Buffalo Law Review

Volume 13 | Number 1 Article 25

10-1-1963

Criminal Law and Procedure—Coram Nobis as Proper Remedy for Testimony Not Perjured and Not Knowingly Used

Peter H. Bickford

failure to observe its own laws, or worse its disregard of the charter of its own existence."[15]

William J. Kirk

CORAM NOBIS AS PROPER REMEDY FOR TESTIMONY NOT PERJURED AND NOT KNOWINGLY USED

Defendant was indicted for his participation in a holdup robbery. In defendant's 1957 trial the only testimony naming defendant as one of the two robbers was given by the driver of the getaway car, whose story required corroboration. This was supplied by the District Attorney's stenographer who put in evidence an unsigned statement of the defendant admitting his guilt. The defense to the statement was defendant's testimony that during the period of interrogation he had been threatened, assaulted and plied with wine and that therefore his admission of guilt was not voluntary. In rebuttal several police officers who had participated in the questioning testified they witnessed none of the intimidation and coercion alleged by defendant. Only one of these officers, City Detective James F. Casey, the detective in charge, testified he had been there for the entire period of detention—the others admitting only brief contact with defendant. Defendant was convicted of first degree robbery, second degree grand larceny, and second degree assault. Subsequently, a writ of error coram nobis was denied after a hearing despite the admission by Detective Casey that his testimony had been false—that actually he had been absent from the interrogation for several hours—on the finding of the County Judge that the false testimony given at the criminal trial was not perjurous, the prosecutor was not aware of the falsity and that the untrue testimony was not material. On appeal by permission, *held*, reversed and new trial ordered. Unintentional false testimony is "in its way as much of a 'fraud' on the court as if it were deliberate . . . . Coram nobis proceedings have as their prime purpose the redress of such frauds." *People v. Robertson*, 12 N.Y.2d 355, 190 N.E.2d 19, 239 N.Y.S.2d 673 (1963).

The common law writ of error coram nobis was given statutory recognition in New York in 1947.[1] Until shortly before such recognition, however, a court of original jurisdiction was generally held not to have the power to reopen a conviction based on fraud or misrepresentation after judgment had been rendered and the defendant had commenced to serve his time.[2] Coram nobis was not in use in New York,[3] and habeas corpus did not lie as long as the defendant was imprisoned by a court having competent jurisdiction over both

15. Mapp v. Ohio, 367 U.S. 643, 659 (1961), as cited in People v. Masselli, 13 N.Y.2d 1, 191 N.E.2d 457, 240 N.Y.S.2d 976 (1963).

1. N.Y. Code Crim. Proc. § 517, as amended by N.Y. Sess. Laws 1947, ch. 706, § 1; revised and clarified by N.Y. Sess. Laws 1954, ch. 806, § 1, N.Y. Sess. Laws 1962, ch. 698, § 8.

2. For a concise history of coram nobis in New York, see Frank, Coram Nobis ¶ 2.02 (1953).

3. *Ibid.*

the person and the crime.[4] But the U.S. Supreme Court had declared that it was the duty of every state to provide some corrective judicial process for the relief of persons convicted and imprisoned where a charge was made of violation of due process of law.[5] Eventually the New York Court of Appeals was faced with the problem of a plea of guilty which was fraudulently obtained, and in light of the federal requirement it held in the landmark case of *Lyons v. Goldstein*[6] that the writ of error coram nobis was a proper remedy whereby a court of competent jurisdiction could reopen its judgment of conviction under proper circumstances. The essence of coram nobis is that it is a motion addressed to the very court which rendered the judgment and is not in the nature of a separate proceeding,[7] although often utilized long after the entry of judgment.[8] The theory is that the court has the inherent power to examine and correct its own proceedings in furtherance of justice and due process of law.[9] Coram nobis proceedings are relatively free of the statutory limitations and restrictions which are prevalent in appeals.[10] Its applicability, however, has been narrowly limited by the case law. The writ is available only to correct errors not apparent on the record.[11] It is not available where other established remedies or procedures can serve, or might have served, their purpose.[12] Coram nobis is not an alternative remedy, rather it is "an emergency measure born of necessity to afford a defendant a remedy against injustice when no other avenue of judicial relief is, or ever was, available to him."[13] The scope and latitude of the writ has not been clearly defined—partly because of the absence of statutory elaboration, and partly because of its gap-filling, last-resort adaptability. "Each case must be decided according to its own equities."[14] This is not to say, however, that there has been no attempt to define their limits of coram nobis.

Following the *Lyons* case, which acknowledged the court's inherent power to reopen a judgment of conviction, the Court of Appeals accepted coram nobis as the proper remedy to test the charge of *perjured* testimony *knowingly* used by the prosecuting attorney in a criminal matter resulting in a conviction[15]—A conviction so obtained having been declared by the federal judiciary to be violation of due process.[16] This rule was intended to abrogate violations of the

4. People *ex rel.* Carr v. Martin, 286 N.Y. 27, 35 N.E.2d 636 (1941).
5. Mooney v. Holohan, 294 U.S. 103 (1935).
6. 290 N.Y. 19, 47 N.E.2d 425 (1943).
7. People v. McCullough, 300 N.Y. 107, 89 N.E.2d 335 (1949).
8. See, *e.g.*, People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951).
9. See Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943).
10. For a comparison of coram nobis with appeals and habeas corpus, see Paperno & Goldstein, Criminal Procedure in New York § 434 (1960).
11. People v. Sullivan, 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957).
12. People v. Caminito, 3 N.Y.2d 596, 148 N.E.2d 139, 170 N.Y.S.2d 799 (1958); People v. Shapiro, 3 N.Y.2d 203, 144 N.E.2d 12, 165 N.Y.S.2d 14 (1957); Matter of Hogan v. Court of General Sessions, 296 N.Y. 1, 68 N.E.2d 849 (1946).
13. People v. Sullivan, 3 N.Y.2d 196, 200, 144 N.E.2d 6, 9, 165 N.Y.S.2d 6, 10 (1957) (Fuld, J., concurring).
14. *Id.* at 199, 144 N.E.2d 6, 9, 165 N.Y.S.2d 6, 10 (Desmond, J., concurring).
15. Matter of Morhous v. Supreme Court, 293 N.Y. 131, 56 N.E.2d 79 (1944).
16. Mooney v. Holohan, 294 U.S. 103 (1935).

fundamental precepts of due process having no remedy at law and which result in the perpetration of a fraud upon the court.[17] A mere showing of perjured testimony which is knowingly used by the prosecuting authorities is not sufficient. It must also be shown that if the truth were known at the time of the trial, it would have been substantial enough to have affected the validity and regularity of the judgment itself.[18] This last requirement appears to be the essential element to justify vacating a judgment of conviction, although, save one instance, there appears to be no case which allows the applicability of coram nobis where there is either erroneous testimony which is knowingly used but not perjured, or perjured testimony which is not knowingly used. The one instance referred to was a case of mistaken identity where the erroneous testimony was "not perjured and not knowingly used."[19] The conviction was vacated, however, upon motion of the defendant and consent of the prosecuting attorney, following a confession to the crime by another man and an executive pardon from the governor. Since the statutory period for a new trial or appeal had expired, the conviction could only have been vacated under the court's inherent power to vacate a judgment based upon fraud or misrepresentation.[20]

In the instant case the court has allowed coram nobis to lie despite the fact that the testimony was mistaken, not perjured, and the falsity was not known by the prosecuting attorney. Unlike the mistaken identity case, however, there is not a clearly erroneous conviction present. Judge Dye, speaking for the minority, adheres strongly to the established rule that "coram nobis does not lie without allegation and proof 'of fraudulent use of perjured testimony by the prosecuting attorney,' "[21] and considers any expansion or extension of coram nobis relief beyond this rule as unwarranted. Coram nobis has not "been made available as the alter ego of a statutory remedy such as a motion for a new trial on newly discovered evidence . . . ."[22] The minority view is that the erroneous testimony did not affect the voluntary nature of the confession. Although Detective Casey had not been present during the entire interrogation as originally maintained, he was still present during a large part of the period, including the time defendant's statement was taken. The hearing below determined that no substantial right of the defendant had been affected. The question was solely one of fact. The majority, however, is of the opinion that the false testimony, used as a rebuttal by the prosecution to defendant's allegation that his confession was not voluntary, destroyed his only chance for acquittal. The fact that the erroneous testimony was from the very officer in charge of the

17. See People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949), *cert. denied*, 388 U.S. 952 (1950).

18. People v. Sullivan, 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957). See also, Fuld, J., *The Writ of Error Coram Nobis*, N.Y.L.J., June 5, 1947, p. 2212, col. 1; June 6, 1947, p. 2230, col. 1; June 7, 1947, p. 2248, cols. 1 & 2.

19. Campbell v. State, 186 Misc. 586, 62 N.Y.S.2d 638 (Ct. Cl. 1946).

20. See discussion of Campbell v. State, *supra* note 19, in Frank, *op. cit. supra* note 2, at ¶ 3.01(b).

21. Instant case at 360, 190 N.E.2d 19, 22, 239 N.Y.S.2d 673, 677 (1963).

22. *Id.* at 361, 190 N.E.2d at 22, 239 N.Y.S.2d at 678.

interrogation is stressed in further support of the substantial nature of the error. Chief Judge Desmond, speaking for the court, insists that the result of the error is as much of a "fraud" on the court as if the testimony had been deliberately used by the prosecution. The general rule of "perjured testimony knowingly used" has proven to be inadequate to prevent this "fraud" on the court; therefore the scope of coram nobis is expanded in this instance to remedy the violation.

Until the instant case the "rule" of "fraudulent testimony knowingly used" has remained categorical. There has been practically no straying from its confines. This may merely reflect a lack of a proper fact situation. Nonetheless, the majority opinion conspicuously lacks authority favorable to its position. The minority, on the other hand, has considerable support for a strict application of the "rule." For all its myriad of authority, however, it appears that the minority has disregarded the one crucial point relied upon by Chief Judge Desmond in the majority opinion: the prime object of coram nobis is the remedy of violations of due process where no other remedy is available, and consequently, the prevention of a fraud upon the court.[23] It seems quite illogical to consider that the injury to the defendant would have been any greater in the instant case if the prosecution had knowingly used the erroneous testimony, rather than mistakenly used the same. Yet that is the distinction that the minority wishes to make between a proper and an improper ground for the use of coram nobis. There may possibly be considerable danger in expanding the scope of coram nobis as is indicated by the minority. But there is a distinction between expanding the writ into areas of statutory remedies, such as a motion for new trial, and the expansion to encompass a deprivation of due process which lacks a sufficient remedy. Coram nobis has always been adaptable enough for the latter purpose.[24] Judge Dye's dissent also emphasizes the insubstantial nature of the error. This, however, is a question only a jury could adequately answer, and a coram nobis proceeding provides the defendant with the only chance of obtaining that answer.[25] The instant case may well be interpreted as a considerable magnification of the scope of coram nobis, yet within the case itself the purpose and the spirit of the writ of error coram nobis are unimpaired.

Peter H. Bickford

PART POSSESSION OF STOLEN GOODS AS PROOF OF THEFT OF WHOLE

On December 4, 1958, a stolen typewriter and radio were pawned in Brooklyn with the defendant's name signed to the pledge cards. The complain-

23. See People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949).
24. See People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961).
25. The New York Code of Criminal Procedure § 466 states that a motion for new trial based on newly discovered evidence must be made within one year after judgment of conviction, except in a case of capital punishment, where it may be made at any time until actual execution. All other motions for new trial must be made before judgment. This statute of limitations emphasizes the importance of the writ of error coram nobis.