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Criminal Law—Right of Indigent to Adequate Appellate Review

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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).

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assignment of counsel is not mandatory but rather within the discretionary power of the court.⁵⁹

Thus, it is now clear that in order for an indigent to have adequate appellate review, he must either be assigned counsel or, the trial record must be made available to him.

APPEAL BY PEOPLE UNDER CODE OF CRIMINAL PROCEDURE SECTION 518 (3)

Section 518 (3) of the Code of Criminal Procedure establishes the right of the People to appeal from a Court order, made at any stage of the action, setting aside or dismissing the indictment on a ground other than the insufficiency of the evidence adduced at the trial.

In the case of *People v. DeCourcy*⁶⁰ the district attorney following the direction of the grand jury, filed an information in the Court of Special Sessions,⁶¹ charging defendant with the "Crime of Leaving Scene of Accident" in violation of subdivision 5-A of Section 70 (now Section 600) of the Vehicle and Traffic Law. Defendant subsequently moved, in County Court, for inspection of the minutes of the grand jury and for an order dismissing the information.

County Court vacated the prior order of the Court of Special Sessions to file the information and dismissed the information so filed.⁶² The Appellate Division⁶³ dismissed the People's appeal on the authority of *People v. Read*⁶⁴ and held that the court lacked jurisdiction as no statute authorized the appeal. The Court of Appeals reversed the Appellate Division and the County Court and reinstated the information.

The earlier case of *People v. Read*⁶⁵ held against an appeal by the People from a motion to dismiss because the statute at that time allowed the People an appeal only from a demurrer. That decision brought about an anomalous situation in the law, as noted by Chief Judge Crane in his opinion, since the People could appeal from a demurrer, but a motion to dismiss the indictment precluded appellate review. The Legislature corrected that situation by amending Section 518 of the Code of Criminal Procedure.⁶⁶ The purpose of that amendment was to broaden the scope of the statute allowing the people an

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

60. 8 N.Y.2d 192, 203 N.Y.S.2d 817 (1960).

61. Pursuant to § 742 N.Y. Code of Crim. Proc.

62. The action of the County Court judge appears to have been completely without authority. "It is not the function of this Court to review the determination of another justice of coordinate jurisdiction." *Smith v. Smith*, 190 Misc. 298, 300, 74 N.Y.S.2d 233, 234, motion denied 272 App. Div. 1076, 75 N.Y.S.2d 390, modified 273 App. Div. 784, 75 N.Y.S.2d 662 (2d Dep't 1947).

"Once a judge has spoken on any subject as to which he has jurisdiction he may be overruled only by a properly constituted appellate tribunal." *People ex rel. Manceri v. Doherty*, — Misc. —, 192 N.Y.S.2d 140, 142 (Sup. Ct. 1959).

63. 10 A.D.2d 641, 196 N.Y.S.2d 890 (2d Dep't 1960).

64. 276 N.Y. 5, 11 N.E.2d 330 (1937).

65. *Ibid.*

66. N.Y. Sess. Laws ch. 832 (1942).