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IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)
)
Plaintiff,)
)
vs.) ORDER RE WRITTEN
) TRANSCRIPT ON APPEAL
MASARO A. SAIMON,)
)
Defendant.)

This matter came on for hearing on May 15, 1991, at 9:00 a.m. on the Exparte Motion of the defendant for clarification of Preliminary Order Re Transcript Preparation. The defendant appeared by counsel, Ms. Pamela O. Tower, Assistant Public Defender.

After hearing from counsel and reviewing the written motion, the court took the matter under advisement and hereby renders this opinion and order.

The defendant seeks a written transcript of all parts of the trial, including the discussions between the court and counsel during sidebars and during the argument of motions raised by the government and the defendant. This court granted defendant's request for the written transcript of jury reinstructions and all testimony given at trial. The court, however, refuses to

order the written transcription of the proceeding related to sidebars, pretrial oral arguments, and arguments concerning various motions raised by counsel. The court's refusal is based on two factors. First, counsel has been offered a reasonable alternative method for obtaining the same information without obtaining a written transcript. Second, the defendant's right to equal protection is not violated simply because he does not have access to the entire proceeding in written form.

In support of his first argument, the defendant cites Griffin v. Illinois, 351 U.S. 21, 76 S. Ct. 585 (1956), for the proposition that a defendant cannot be deprived of a transcript of proceedings for the purpose of perfecting his appeal simply on the basis of the fact that he is indigent and cannot afford one. The defendant, however, fails to mention that the Griffin Court also noted that the state could adopt alternative procedures for providing the defendant with the same information without actually transcribing the entire trial. The Court stated that:

We do not hold that [the state] must purchase a stenographer's transcript in every case where a defendant cannot buy it. The [court] may find other means of affording adequate and effective appellate review to indigent defendants We are confident that the State will provide corrective rules to meet the problem which the case lays bare.

Id. at 591.

The language of the Griffin case expressly allows a court to utilize alternative methods of granting a defendant access to the information necessary to perfect his appeal. In the present case, the court has offered defense counsel the opportunity to review the audio tapes of all phases of the trial. The court

has also informed counsel that following his review the court will order a written transcript of any areas of the trial relevant to points of error that counsel intends to raise on appeal. This alternative method constitutes a corrective rule that meets the standards enunciated in Griffin and its progeny.

The defendant also told the court that the progeny of the Griffin case supports his position that he is entitled to a written transcript of the entire proceeding. A reading of the cases citing the Griffin case reveals that the opposite is true.

The United States Supreme Court confronted this issue in Hardy v. United States, 375 U.S. 278, 84 S. Ct. 424 (1964). In Hardy, a majority of the Supreme Court stated that a court appointed attorney representing an indigent on appeal is entitled, at a minimum, to a transcript that is relevant to the points of error counsel has raised. The Court noted a distinction between counsel representing a defendant for the first time on appeal and situations where the counsel on appeal also represented the defendant at trial. The Court noted that counsel representing the defendant for the first time on appeal is entitled to the entire record because he or she did not have the benefit of presence at trial. Id. at 426-27. Conversely, where counsel on appeal is the same as at trial, the Court stated that the defendant need not receive the entire transcript since they were present at the original trial and in position to note points of error.

This opinion was subsequently modified somewhat in Britt v. North Carolina, 404 U.S. 227, 92 S. Ct. 431 (1971). In Britt,

the Court emphasized that requiring the defendant or his counsel at trial to rely on their memories to discern what may ultimately be appealed is not a sufficient alternative to giving them a transcript. See also, Holmes v. United States, 383 F.2d 925, 929 (D.C. App. 1967) ("It is a mistake to suppose that a request for full transcript emanates from unfamiliarity with the trial").

The Britt Court also noted, however, that there are two factors that are relevant to an indigent's claim of need for a free written transcript. First, "the value of the transcript to the defendant in connection with the appeal or trial for which it is sought." Id. at 434. Second, "the availability of alternative devices that would fulfill the same functions as a transcript." Id. The Court explained that there is a distinction between requiring that a defendant show a particularized need for a written transcript and requiring a defendant to use an alternative device to obtain the same information. The Court noted that requiring the defendant to make a particularized showing of need may be unconstitutional, but requiring that a defendant avail himself to an alternative method of obtaining what is "substantially equivalent" to a written transcript is constitutional. The Court concluded that because the defendant could have gone to the court reporter and listened while the reporter read aloud her notes from the trial, a reasonable equivalent alternative existed.

The Britt Court's distinction is important to a resolution in this case. The Britt Court expressly stated that requiring

the defendant or his counsel to listen to a court reporter read her notes was the substantial equivalent of a written transcript. In the present case, the defendant has not only been offered the opportunity to review the entire trial on audio tape, but the court made the additional offer to provide him with written transcripts of areas from which defendant intends to raise points of error on appeal. Therefore, the court is not conditioning the defendant's review of the record on a particularized showing that errors existed in particular portions of the trial. Rather, the court is offering the defendant a sufficient alternative method to providing a paper transcript of the entire proceeding and merely requiring a showing of need prior to putting relevant portions in paper form. This clearly complies with the test enunciated in Britt.

The defendant also argues tht his constitutional right to equal protection under the law has been violated because defendants who have adequate resources can afford to have the trial transcribed on paper while indigent defendants are not afforded this luxury. This argument is without merit. Neither the equal protection clause contained in the Fifth or Fourteenth Amendments protect indigent defendants from every inequity that may exist between themselves and defendants with access to additional resources. United States v. MacCollum, 426 U.S. 317, 96 S. Ct. 2086 (1976). Equal protection only requires that all parties have access to the same instruments necessary to vindicate their legal rights. Roberts v. LaVallee, 389 U.S. 42, 88 S. Ct. 194 (1967). In the context of a criminal proceeding, this only

requires that defendants have access to the tools necessary to present their claims fairly. United States v. MacCollum, supra at 2091.

Rule 36 of the Commonwealth Rules of Practice allows a party requesting a transcript to obtain a copy of the audio tape of the proceeding upon the payment of a fee. The court has already waived the fee in this case (as it does in all forma pauperis proceedings), thus allowing defense counsel the same access to an audio transcript of the proceedings as anyone of additional financial means could obtain. See, Long v. District Court of Iowa, 385 U.S. 192, 87 S. Ct. 362 (1966) (state may not interpose financial consideration to keep defendant from exercising right to appeal). The only distinction that could be raised by the defendant is whether a party who can afford to have the tape transcribed in written form has some additional advantage that is not available to the indigent defendant. Defense counsel cites no case law supporting such a claim, nor can the court imagine a court making such a distinction.

All audio tapes of the entire proceedings in the instant case are available to the defendant for his review. Co-counsel for the defendant has reviewed portions of the audio tape of closing argument and has designated that portion relevant to the appeal. The court hereby orders this designated portion of the audio tape transcribed. Any portion designated by the defendant as relevant to the points of error that counsel intends to raise on appeal can and will be ordered transcribed.

The motion of defendant for recusal of the undersigned judge is hereby denied.

SO ORDERED this 17 day of May, 1991.



Marty W. K. Taylor
Associate Judge