University of Miami Law Review

Volume 8
Number 1 *Miami Law Quarterly*

Article 15

10-1-1953

Criminal Law -- Certiorari -- Effect of Denial

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CRIMINAL LAW—CERTIORARI—EFFECT OF DENIAL

State convict's petition for certiorari to the United States Supreme Court for direct review of their conviction was denied.[1] *Held*, it was error for the federal district court to give effect and consideration to this denial in a subsequent petition for a writ of habeas corpus. *Brown v. Allen*, 344 U.S. 443 (1953) (affirmed on other grounds).

The Supreme Court has often said that the denial of certiorari imports no expression of opinion upon the merits of a case.[2] However, nine years ago the Court said that a federal court will not ordinarily re-examine issues upon a writ of habeas corpus when certiorari has been previously denied.[3] This inconsistency was magnified by the doctrine of *Darr v. Burford*,[4] a more recent case, which states that a federal court may not entertain a habeas corpus application unless the petitioner has exhausted all state remedies by way of appeal, including in this category, an application to the United States Supreme Court for a writ of certiorari. Thus, while denial of certiorari was a prerequisite to habeas corpus proceedings by a state prisoner, there was no clear cut opinion as to the effect to be given to that denial.

Since the conflict arose, the lower courts have arrived at opposite interpretations. Several courts decided that the Supreme Court meant that the denial of certiorari was to be given effect.[5] Other courts determined, as the Supreme Court had previously determined, that the denial of certiorari was of no effect whatever where the court gave no expression of opinion.[6] This left a pressing need for a new mandate from the Supreme Court.

The majority opinion of the court on this point was expressed by Justice Frankfurter when he said . . . "denial of certiorari means only that, for one reason or another . . . which may have nothing to do with the merits . . . there were not four members of the Court who thought the case should be heard."[7] The minority on this point, while not suggesting that denial of certiorari should be stare decisis, stated that "there is no reason why a district court should not give consideration to the record of the prior certiorari to this Court and such weight to our denial as the district court

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1. Brown v. North Carolina, 233 N.C. 202, 63 S.E.2d 99, *cert. denied*, 341 U.S. 943 (1951); Speller v. North Carolina, 231 N.C. 549, 57 S.E.2d 759, *cert. denied*, 340 U.S. 835 (1950); 230 N.C. 345, 53 S.E.2d 294 (1949); 229 N.C. 67, 47 S.E.2d 537 (1948); Daniels v. North Carolina, 231 N.C. 509, 57 S.E.2d 653, *cert. denied*, 339 U.S. 954 (1950); 231 N.C. 341, 56 S.E.2d 646 (1949); 231 N.C. 17, 56 S.E.2d 2 (1949).

2. Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950); House v. Mayo, 324 U.S. 42 (1945); United States v. Carver, 260 U.S. 482 (1923); Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916).

3. *Ex parte* Hawk, 321 U.S. 114 (1944); *accord*, White v. Ragen, 324 U.S. 760 (1945); House v. Mayo, 324 U.S. 42 (1945).

4. Darr v. Burford, 339 U.S. 200 (1950).

5. Anderson v. Edison, 191 F.2d 989 (8th Cir. 1951); Adkins v. Smyth, 188 F.2d 452 (4th Cir. 1951); Schechtman v. Foster, 172 F.2d 339 (2nd Cir. 1949).

6. United States v. Hohn, 198 F.2d 934 (3rd Cir. 1952); Hawk v. Hann, 103 F. Supp. 138 (D.Neb. 1952).

7. *Id.* at 439.

feels the record justifies."[8] Justice Jackson expressed a third view to the effect that no lower federal court should entertain a habeas corpus petition from a state prisoner unless there is a jurisdictional problem whereby there is no adequate remedy available.[9]

Since the denial of certiorari means only that the Supreme Court did not deem the questions presented therein of sufficient importance for their consideration, it seems harsh that this should be the last appeal to the courts by a man condemned to die. Denial of certiorari should be given effect only when an opinion is expressed.

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PROCEDURE—FEDERAL RULES—VOLUNTARY DISMISSAL

Plaintiffs filed suit for specific performance of a contract of sale and moved for an injunction *pendente lite*, which was denied. Plaintiffs then filed a notice of appeal and applied for a stay pending appeal. This stay was also denied. After an order to show cause why plaintiffs should not be enjoined from instituting an action in another jurisdiction based on the same subject matter, had been directed to them, but before the return day of the order, plaintiffs filed their notice of voluntary dismissal.[1] Upon a denial of defendant's motion to vacate the notice of dismissal, defendant appealed. *Held*, although neither an answer nor a motion for summary judgment had been filed, a literal application of the rule would defeat its purpose of preventing arbitrary dismissal after an advanced stage of the suit had been reached. *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir.), *cert. denied*, 73 Sup. Ct. 949 (1953).

Before the adoption of the Federal Rules of Civil Procedure a plaintiff had an absolute right to discontinue or dismiss his action at law at any time prior to verdict or judgment.[2] By virtue of the Conformity Act[3] federal courts were bound in matters of practice in actions at law, including questions of voluntary dismissal, by the practice of the state courts in the territories in which the respective federal courts had jurisdiction.[4] The plaintiff's right

8. *Id.* at 407.
9. *Id.* at 423.

1. FED. R. CIV. P. 41 (a) (i), as amended (1946). Florida rule provides for similar dismissal under FLORIDA COMMON LAW RULE 3 (a)(i). ". . . an action may be dismissed by the plaintiff without order of court (1) by filing a *notice* of dismissal *at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs* . . . ."

2. *In re* Skinner & Eddy Corp., 265 U.S. 86 (1924); Barrett v. Virginian R.R., 250 U.S. 473 (1919); McGowan v. Columbia River Packer's Ass'n, 245 U.S. 352 (1917); Confiscation Cases, 7 Wall. 454, 457 (U.S. 1869); Veazie v. Wadleigh, 11 Pet. 55 (U.S. 1837); Prudential Ins. Co. v. Stack, 60 F.2d 830 (4th Cir. 1932).

3. REV. STAT. § 914 (1874), 28 U.S.C. §724 (1948).

4. Barrett v. Virginian R.R., 250 U.S. 473 (1919); Nudd v. Burrows, 91 U.S. 426 (1875).