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Criminal Law and Procedure—Coram Nobis and Exhaustion of the Appellate Process

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objection or otherwise,"[12] except questions concerning jurisdiction.[13] Defendant's counsel had objected at the time to testimony regarding the post-arraignment interview was admitted but he did not give any grounds for the objection. The trial court overruled the objection. It is a long standing and generally accepted court made rule that an objection must be specifically and expressly stated. Therefore, the Court could not decide the constitutional issue without first deciding the procedural problem. Haunted by the spectre of a defendant being deprived of his constitutional rights but unwilling to ring the death knell of the court rule regarding the sufficiency of objections, the Court seized upon the failure of the trial court to admit the exculpatory parts of the record of the pre-arraignment interrogation and reversed the judgment, thereby laying the case to rest. By rationalizing that the fact the defendant admitted making the pre-arraignment interview offset the fact that the defendant denied making the incriminating statements contained in the record thereof, the Court was able to fit the case into a familiar niche in the law and at the same time was able to purge a sticky bone from its throat.

The decision in the instant case is an example of how a principle of law may be stretched to a point where it loses its effectiveness. The purpose of the rule relied upon in this case is to frustrate the effects of using statements out of context and prevent the injustice that would result from presenting only one side of a story. But, in the instant case, the evidence against the defendant was overwhelming and clearly supported his conviction. The defendant was certainly allowed to present his side of the story when he appeared as a witness. In what manner was the defendant prejudiced? The real significance of this decision is as an example of how far the courts will often go in order to protect the rights of a defendant in a criminal proceeding. This brings up a very pregnant question: is it necessary to go to such lengths to protect a defendant when his conviction could be clearly supported by the evidence; and, is the interest of the public being properly protected in allowing an obviously guilty defendant to take advantage of a technical and non-prejudicial error and thereby secure a new and expensive retrial?

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CORAM NOBIS AND EXHAUSTION OF THE APPELLATE PROCESS

Defendant was convicted in 1955 of several counts of robbery and assault. Six years later he instituted a coram nobis proceeding, alleging in his petition that after he had been indicted and in the absence of counsel he was questioned; that through the use of force and threats a statement was obtained and used by the prosecution at his trial. Defendant was represented by counsel both at the trial and upon sentencing, yet no objection was made to the use of the state-

12. N.Y. Code Crim. Proc. § 420-a. *E.g.*, People v. Friola, 11 N.Y.2d 157, 182 N.E.2d 100, 227 N.Y.S.2d 423 (1962).

13. *E.g.*, People v. Nicometi, 12 N.Y.2d 428, 191 N.E.2d 79, 240 N.Y.S.2d 589 (1963).

ment at the trial and no appeal was taken from the judgment of conviction. The County Court denied the defendant's petition, but the Appellate Division reversed and directed a hearing. On appeal, *held*, reversed. The Court of Appeals reinstated the order of the County Court and held that a writ of error coram nobis may not be used to vacate a judgment of conviction on grounds of denial of right to counsel, where defendant's right to raise the issue on appeal was not substantially impaired. *People v. Howard*, 12 N.Y.2d 65, 187 N.E.2d 113, 236 N.Y.S.2d 39 (1962).

While the common law writ of error coram nobis has become disused and obsolete in many jurisdictions, it has been revigorated and much used in New York State in the past twenty years. The effect of the writ is similar to that of a motion for a new trial, and, if granted, has the same effect as a new trial.[1] Yet it is to be distinguished from all other post-judgment remedies in that it is an emergency measure to afford a defendant a remedy against injustice when no other avenue of judicial relief is, or ever was, available to him.[2] Thus, coram nobis usually may not be used to raise errors appearing on the face of the record,[3] since other remedies such as appeal and motion for a new trial normally exist. However, where the disallowance of the writ would amount to a denial of due process, this rule is waived.[4] Indeed, the very reason for the rebirth and expansion of the doctrine of coram nobis in New York State was to satisfy the requirement of the due process clause by providing a means of reviewing a violation of due process where no other corrective procedure existed.[5] It is the remedy for a claim of deprivation of due process of law outside the record. Some of the established grounds for its use include mistake,[6] failure of district attorney to disclose material testimony,[7] guilty plea made in reliance on false promise of the court,[8] and denial of counsel,[9] or failure to advise of the right to counsel.[10] In all instances the errors complained of must not be trivial.[11] Negligence or ineptitude of an attorney may also be ground where its magnitude is so great as to make the entire proceeding a mockery and a sham.[12] Application is made to the court where judgment of conviction was rendered.[13] There is no time set within which application must be made,[14] and appeal from an order denying or granting the writ is authorized by statute.[15] Except for a claim of

1. People v. Fanning, 73 N.Y.S.2d 68 (Schuyler County Ct. 1947).
2. People v. Sullivan, 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957).
3. People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949).
4. People v. Silverman, 3 N.Y.2d 200, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957).
5. See Frank, Coram Nobis ¶ 2.02 (1953). See generally *id.* ¶ 2.01.
6. People *ex rel.* Harrison v. Jackson, 298 N.Y. 219, 82 N.E.2d 14 (1948).
7. People v. Riley, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings County Ct. 1948).
8. People v. Guariglia, 303 N.Y. 338, 102 N.E.2d 580 (1951).
9. Moore v. Dempsey, 261 U.S. 86 (1923).
10. People v. McCullough, 300 N.Y. 107, 89 N.E.2d 335 (1949).
11. People v. Eastman, 283 App. Div. 833 (3d Dep't 1954).
12. People v. Brown, 7 N.Y.2d 359, 165 N.E.2d 557, 197 N.Y.S.2d 705 (1960).
13. People v. McCullough, 300 N.Y. 107, 89 N.E.2d 335 (1949).
14. People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951).
15. N.Y. Code Crim. Proc. § 518.

incompetance of petitioner's counsel, where much more is apparently required,[16] a petitioner will be denied a hearing only where the record conclusively shows his allegations to be false and no reasonable probability exists of their being true.[17] At the hearing the burden is on the petitioner to overcome a presumption of regularity and prove his allegations.[18] Decisions defining the scope of coram nobis have necessarily followed or included decisions defining what amounts to violation of due process.

In 1960 in *People v. Di Biasi*,[19] the Court of Appeals held that any post indictment statement made in the absence of counsel was a violation of a defendant's constitutional right to counsel. This principle was accentuated in *People v. Waterman*,[20] a decision that followed the next year, where in a quote from an earlier United States Supreme Court decision the Court noted that a denial of a defendant's right to representation by counsel after indictment and before trial could be denial of "effective representation by counsel at the only stage when legal aid and advice would help him." In these cases the admission in evidence of the post indictment statements made in absence of counsel was accomplished over the timely objection of counsel for the defendant at the trial. Their appeals resulted in further development of the concepts of due process and right to representation by counsel. A moot question was whether the emphasis the Court placed on assistance of counsel at every stage of the criminal proceeding was indicative of a value that would justify a waiver of the rule that coram nobis will not lie where another remedy was available to the defendant. In such a case would disallowance of the writ amount to denial of due process? An eloquent dissent fourteen years prior to the *Di Biasi* and *Waterman* cases had voiced the view that "constitutional rights as well as due process requirements rest upon something more substantial, than what might have been but was not done."[21] Still, only where the other remedy had been less than real, as where petitioner was not advised of his right to counsel nor represented by one,[22] had the rule been waived. Representation by counsel at sentencing has, alone, been consistently held to provide ample opportunity for the defendant to benefit from every defense which would have been available to him originally.[23]

The Court of Appeals restated the reason behind this rule which the Appellate Division had ignored or waived in the present case. It is, in effect, a resolve between the conflicting values of providing "corrective process at any time for any substantial defect," and of "putting an end to litigation at some

16. People v. Brown, 7 N.Y.2d 359, 165 N.E.2d 557, 197 N.Y.S.2d 705 (1960).
17. People v. Guariglia, 303 N.Y. 338, 102 N.E.2d 580 (1951).
18. People v. Passante, 22 Misc. 2d 11, 196 N.Y.S.2d 489 (1960).
19. 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).
20. 9 N.Y.2d 561, 566, 175 N.E.2d 445, 448, 216 N.Y.S.2d 70, 75 (1961). See generally, 11 Buffalo L. Rev. 153 (1961).
21. Canizio v. New York, 327 U.S. 82, 90 (1946).
22. See, *e.g.*, People v. Koch, 299 N.Y. 378, 87 N.E.2d 417 (1949).
23. See, *e.g.*, Canizio v. New York, 327 U.S. 82 (1946); People v. Jardine, 11 N.Y.2d 941, 183 N.E.2d 228, 228 N.Y.S.2d 827 (1962); People v. Jones, 1 N.Y.2d 665, 133 N.E.2d 517, 150 N.Y.S.2d 30 (1956).

point." If the petitioner's constitutional rights were violated he had counsel who could have made an objection to the statement's use at the trial. A ruling against him could have been tested on appeal. Thus, there had been a remedy available to the petitioner. There is an "unmistakable social burden in affording unending corrective process for any defect." Considering the fact that the trial took place before the decisions in *Di Biasi*[24] and *Waterman*,[25] the prospect of a successful appeal at that time may not have been as inviting to such an effort as it would be today. However, this would have no force as an argument for a further extension of the scope of coram nobis. The Court cited *People v. Muller*[26] and noted that so called new law "may not be applied retroactively to a case where the normal appellate process was either not invoked at all or was exhausted before the new rule was announced."[27] *Muller* followed *Mapp v. Ohio*[28] and *People v. Loria*.[29] *Mapp* held that evidence obtained through search and seizure in violation of constitutional right is inadmissible in criminal proceedings in a state court. *Loria* held that the *Mapp* rule would be applied to all appeals that were pending at the time it was handed down. In *Muller*, an unsuccessful attempt was made to apply the *Mapp* rule to circumstances in which leave to appeal had been applied for and denied. The Court indicated by means of dictum that the *Mapp* rule would not be applied in any case in which the normal appellate process had been exhausted. Substituting the *Di Biasi* rule for the *Mapp* rule, it becomes clear that failure to apply for leave to appeal within the time allowed for such application falls under the general classification of situations where the normal appellate process has been exhausted. With this case, as dictum in *Muller* indicated would be the rule, no distinction may be drawn between the clear case of the defendant whose judgment of conviction has been finally affirmed, a defendant who has been denied leave to appeal, and now, a defendant who has failed to apply for leave to appeal within the time specified for such application. In all three of these cases the appellate process has been actually or effectively exhausted. Thus, where the normal appellate process provides an appropriate remedy, and it has been actually or effectively exhausted, coram nobis also will not lie, since it applies only to those cases where no other avenue of judicial relief is, or ever was available.[30]

The energy and time available to our courts is not boundless, and the policy of affording coram nobis relief to only those cases where no other remedy does or ever has existed to correct violations of due process is both prudent and in accord with a goal of making some approach to justice in a universe of different cases. This position becomes more sobering, but no less tenable, where as here, a remedy did not become clearly available until after the opportunity to

24. People v. Di Biasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).
25. People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).
26. 11 N.Y.2d 154, 182 N.E.2d 99, 227 N.Y.S.2d 421 (1962).
27. Instant case at 69, 187 N.E.2d at 116, 236 N.Y.S.2d at 43.
28. 367 U.S. 643 (1961).
29. 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).
30. People v. Sullivan, 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957).

use it had passed. It has been said that the development of the law is more continuous than it is sporadic, and the fact that its course is capable of prediction is some consolation. Each decided case that has gone through the courts cannot be reexamined and redecided with each enlargement of the law, and the refusal of the Court to expand the scope of coram nobis to these situations appears sound. There seemingly cannot be an effective corrective remedy for the individual who suffers the injustice that may result from a range of practicing law characterized as something less than brilliant, down through and including poor, as distinguished from shockingly inadequate, legal representation. Rather, the remedy must continue to be a preventive one, sustained by high standards of integrity and excellence within the legal profession.

Carl B. Kustell

RIGHT TO PROMPT TRIAL NOT LOST BY INCARCERATED PRISONER WHERE REQUEST FOR NEW TRIAL NOT FORWARDED TO PROSECUTOR BY PRISON AUTHORITIES

Defendants were charged, by a Bronx County indictment filed September 20, 1957, with the crimes of kidnapping, robbery in the first degree, and assault in the second degree. They were convicted of robbery in the first degree and assault in the second degree on December 4, 1958 and sentenced to prison terms. The Appellate Division unanimously reversed these convictions and directed a new trial on March 1, 1960. Defendants were incarcerated when they were notified on March 2, 1960 of the reversal of the conviction. On that day, they both made request through the chief clerk of the prison, pursuant to law, that the Bronx County indictment (underlying the conviction that had been reversed) be disposed of within 180 days.[1] This request was not forwarded to the district attorney of Bronx County. On January 16, 1961, ten months after the request for disposal had been made, the defendants were produced in the Bronx County Court for trial on the basis of the indictment. Defendants moved that the indictment be dismissed on the ground that they had not been brought to trial within the 180 day period. This motion was denied on the ground that the district attorney had not received any request from the defendants that the indictment be disposed of and that therefore, the 180 day period had not commenced to run. Defendants pleaded guilty to attempted robbery in the third degree. On appeal from the judgments entered on the pleas with specific request that the order denying the motion for dismissal of the indictment be reviewed, the Appellate Division reversed the convictions and dismissed the indictment with prejudice.[2] The People appeal by permission of an associate judge of the Court of Appeals; *held*, affirmed unanimously, the failure or refusal by the commissioner of correction or his agent to send on to the district attorney requests of two prisoners that another case against them be brought on for trial within

1. N.Y. Code Crim. Proc. § 669-a.
2. People v. Masselli, 17 A.D.2d 367, 234 N.Y.S.2d 929 (1st Dep't 1962).