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Criminal Law And Procedure—Coram Nobis Allowed Upon Allegation That Acceptance of Guilty Plea Violative Of Due Process

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of contempt within the view and presence of the court is no reason to lower the standard of procedure applied to determine his guilt of committing contemptuous acts outside of the view and presence of the court. The argument that relator's conduct outside the view and presence of the court was "plainly" contemptuous does not appear to be an adequate reason not to allow him at least some time to prepare his defense.

A. D.

CORAM NOBIS ALLOWED UPON ALLEGATION THAT ACCEPTANCE OF GUILTY PLEA VIOLATIVE OF DUE PROCESS

In 1943 a thirteen-year-old boy entered a plea of guilty to the crime of murder in the second degree. At the time of the plea there were before the court the statements of three psychiatrists, given in a conference prior to acceptance of the plea, to the effect that the boy was legally sane. A fourth psychiatrist informed the judge at that time that it was his opinion that the accused was suffering from an epileptic attack during commission of the act and that such an attack would have rendered anyone incapable of remembering the acts committed in the course of seizure. The day following the conference the court accepted the boy's plea. The convicted boy suffered a number of attacks of the grand mal type, as well as numerous lesser attacks, subsequent to his imprisonment. He brought a petition for a writ in the nature of coram nobis alleging that under the circumstances of his youth and epileptic condition his plea of guilty was neither effective nor voluntary, but was violative of due process of law. The trial court denied the petitioner a hearing on the allegations. On appeal, *held*, reversed. The taking of such a plea required an "extreme measure of caution and at least a certainty of guilty and of the complete absence of any plausible defense . . ." in view of the petitioner's youth and epileptic condition. *People v. Codarre*, 10 N.Y.2d 361, 179 N.E.2d 475, 223 N.Y.S.2d 457 (1961).

The writ of error coram nobis originated in the Chancery Court and was directed to the court of original jurisdiction to correct judgments resulting from errors of fact. The writ lay dormant in New York until the Court of Appeals gave it new life in 1943. The Court held that the right to hear a motion to vacate a judgment of conviction was within the inherent power of the court, as was exercised in common law criminal cases "through the writ of error coram nobis."[1] In a subsequent case a petitioner was denied the right to appeal from an order denying a motion to vacate a judgment of conviction.[2] The Legislature remedied this situation by permitting an appeal from an order denying[3] or granting[4] a motion for a writ of coram nobis. This was the first statutory recognition of coram nobis in New York.

1. Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943).
2. People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (1945).
3. N.Y. Code Crim. Proc. § 517.
4. N.Y. Code Crim. Proc. § 518.

Following its resurrection the writ retained many of its common law characteristics. The application is addressed to the court which rendered the original judgment.[5] And, the writ is not available where there is, or was, another avenue of judicial relief open to the petitioner.[6] However, there is an exception to the common law rule that coram nobis may not be used to raise errors appearing on the face of the record.[7] In a case where there is evidence that there has been "a denial of due process requiring corrective judicial process," the scope of the writ will be expanded and a hearing will be allowed on petitioner's allegations.[8] In all judgments of conviction there is a presumption of regularity, but the Court held in a landmark case that this presumption cannot settle without a trial, what otherwise would be a dispute of fact.[9] Once petitioner has come forward with proof, the presumption is overcome. The courts have been liberal in deciding what is necessary to overcome this presumption, and the standard has emerged that when the facts alleged by the petition, if established, would justify relief by way of coram nobis, the petitioner is entitled to a hearing, unless the allegations are "conclusively refuted by unquestionable documentary proof."[10] Also, a hearing will be denied when the record establishes that the allegations are false and there is no reasonable probability that the averments are true.[11] After the petitioner's allegations have rebutted the presumption of regularity, a hearing is necessary to satisfy the due process requirement that a person be granted a hearing upon the merits, where he may appear, assert and protect his rights.[12] It is not sufficient that the allegations are denied, because it is well settled by the United States Supreme Court and the Court of Appeals that the denial only serves to determine the issues which are to be resolved at the hearing.[13]

In the instant case the issue of petitioner's sanity was raised at a conference prior to accepting the petitioner's plea of guilty, and the minutes of this conference are a part of the record. The dissenting opinion concludes, that even if there was an error it appears on the face of the record and, therefore, is not reviewable by coram nobis. But the majority is of the opinion that because of the alleged deprivation of due process, this case is an exception to the general rule, and review by coram nobis is available. The petition alleged that to allow a thirteen-year-old boy to plead guilty to murder when there was before the

5. People v. McCullough, 300 N.Y. 107, 89 N.E.2d 335 (1949).
6. People v. Sullivan, 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957).
7. People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949).
8. People v. Silverman, 3 N.Y.2d 200, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957).
9. People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951).
10. People v. Picciotti, 4 N.Y.2d 340, 345, 151 N.E.2d 191, 194, 175 N.Y.S.2d 32, 35 (1958); People v. Langan, 303 N.Y. 474, 477, 104 N.E.2d 861, 862 (1952); People v. Richetti, id. at 296, 97 N.E.2d at 911.
11. People v. Picciotti, supra note 10; People v. Silverman, supra note 8, at 203, 144 N.E.2d at 11, 165 N.Y.S.2d at 13; People v. Guariglia, 303 N.Y. 338, 343, 102 N.E.2d 580, 583 (1951).
12. Lyons v. Goldstein, supra note 1, at 25, 47 N.E.2d at 428.
13. Waley v. Johnston, 316 U.S. 101 (1942); Walker v. Johnston, 312 U.S. 275 (1941); People v. Richetti, supra note 9.

court the opinion of a psychiatrist that the killing occurred during an epileptic seizure, was a denial of due process. In the case of *People v. Higgins*,[14] which was a murder case involving an epileptic, the Court held, that "the People had to prove beyond a reasonable doubt that, at the time he struck decedent, defendant was not in the throes of an epileptic furor attack . . . ." The court in the instant case also had before it medical testimony that one who does anything during an epileptic seizure "always forgets what he did." In addition, the record of the conference discloses that the trial judge might have been overly anxious to accept a guilty plea to a reduced charge from murder in the first degree. On one hand, he was faced with the possibility of sending a thirteen-year-old to the electric chair, and on the other hand, risking an acquittal by the jury on the ground of insanity. The minutes of the conference disclose the reluctance of the trial court to face the possibility of imposing the death sentence on the petitioner:

> The Court: I don't want to see this boy burned. I never have. He is too young at the age of 13, and I don't want to see that boy convicted of murder first. I don't say he will. I don't know, but I don't want to see that chance taken if I can help it, and that's my feeling.

The minutes also disclose the trial court's fear of the possibility of the defendant being committed to a mental hospital if acquitted on the ground of insanity, and being released shortly thereafter upon a finding of sanity:

> The Court: Then he would be out at the age of 14 and with no provision for parole, and then we are in a hot spot . . . .

The Court held that no matter how honorable or sincere were the intentions of the participants in the conference, their good intentions were not a substitute for due process. Chief Judge Desmond, speaking for the Court, concluded that the defendant's age, along with the possibility that he was not mentally competent, should have caused the trial court to exercise extreme caution in accepting a guilty plea, which caution the record discloses was not present.

Although the decision of the Court comports vaguely with the concept of due process as procedural fairness, it does not fall within the confines of those factors which have heretofore entered into the conclusion which is due process. The consideration of the age of an accused during periods of prolonged interrogation has had a due process value assigned to it.[15] To a lesser extent it may be argued that the duty of the Court to protect the interests of an accused has also been a consideration affecting due process.[16] The argument does become difficult, though, where, as here, the accused's rights have

14. 5 N.Y.2d 607, 617, 159 N.E.2d 179, 184, 186 N.Y.S.2d 623, 630 (1959).
15. Gallegos v. Colorado, 370 U.S. 49, 53, 54 (1962); Haley v. Ohio, 332 U.S. 596, 599, 600 (1948).
16. Hudson v. North Carolina, 363 U.S. 697, 703 (1960).

been safeguarded by having counsel. The harshness of the statute under which the accused was tried would not enter into the accepted calculation of due process, since it was admittedly not unconstitutional. The remaining element, the mental condition of the accused at the time of the commission of the act, which to the Court seemed deserving of great weight, has not been previously introduced into the formula. It is true that the mental condition of the accused at the time of plea, and even during the pre-arraignment stages of criminal proceedings, have been held to affect constitutionally the acceptance of a plea or in the latter instance the admissibility of a confession.[17] The mental condition of the accused at the time of the act had been regarded by the trial court, and its value as a defense presumably judged by the accused's attorney in advising the accused to plead guilty. Accordingly, fresh consideration of this factor in a coram nobis hearing does not seem especially called for by the demands of due process. It is quite clear that all of these factors entered into the Court's decision, and all the factors appear in toto to amount to the deprivation of due process. But little in the Court's holding suggests anything more than an ad hoc decision tied to a combination of facts having varied significance. The decision affords only limited authority for including any one factor as dominant in reaching the conclusion of whether there was due process, although now in a minimal way these new factors may properly be considered in determining whether or not the accused's plea has been fairly taken. The holding of the instant case is in accord with the recent pronouncement by the Court regarding the scope of coram nobis, "this court has not hesitated to expand its scope when necessary to afford the defendant a remedy in those cases in which no other avenue of judicial relief appeared available."[18]

W. J. L.

EVIDENCE OBTAINED BY MEANS OF WIRETAP ADMISSIBLE IN STATE CRIMINAL PROCEEDING

Defendants were convicted on gambling indictments through evidence obtained by intercepted telephone conversations. From adverse judgments of the County Court and Appellate Division, defendants appealed to the Court of Appeals. *Held*: convictions affirmed, three judges dissenting. Wiretap evidence secured pursuant to state law is admissible in evidence in New York criminal proceedings. *People v. Dinan*, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962).[1]

In New York, though statute forbids such evidence to be introduced in

17. Gallegos v. Colorado, supra note 15; Culombe v. Connecticut, 367 U.S. 568 (1961); Haley v. Ohio, supra note 15; People v. Boehm, 309 N.Y. 362, 368, 130 N.E.2d 897, 900 (1955).

18. People v. Hairston, 10 N.Y.2d 92, 93-94, 176 N.E.2d 90, 91, 217 N.Y.S.2d 77, 78 (1961).

1. 15 A.D.2d 786, 224 N.Y.S.2d 624 (2d Dep't 1962).