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Criminal Law—Appeal From Courts Not of Record

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APPEAL FROM COURTS NOT OF RECORD

An appeal from a conviction in a court not of record is taken under Section 751 of the Code of Criminal Procedure "by filing an affidavit with the magistrate . . . setting forth the alleged errors in the proceedings . . ." Then, under Section 756 of the Code, "The magistrate . . . must make a return to all the matters stated in the affidavit . . . (to be filed with the county clerk)." The third relevant statute is Section 388 (1) of the Code which requires that "The district attorney, or other counsel for the people, must open the case." This Section now applies to courts not of record as well as to courts of record,[33] and the defendant cannot waive this requirement.[34]

In the case of *People v. Klein*,[35] the defendant was convicted, in a City Court of Special Sessions, of driving while intoxicated.[36] On appeal to the County Court under Section 751, he alleged five errors in his affidavit, but did not allege a failure of the District Attorney to make an opening statement, as required by Section 388 (1) of the Code. Since Section 756 requires the magistrate to make a return only on those errors alleged by the defendant's affidavit, no return was made concerning the opening statement by the District Attorney, hence there was no indication in the record before the County Court that Section 388 (1) was complied with. The defendant raised this issue for the first time in his argument before that court.

The case of *People v. Levine*,[37] in addition to holding that the requirement of Section 388 (1) cannot be waived, also held that a mere reading of the indictment by the district attorney does not constitute an adequate opening statement. Relying on this case, the County Court in the present case reversed the conviction and, in effect, held as follows: Since the requirement of Section 388 (1) is a fundamental right, not only must there be an opening statement, but it must be an adequate one. The only way its adequacy can be determined is if the statement, or a summary thereof, is contained in the return of the magistrate. "In the absence of such a return, there is no presumption that an adequate opening was made." [38]

The Court of Appeals reversed the County Court, and ordered the latter to rule on the original affidavit of errors filed by the defendant. This reversal was based on the ground that Section 756 of the Code only requires the magistrate to make a return as to errors alleged in the affidavit of the defendant. If the defendant felt the return was insufficient, he should have applied for an amendment under Section 758 of the Code. Otherwise, the return is binding

33. People v. Wallens, 297 N.Y. 57, 74 N.E.2d 307 (1947).
34. People v. Levine, 297 N.Y. 144, 77 N.E.2d 129 (1948).
35. 7 N.Y.2d 264, 196 N.Y.S.2d 964 (1959).
36. N.Y. Vehicle and Traffic Law § 70(5).
37. Supra note 34.
38. 7243 Cases and Points, No. 5, Record On Appeal, Memorandum Opinion of the County Court, p. 79.

on the appellate court,[39] and the conviction of the trial court cannot be lightly set aside on mere statements by the defendant's counsel while arguing the appeal.

The holding of the County Court appears to have been in error for two reasons. In the first place, its reliance on the *Levine* case was misplaced. The *Levine* case was tried, in the first instance, in a County Court, which is a court of record, whereas the present case was tried initially in a court not of record. Thus, the method of appeal is considerably different.[40] Additionally, the face of the record before the Appellate Court in the *Levine* case clearly raised the issue of compliance with Section 388 (1).[41] In the present case, the record was completely void of any reference to Section 388 (1).

The more basic error of the County Court appears to have been that it failed to distinguish between the content of the record in an appeal from courts of record and a return from courts not of record. In the former case, on an appeal, the entire record is forwarded to the Appellate Court. Thus, if the entire records is void of any mention of a "fundamental right" of the defendant,[42] the absence of such an element from the record justifies the presumption that the fundamental right was denied to the defendant. On the other hand, when an appeal is taken from a court not of record, by definition, no record of the entire trial was kept. On appeal, the only record available to the Appellate Court is the return of the magistrate as required by Section 756 of the Code. Since this does not purport to be a record of the entire trial, the presumption is not justified.

Admittedly, in courts not of record, defendants are more likely to be deprived of their rights than in higher courts. It is doubtful that any one case could significantly improve this situation. The present case, however, implicitly attempts to strike a balance between efficient disposition of the many misdemeanor cases which are handled by such courts and securing to the defendant his rights.

REQUIREMENTS FOR ADEQUATE APPELLATE REVIEW IN-FORMA PAUPERIS

It is now well settled in New York that no one can be denied the right to adequate appellate review because of his indigency.[43] The issue of what constitutes adequate appellate review arose in the recent case of *People v. Borum*.[44] The appellant asked the Appellate Division to review his case as

39. This holding is supported by People v. Prior, 4 N.Y.2d 70, 172 N.Y.S.2d 155 (1958); People v. Mason, 307 N.Y. 570, 122 N.E.2d 916 (1954).

40. Compare N.Y. Code Crim. Proc. Part 5, Title III for method of appeal from courts not of record, with Part 4, Title XI for method of appeal from courts of record.

41. "The record discloses that the Assistant District Attorney addressed the jury as follows: . . ." Supra note 34 at 146, 77 N.E.2d 129 (1948).

42. Throughout the Klein case, both the County Court and the Court of Appeals referred to "fundamental rights" or "fundamental error." The precise meaning of these words as used is unclear. They most likely refer to statutory requirements as opposed to those rights protected by the due process clause of the Fourteenth Amendment.

43. People v. Pride, 3 N.Y.2d 545, 170 N.Y.S.2d 321 (1927).

44. 8 N.Y.2d 177, 203 N.Y.S.2d 84 (1960).