronted with much the same situation as the situation in the instant case. In that case the failure of the court-appointed attorney to timely file the notice of appeal resulted in a dismissal of the appeal. The court in the instant case adopted the authority of the *Treat* case as the basis for dismissing the appeal.[8] However, in continuing further and hearing the contended errors, the court in the instant case placed itself in a dilemma. Even if the matters alleged by the defendant to be error had been found to be error, the court by dismissing the appeal would appear to be without power to modify or reverse the judgment of the lower court.[9] The obvious and usual effect of dismissing an appeal would be to leave the court without power to decide the merits.[10] Despite this fact, however, the court attempted to justify its consideration of the errors by relying on *State v. Blakeslee*.[11] In that case the court held:[12]

> It is the duty of the court to make appointment of counsel effective, i.e., to give court appointed counsel a reasonable time for the preparation of his case after he has been appointed.

This reasoning, however, is of doubtful application to the instant case; failure to perfect an appeal is not a violation of due process[13] while failure to grant sufficient time to prepare a trial may be violation of due process.[14] Thus, it was incumbent upon the court in the *Blakeslee* case to grant sufficient time to allow court-appointed counsel to prepare his case in order to insure a fair trial, *i.e.*, to insure more than the pretense of a trial.

The court in the instant case might have found a basis for its action by analogy with cases where a delay was caused by the error, negligence or misconduct of some court officer such as a clerk of the court.[15] For example, a late appeal was not dismissed when the clerk failed to endorse the filing date on the record until after the expiration of the filing date.[16] Nor was a late appeal dismissed when a clerk neglected to transmit the transcript of appeal to the appellate court until after more than a year.[17] Although these cases cannot be said to involve untimely procedure by an attorney, but by an agent of the court, it might be argued that inasmuch

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tana Constitution Art. III, § 27. Research has failed to disclose any cases directly holding that dismissal of appeal is a violation of due process in Montana; however, the court in the instant case at 419 seems to indicate that dismissal of an appeal would not be a violation of due process under either the Constitution of Montana or the Constitution of the United States. Therefore, it appears that due process under the Montana Constitution would be interpreted the same as due process under the Constitution of the United States.

[7]State *ex rel.* Treat v. District Ct., 124 Mont. 234, 221 P.2d 436 (1950).
[8]Instant case at 416.
[9]*Ex parte* Bathurst, 98 Cal. App. 552, 277 Pac. 201 (1929); C.J.S. *Appeal and Error* § 1384 (1958).
[10]Armes v. Louisville Trust Co., 306 Ky. 155, 206 S.W.2d 487 (1947); Schaff v. Kennelly, 69 N.W.2d 777, (N.D. 1955).
[11]131 Mont. 47, 306 P.2d 1103 (1955).
[12]*Id.* at 51, 306 P.2d at 1105.
[13]See cases cited in note 6 *supra.*
[14]State v. Sweet, 233 Ind. 160, 117 N.E.2d 745 (1954); See Annot., 84 A.L.R. 545 (1933); 16A C.J.S. *Constitutional Law* § 591 (1956).
[15]3 AM. JUR. *Appeal and Error* § 417 (1939), and cases cited therein.
[16]Bobbott v. Cundiff, 296 Ky. 802, 177 S.W.2d 596 (1944).
[17]Burch v. Mathson, 24 So. 2d 476 (La. App. 1946).

as court-appointed attorneys are selected by the court, the instant case, by analogy, would fall into this exception. In the instant case, the court expressly recognized that the dilemma it faced was caused by the fact that the attorney was appointed by the court and was not selected and employed by the defendant.[18] On this basis, it could be argued that the neglect of the court-appointed attorney should be remedied in the same manner as the neglect of a clerk of the court, especially when there is substantial evidence that there was a timely decision to take an appeal and a clear intention to perfect it.[19]

The practice of ignoring this type of jurisdictional defect finds precedent in other courts where late appeals have been allowed on other grounds. An appeal was not dismissed when appellant's counsel filed the appeal in the wrong court but respondent, fully apprised of the error, waited until after the time for filing had expired before objecting; the appeal was transferred to the proper court *nunc pro tunc*.[20] A late appeal has also been permitted where timely filing was prevented by respondent's fraud or misrepresentation.[21] The court's interest in mollifying this requirement may be even greater in a criminal case than in a civil case.

On the basis of these cases it might be argued that the court in the instant case, rather than dismiss the appeal, should have waived the strict jurisdictional requirements and allowed the late filing of the appeal. Thus, an exception to the rule would be created where untimely filing was caused by a court-appointed attorney. In order to avoid an unmerited widespread abuse of this exception, the court could impose another requirement, *i.e.*, that there be evidence of timely and diligent action to perfect the appeal other than the filing. However, the court did not do this; it dismissed the appeal and then discussed the errors, thereby discussing in detail matters already rendered irrelevant and with respect to which it had declared itself not competent to act. Further, the court not only discussed the errors, but it also cited authority[22] intended to support its right to do so. The logical consequence of citing the *Blakeslee* case must be that the court would give a remedy. Otherwise the citation of this case and the examination of error in the instant case would be without significance. Of course, such action could have been intended as a salve to the defendant by advising him that he lost nothing by the late filing, anyway. Therefore, it appears that the court recognized the harshness of the jurisdictional rule, under the circumstances of the instant case, and desired to mitigate this harshness. The obvious question that the court has left unanswered, however, is what would happen if in a similar case in the future the appellant's claims of error were well taken. Would the court make an exception in the case of a court-appointed attorney, waive the jurisdictional requirements, and grant relief by modifying or reversing the decision; or would

[18]"A far-different situation would confront us here if the defendant had employed his own counsel, in which instance it would be the exercise of his own judgment on the ability of such counsel as he chose." Instant case at 418.

[19]The court in the instant case, at 418, said: "Court-appointed counsel for the defendant did diligently pursue the course provided by our laws for perfecting an appeal, except that they failed to timely file the notice of appeal. . . ."

[20]Appeal of Fields, 305 Pa. 125, 157 Atl. 263 (1931).

[21]See cases cited in 149 A.L.R. 1261 (1944).

[22]Instant case at 418.

the court ignore the action taken in the instant case, adhere to the strict jurisdictional rule, and dismiss the appeal without further comment?

The most practical means of solving this problem of late appeals has been taken in a few jurisdictions which have enacted statutes[23] or rules[24] permitting, under given circumstances and subject to certain safeguards, the filing of late appeals. In these jurisdictions, at the discretion of the appellate court, relief is generally allowed by granting an extension of the time for filing notice of appeal upon a showing of merit in the appeal and upon a showing of excusable neglect, mistake, or accident. Illinois has provided that:[25]

> No appeal may be taken from a trial court to the Supreme or Appellate Court after the expiration of sixty days . . . but notice of appeal may be filed after the expiration of said sixty days, and within a period not to exceed fourteen months . . . upon petition filed and notice given to adverse parties within one year . . . and upon a showing by affidavit that there is merit in appellant's claim for an appeal and that the failure to file notice of appeal within the sixty day period was not due to appellant's culpable negligence.

Under this statute an appeal would not be dismissed where appellant could show that his failure to appeal within the statutory time was due to his lack of funds.[26] Such a relief statute might well be set up in Montana to provide for the filing of late appeals in criminal cases whenever appellant has not been guilty of culpable negligence, provided there is a showing of merit in the appeal.

It is apparent that the action of the court in the instant case will need further clarification. Whether the court in a similar case will consider the appellant's claims of error and grant relief when merit is found therein, or whether the court will ignore the action it took in the instant case and, by following the strict jurisdictional rule, dismiss the appeal, are questions which the court undoubtedly will be called upon to answer in the future. If the court was seeking some basis on which to justify a hearing on the late appeal under these circumstances, this case may have emphasized a need to relax the strict jurisdictional requirements for the filing of appeals, either by a judicial determination or by the enactment of a statute.

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[23] ILL. ANN. STAT. ch. 110, § 76 (1956); R.I. GEN. LAWS § 9-21-6 (1956); WIS. STAT. ch. 324.05 (1959); MASS. ANN. LA s ch. 214, § 28 (1955); N.H. ANN. STAT. ch. 508, § 7 (1955).

[24] COMP. LAWS, MICH., Vol. 6A, Appendix 4, Rule 57 (1948).

[25] ILL. ANN. STAT. ch. 110, § 76 (1956). Another analogous statute is found in R.I. GEN. LAWS § 9-21-6 (1956) which provides that: "When any person . . . from accident, mistake, unforeseen cause, or lack of evidence newly discovered, has failed to prosecute his appeal . . . the supreme court, if it appears that justice requires a revision of the case, may, upon petition filed within one year after the entry of judgment, allow an appeal to be taken." See also, WIS. STAT. ch. 342.05 (1957) which provides that: "If any person . . . without fault on his part, omit to take his appeal within the time allowed, the court may . . . allow an appeal, if justice appears to require it, with the same effect as though done seasonably."

[26] Gearty v. Fish, 289 Ill. App. 538, 7 N.E.2d 493 (1937).