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Criminal Procedure—Right of Appeal as Poor Person Limited by Court's Determination of Cause

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The Board of Parole computed the maximum expiration date of petitioner's term by treating the two sentences as running consecutively. Thereupon, petitioner brought an Article 78 proceeding relying upon the "presumption of concurrence." The Court of Appeals held that the presumption was not applicable to sentences imposed at different times, in different courts and for completely unrelated crimes.[37]

The Court also stated that an Article 78 proceeding was the proper remedy rather than habeas corpus, inasmuch as petitioner did not seek review of a discretionary act of the Board, but rather, maintained that the Board's action was erroneous as a matter of law.[38]

Bd.

RIGHT OF APPEAL AS POOR PERSON LIMITED BY COURT'S DETERMINATION OF CAUSE

The Code of Criminal Procedure grants to all defendants in a criminal prosecution the right of appeal.[39] To prevent this right of appeal from being an empty right, the Rules of Civil Practice, Rule 35, enable a defendant to appeal as a poor person and thereby obtain a copy of the transcript of all prior proceedings at the expense of the State. The relator, in *People ex rel. Baumgart v. Martin*,[40] attempted to appeal as a poor person from the dismissal of a writ of habeas corpus.

The relator, convicted of murder in the second degree, applied for a writ of habeas corpus challenging the jurisdiction of the court to find a verdict on the ground that only eleven jurors had answered the polling of the jury. At the hearing it was found that this was only a stenographic error in the record and the writ was denied; whereupon, relator filed a notice of appeal. Relator, in the meantime, prosecuted an appeal from the original judgment of conviction based upon the same grounds as the writ. The original judgment was affirmed in both the Appellate Division[41] and the Court of Appeals,[42] and certiorari was subsequently denied by the United States Supreme Court.[43] Respondent then made a motion in the Appellate Division to dismiss the dormant appeal from the denial of the writ of habeas corpus, and at the same time relator made a cross motion for leave to appeal as a poor person. The Appellate Division denied relator's motion for permission to appeal as a poor person and granted respondent's motion for dismissal for failure to file and serve the printed papers on appeal as required by Rule 234 of the Rules of Civil Practice.

The determination of this case hinged upon the fundamental question of

37. The Court noted that it had already rejected the contention that a presumption of concurrence was applicable in the case of two unrelated crimes. See, People on Petition of Aronstein ex rel. Mello v. Warden, 1 A.D.2d 977, 150 N.Y.S.2d 915 (2d Dep't 1956).
38. Cf. Hines v. State Board of Parole, 293 N.Y. 254, 56 N.E.2d 572 (1944).
39. N.Y. Code Crim. Proc. § 517.
40. 9 N.Y.2d 351, 214 N.Y.S.2d 370 (1961).
41. 6 A.D.2d 854, 175 N.Y.S.2d 1010 (4th Dep't 1958).
42. 5 N.Y.2d 874, 182 N.Y.S.2d 24 (1959).
43. 359 U.S. 994 (1959).

how far the right of appeal as a poor person extends in light of the 1960 decision of *People v. Boram*.[44] Does an indigent defendant have the same right of appeal as all defendants, or is his right limited in some way by other considerations? The Court of Appeals affirmed the Appellate Division's order dismissing the appeal and said that relator had already received his right of appeal, and that neither the Constitution nor the State of New York requires the public to finance a new appeal when no new or different issues are raised by it. The Court does not overrule the *Boram* case as it is clearly distinguishable. In that case a defendant was denied his right to obtain a printed transcript as a poor person because his appeal lacked merit. The Court there said that an indigent defendant is not given the same right of appeal as a defendant with financial means when the Appellate Division dismisses the appeal on the basis of the prosecutor's affidavits and requires that the defendant show substantial merit before he is allowed to appeal. In the present case, defendant had already received appellate review on the issues he was trying to raise again on the second appeal. Should the Court allow these same issues to be litigated again at public expense? The Court need not allow an indigent defendant "to indulge his litigious proclivity at public expense,"[45] as one proceeding should satisfy his right of appeal when no new or different points are raised, and he has received "as adequate appellate review as defendants who have the money enough to buy transcripts."[46]

The United States Supreme Court has ruled that a state, once giving a defendant in a criminal action the right of appeal, cannot deny an indigent prisoner his right of appeal from a judgment of conviction solely because of his poverty.[47] He must receive adequate appellate review or there would be a denial of his constitutional rights of due process and equal protection.[48] New York has provided for such protection by statute, and also in cases like *Boram* in which no showing of substantial merit can be required as the basis of this right. Appellate review is protected in both an appeal from a judgment of conviction and a writ of error coram nobis.[49]

This decision is important in that it clarifies the right of appeal in New York. The Court is not conditioning this right upon the showing of substantial merit, but neither does it guarantee an indigent defendant the right to prosecute every possible appeal. The Supreme Court's guarantee speaks in qualitative terms when it says that an indigent defendant must receive as adequate an appeal as a defendant who can afford to do so. The Court here is not infringing upon the quality of appeal, but only restricting appeals where no new issues are raised. The dissenters, led by Chief Judge Desmond, want not

44. 8 N.Y.2d 177, 203 N.Y.S.2d 84 (1960).
45. People v. Martin, supra note 40.
46. Griffin v. Illinois, 351 U.S. 12, 19 (1956).
47. Burns v. Ohio, 361 U.S. 252 (1959).
48. Griffin v. Illinois, supra note 46.
49. People v. Pitts, 6 N.Y.2d 288, 189 N.Y.S.2d 650 (1959).

only to protect the quality of appeal, but also to grant the defendant the same right of appeal in quantitative terms. It would be impossible to resolve the debate as to which viewpoint guarantees, in the constitutional sense, the right of review, but when prosecuted at public expense, should this right be completely unlimited? The majority best answers this in stating that "due process and equal protection imposed no obligation on the State to accord a purposeless activity a constitutionally protected status."[50]

R. A. O.

PRIOR FELONY CONVICTION DETERMINED ACCORDING TO NEW YORK STATUTE

Section 1941 of the Penal Code of New York provides that one convicted of a felony in New York is to be punished as a multiple felony offender if he was previously "convicted . . . under the laws of any other state . . . of a crime which, if committed within this state, would be a felony."[51]

In the case of *People ex rel. Goldman v. Denno*,[52] the Court was faced with the following facts. The prisoner was convicted of a felony in New York, and was sentenced to fifteen years to life, pursuant to Section 1941, as a third felony offender. In a prisoner's habeas corpus proceeding, Goldman sought a resentencing since the felonies for which he was convicted prior to the felony in point would not have constituted felonies if committed within New York. The Appellate Division reversed the Supreme Court's dismissal, concluding that only one of the three prior convictions was a felony for purposes of harsher punishment.[53]

The appeal to the highest court in New York occasioned a restatement of the applicable rules for determining whether a foreign jurisdiction's conviction was for a crime which would be a felony if committed in New York. The rule was stated that if one is convicted for violation of a statute under which the act or acts prohibited would be felonies in New York, then the party will be considered a felony offender. But, if the statute under which the party is convicted prohibits acts, some of which constitute felonies in New York, and some of which constitute misdemeanors, an inquiry must be made into the indictment to determine whether the charged acts would have been felonious in New York. If the indictment alleges acts, some of which would be felonies and others which would be misdemeanors, then the conviction may not be regarded as a felony for purposes of determining punishment.

The Court agreed that two of the prior convictions were not properly felonies under New York law. The Court divided on the character of a 1947 conviction under the Federal Narcotics Statutes. These statutes provide that one will be guilty of a felony if he receives, conceals, sells or facilitates the transportation, concealment, and sale of a narcotic drug;[54] whereas, the New

50. Supra note 39.
51. N.Y. Penal Law § 1941(2).
52. 9 N.Y.2d 138, 211 N.Y.S.2d 403 (1961).
53. 9 A.D.2d 955, 196 N.Y.S.2d (2d Dep't 1959).
54. 21 U.S.C. §§ 173, 174.