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Constitutional Law—In Forma Pauperis Appeals Apply to Dismissal of Motions

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IN FORMA PAUPERIS APPEALS APPLY TO DISMISSAL OF MOTIONS

While the right to appeal is not a constitutional right,[12] it is well established that once it has been granted, the denial of such right because of poverty amounts to a denial of equal protection and due process of law guaranteed by the Fourteenth Amendment of the United States Constitution.[13]

The Court of Appeals in establishing this rule and other courts in following it, had previously dealt only with *forma pauperis* appeals from judgments of convictions.[14] However, in *People v. Wilson*[15] a new development arose. Appellant appealed from an order denying his application for the common law writ of error *coram nobis*,[16] which application alleged that he was not advised of his right to counsel at the time of his arraignment and sentence. He made a subsequent motion for leave to appeal as a poor person. The Appellate Division denied this motion and later dismissed the appeal upon defendant's failure to appear.[17] Defendant appealed from this dismissal and thereby raised the issue of whether the right to appeal *in forma pauperis* extended to dismissals of motions to vacate judgments as well as from judgments of conviction.

Formerly, in New York, no appeal could be taken from an order denying a motion to vacate a judgment.[18] This led to an amendment in 1947 to Section 517 of the Code of Criminal Procedure, New York's statute governing appeals by defendants.[19] The wording was again changed in 1958 upon the recommendation of the Judicial Council, stating that the change was to remove any doubts as to the right to appeal from an order of a court denying a motion in the nature of a *coram nobis* proceeding.[20]

The Court of Appeals, citing section 517 of the Code of Criminal Procedure[21] as granting the appellant the right to appeal, reversed the Appellate Division and held that since no distinction is made by the statute between an appeal from a judgment of conviction and an order denying a motion to vacate a judgment (*coram nobis* proceeding), the law applicable to the former is likewise applicable to the latter.

12. People ex rel. Sauchuk v. Lilholt, 20 Misc. 2d 314, 194 N.Y.S.2d 101 (County Ct. 1959).

13. People v. Pitts, 6 N.Y.2d 288, 189 N.Y.S.2d 650 (1959); People v. Pride, 3 N.Y.2d 545, 170 N.Y.S.2d 321 (1958).

14. Ibid.

15. 7 N.Y.2d 568, 200 N.Y.S.2d 40 (1960).

16. The purpose of such writ being to correct a judgment in the same court in which it was rendered, on the ground of error of fact, which fact did not appear in the record.

17. 9 A.D.2d 869, 196 N.Y.S.2d 575 (2d Dep't 1959).

18. People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (1945).

19. 19th Annual Report of N.Y. Judicial Council (1953), at 81-83, and Supporting Study, at 225, 238.

20. Ibid.

21. N.Y. Code of Crim. Proc. § 517:
An appeal may be taken as of right by the defendant from an order denying a motion to vacate a judgment of conviction, otherwise known as a motion or application for a writ of error coram nobis, to the court which an appeal from the judgment of conviction would lie as provided in this section. . . .

The effect of the decision is to further extend the right of individuals to appeal *in forma pauperis*.

IMPROPER REMARKS BY COURT CONSTITUTED PREJUDICIAL ERROR

A new trial was granted in *People v. Bai*[22] on the grounds that judicial error in the trial court denied defendant of due process of law as guaranteed by the State[23] and Federal[24] Constitutions and the New York Code of Criminal Procedure.[25]

Defendant had been convicted in Nassau County District Court for assault in the third degree,[26] and the conviction was affirmed by the County Court.

At his trial defendant appeared without counsel, his attorney having withdrawn from the case, and requested an adjournment. Since several previous requests had been made and granted for the same reason, the trial court denied a further extension. Defendant reluctantly proceeded to conduct his own defense, but disclaimed ability to examine twenty-seven witnesses he had subpoenaed. The trial judge construed this as an authorization to discharge them and accordingly did so.

Appellant contends the judgment should be reversed for two reasons. First, he was forced to stand trial without counsel and thereby deprived of a fair hearing and secondly, the trial judge improperly prevented him from examining a written statement of a witness for the prosecution which was in the possession of the authorities.

The Court of Appeals held as to the first contention, that from the facts of the case, defendant was given sufficient time to obtain an attorney. If he chose to appear without one as a result of his own inaction, he must be deemed to have waived his right to legal representation. To hold otherwise would give the accused the complete power to block every prosecution by this method. This is in accord with settled New York law.[27]

The Court did feel, however, that the trial judge was without authority in dismissing the witnesses subpoenaed by the defendant. Nowhere in the record did the defendant request them either to remain or to be discharged, but simlpy indicated that he was unable to conduct a proper examination. Since a trial was to be conducted, it was defendant's right to have his witnesses present.

The Court also held that it was error for the trial judge to mention an appeal in the presence of the jury. The judge had stated "if you buy this record on an appeal, every one of those words will cost you more." The fact that there was an endeavor to correct this statement in the charge was not

22. 7 N.Y.2d 152, 196 N.Y.S.2d 87 (1959).
23. N.Y. Const. Art. I, § 6.
24. U.S. Const. Amend. XIV.
25. N.Y. Code Crim. Proc. § 415.
26. N.Y. Penal Law § 244(1).
27. People v. Hildebrandt, 308 N.Y. 397, 126 N.E.2d 377 (1955).