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Criminal Law—Coram Nobis: Right to Effective Counsel

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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 convicition 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*.

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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).

In the *Brown* case, the Appellate Division affirmed an order denying a hearing to the petitioner who had been convicted of first degree manslaughter in 1953.[76] In the Court of Appeals, the petitioner alleged that, at the trial, the court-appointed attorney had erred, in both advising against calling eyewitnesses, who had made a statement favorable to him, or using the statement, because it would be detrimental to his case.

In both cases, the Court upheld the denials of the hearings sought, reasoning that post-conviction relief is available to the petitioner only where it is the state, through such an agency as the courts, which denied a defendant effective counsel. Here, however, the Court did nothing which has been established as a basis for granting a hearing by *coram nobis*.

It is well-established that the length of time in which counsel confers with the defendant is not crucial in determining the effectiveness of the counsel's assistance.[77] The Court reasoned that effective representation of counsel is denied only if it was not reasonably deducible that the accused could have been adequately advised under the circumstances. Thus the Court in the *Tomaselli* case concluded, that even for a sixteen-year old boy (the defendant), the charges were not so complicated that the proper course for counsel to point out could not have been determined after a brief conference. It follows that, even though the attorney advised the plea only ten minutes after he had been assigned, the representation given was not ". . . so patently lacking in competence or adequacy that it becomes the duty of the court to be aware of it and correct it." [78]

In the *Brown* case, the same reasoning and principles present in the *Tomaselli* case apply. Here, the Court stated that the conviction would not be vacated where the petitioner merely alleges negligence, or error of counsel's judgment. Although the Court in both cases holds itself responsible for the appointment of effective counsel, it will not be responsible for every error made by otherwise competent counsel.

The dissent discusses the facts in both cases in considerable detail, and contends that the serious nature of the charges made by the petitioners, warrants further investigation. Previously, however, *coram nobis* has been denied where the defendant claimed his counsel had failed to advise him that a coerced confession would be excluded on the trial, and the proceeding ended in a plea of guilty.[79] This writ was also improperly invoked where a petitioner claimed fraud on the part of the defense counsel.[80] In addition, as the majority in both cases point out, the allegations made were such that, though

76. 6 A.D.2d 1032, 178 N.Y.S.2d 1016 (1st Dep't 1958).
77. United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949).
78. Supra note 71 at 356, 197 N.Y.S.2d 702 (1960).
79. People v. Lyons, 19 Misc. 2d 606, 196 N.Y.S.2d 446 (Ct. Gen. Sess. 1952).
80. People v. Neeley, 4 A.D.2d 1019, 169 N.Y.S.2d 268 (1st Dep't 1957); People v. Moore, 284 App. Div. 925, 134 N.Y.S.2d 397 (3d Dep't 1954); People v. Stryzewski, 19 Misc. 2d 598, 196 N.Y.S.2d 337 (County Ct. 1951).

proven, they would not afford basis for relief by coram nobis. This is so, because, as previously indicated, it must be the court that denied the defendant the right to effective counsel, and not some dereliction by counsel himself.[81] Under any reasonable interpretation of the petitioners' claims, it was their own counsels and no state agency that allegedly caused the harm. Nor were the trials "a farce and a mockery of justice," so that the Court was on notice that inadequate representation had been afforded the defendants.[82]

CORAM NOBIS — DEFENDANT DEPRIVED OF COUNSEL OF HIS CHOICE.

The general rule is that *coram nobis* will not lie to correct errors of law or fact apparent on the face of the record.[83] There is an exception,[84] however, where a defendant has been deprived of the right to counsel of his choice as guaranteed by the New York State Constitution.[85] In this instance the writ is available even though an ordinary appeal is possible.

Thus, in *People v. Hannigan*,[86] the Court of Appeals overruled an order of the Appellate Division[87] affirming the denial of an application for a writ of error *coram nobis* by the Bronx County Court, holding that petitioner is entitled to a hearing upon his allegations of denial of due process in that he was deprived of counsel of his choice at the time of sentencing.

The petitioner here, alleged, that at the time of sentencing the County Judge substituted an Assistant District Attorney in place of petitioner's attorney who was then present in the courtroom. Since the State was unable to produce the minutes of sentencing or other evidence to rebut the petitioner's contention, questions of fact and credibility remained for the County Court's disposition, and thus defendant was entitled to a hearing.

The three-man dissent took the position that the County Court, in denying the application, had before it all the evidence that either side would be able to present, and was therefore justified in exercising its discretion as it did.

The present case, while following the *Silverman* case in its expansion of the uses of *coram nobis,* does not constitute a further expansion of the doctrine, but is merely another application of the rule announced in *Silverman* where the court said, ". . . the scope of *coram nobis* will not be expanded unless the injury done to the defendant would deprive him of due process of law."[88]

81. Supra note 71 at 354, 197 N.Y.S.2d 701 (1960).
82. Supra note 77.
83. People v. Sullivan, 3 N.Y.2d 196, 165 N.Y.S.2d 6 (1957).
84. People v. Silverman, 3 N.Y.2d 200, 165 N.Y.S.2d 11 (1957).
85. N.Y. Const. Art. I, § 6.
86. 7 N.Y.2d 317, 197 N.Y.S.2d 152 (1960).
87. 8 A.D.2d 612, 185 N.Y.S.2d 743 (1st Dep't 1960).
88. Supra note 84 at 202, 203, 165 N.Y.S.2d 13 (1957).