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Criminal Law—Requirements For Adequate Appellate In Forma Pauperis

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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).

COURT OF APPEALS, 1959 TERM

an indigent defendant, and to issue a writ of error *coram nobis*. The District Attorney opposed these motions with affidavits stating that the appeal was without merit. The Appellate Division refused to assign counsel to the appellant and dismissed the appeal on all issues.⁴⁵ The appellant had a complete copy of the transcript of all prior proceedings. The Court of Appeals held that the appellant had not received an adequate appellate review, and remanded the case for further proceedings. It said that since appeal was a matter of right, the court cannot dismiss an indigent appeal on the basis of affidavits, or insist that the indigent show that his case has merits before it will entertain the appeal.

The privilege of indigent appeal as a matter of right is fairly recent in New York law. It had been held that the courts could dismiss an appeal where the appellant's indigency prevented him from preparing his case.⁴⁶ Then, in 1956, the U.S. Supreme Court, in *Griffin v. Illinois*,⁴⁷ said that while a state can withhold the privilege of appellate review, once the privilege is made available, it cannot be withheld from poor persons because they are unable to meet the expenses of appeal. This decision required that the state supply the indigent appellant a copy of the transcript of all prior proceedings free. The assignment of counsel, however, when the record is available to the defendant, is a discretionary power of the court and is not necessary when the record shows the appeal is without merit.⁴⁸ In situations where the record is not available to the appellant, the court has held the assignment of counsel to be mandatory in an indigent appeal.⁴⁹

Since appeal is a right, to dismiss an indigent appeal on the merits, on the presentation of affidavits without a complete review of the record, ignores the fact that the appellant was denied the means, (either counsel or record), necessary to adequately prepare his case.⁵⁰ This doctrine was accepted by the Court of Appeals in the instant case. This decision appears to leave the Appellate Division with the choice of either assigning counsel or having a complete review of the record by the bench. Equal protection of the law implies that an indigent appellant have counsel. "No matter how intelligent or educated, a layman does not have the know how to analyze the evidence and evaluate it, much less have the special ability necessary to search out errors, or argue points of law, even if he may be able to recognize them."⁵¹ In the instant case the court does not expressly require that counsel be assigned, but it does require that as thorough a consideration should be given to an indigent appeal as would be given to the appeal of a person of means. This cannot be done,

45. 11 A.D.2d 756, 203 N.Y.S.2d 496 (2d Dep't 1959).

46. *People v. Raymondi*, 180 Misc. 973, 43 N.Y.S.2d 217 (County Ct. 1943).

47. 351 U.S. 12 (1956).

48. *People v. Breslin*, 4 N.Y.2d 73, 172 N.Y.S.2d 157 (1958).

49. *People v. Kalan*, 2 N.Y.2d 278, 159 N.Y.S.2d 480 (1957).

50. *People v. Wilson*, 7 N.Y.2d 568, 200 N.Y.S.2d 40 (1960).

51. *Supra* note 48 at 81, 172 N.Y.S.2d 165 (1958).

if the court requires that the indigent show that his case has substantial merit before it has been reviewed by a qualified member of the bar.

RIGHT OF INDIGENT TO ADEQUATE APPELLATE REVIEW

The defendant in *People v. McCallum*⁵² was convicted of two counts of burglary in the third degree and one count of petit larceny in County Court of Erie County. In his appeal to the Appellate Division, the defendant had neither an attorney nor access to the judgment roll or to the copy of the stenographic minutes of the proceedings of the trial. Nevertheless, the Appellate Division affirmed the conviction.⁵³ In a per curiam opinion, the Court of Appeals reversed the Appellate Division and remitted the case to it for further proceedings, holding that the defendant had been deprived of his rights on appeal in that he had not received an adequate review by the Appellate Division.⁵⁴

The privilege of indigent appeal as a matter of right is fairly recent in New York. It had been held that the courts could dismiss an appeal where the appellant's indigency prevented him from preparing his case.⁵⁵

However, the Supreme Court of the United States decided, in the case of *Griffin v. People of the State of Illinois*,⁵⁶ that a state denies a constitutional right guaranteed by the Fourteenth Amendment to the United States Constitution if it allows all convicted persons to have appellate review except those who cannot afford to pay for the rewards of their trial. "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."⁵⁷

The rationale behind the rule is that such a condition amounts to a discrimination based on financial condition alone and as such amounts to a denial of equal protection and due process of law to those financially unable to pay for a copy of the trial minutes.

In conforming with the decision of *Griffin*, the Court of Appeals formulated a rule for adequate appellate review in indigent cases in *People v. Kalan*.⁵⁸ In the case of an indigent, physically unable to inspect the minutes of the trial on file in the County Clerk's Office, as where he is incarcerated at the time he seeks to appeal, and who urges errors at the trial, assignment of counsel for his appeal is required to insure that he be afforded adequate appellate review within the meaning of the equal protection and due process clauses of the Constitution.

However, when the record of the trial is available to the defendant, the

52. 8 N.Y.2d 155, 203 N.Y.S.2d 66 (1960).

53. 9 A.D.2d 719, 193 N.Y.S.2d 236 (4th Dep't 1959).

54. Supra note 52.

55. *People v. Raymond*, 180 Misc. 973, 43 N.Y.S.2d 217 (County Ct. 1943).

56. 351 U.S. 12 (1956).

57. Id. at 19.

58. 2 N.Y.2d 278, 158 N.Y.S.2d 480 (1957).