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Criminal Law—Appeal by People Under Code of Criminal Procedure Section 518 (3)

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COURT OF APPEALS, 1959 TERM

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).

appeal as of right from any order setting aside or dismissing an indictment for reason other than insufficiency of evidence adduced at trial. The Court of Appeals following *People v. Levenstein*⁶⁷ stated that as a matter of statutory construction "indictment" as used in Section 518 of the Code of Criminal Procedure also means "information" where appeals from Courts of Special Sessions are involved.

CORAM NOBIS — RIGHT TO EFFECTIVE COUNSEL

The writ of error *coram nobis* has been recognized as a means for vacating judgment based on a violation of the defendant's constitutional rights, but presupposes that the proceeding is not a substitute for appeal, new trial or other statutory remedy.⁶⁸ Although the scope of the writ has been extended considerably, the decisions have denied its application where the petitioner has claimed that his attorney has been guilty of some misconduct or negligence which would amount to inadequate representation.⁶⁹ Thus, the Court of Appeals held, in *People v. Brown*,⁷⁰ and *People v. Tomaselli*,⁷¹ that *coram nobis* will not be granted to dismiss a conviction of a criminal charge when the petitioner merely alleges that assigned counsel erred in judgment,⁷² or failed to represent him properly.⁷³

In the *Tomaselli* case, the petitioner's main contention was that the circumstances under which he pleaded guilty to a forgery charge were such that he was denied effective representation of counsel. Both the County Court of Dutchess County,⁷⁴ and the Appellate Division,⁷⁵ denied petitioner a hearing. Arguing before the Court of Appeals, the petitioner alleged that more than twenty-five years ago he had appeared in the County Court without counsel, for arraignment upon a forgery charge. The court refused to accept a guilty plea and assigned a local attorney, present in the courtroom, to petitioner. Assigned counsel advised petitioner to plead guilty, after conferring with him for only ten minutes. The petitioner, however, acknowledged that during this conference he had admitted his guilt, in answer to a specific question of counsel. A week later the petitioner was given a suspended sentence, after counsel had spoken to the court in his behalf. Several months later, the petitioner was convicted upon a charge of armed robbery, and received a thirty-five year sentence as a second felony offender. It was to vacate the prior conviction and thus relieve himself of the second offender punishment, that the petitioner sought a hearing by way of *coram nobis*.

67. 309 N.Y. 433, 131 N.E.2d 719 (1956).

68. Frank, *Coram Nobis* § 3.01 at 23 (1953).

69. *Id.* § 3.01(g) at 50.

70. 7 N.Y.2d 359, 197 N.Y.S.2d 705 (1960).

71. 7 N.Y.2d 350, 197 N.Y.S.2d 697 (1960).

72. *Supra* note 70.

73. *Supra* note 71.

74. 14 Misc. 2d 470, 197 N.Y.S.2d 451 (County Ct. 1958).

75. 8 A.D.2d 821, 190 N.Y.S.2d 329 (2d Dep't 1959).