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Criminal Law—Revocation of Driver's License

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guilty defendant moved successfully to have the charge prosecuted by indictment.[14] The same grand jury returned a true bill upon the same counts as contained in the information, but without hearing the evidence against defendant a second time. Defendant sought reversal of his conviction because of this failure of the same grand jury to recall the same witnesses who had previously testified before it, or to have their testimony re-read. This is an issue of first impression before the Court of Appeals.[15]

The grand jury had both the power and the duty to inquire into the conduct of defendant.[16] An accused has the right to move to dismiss an indictment based on illegal or insufficient evidence,[17] but there is a presumption that the indictment has been legally found until the contrary is shown.[18] It has been held that a superseding indictment is valid though certain witnesses were not reexamined when both indictments were found by the same grand jury.[19]

In affirming the conviction the Court here held that "the grand jury might have refused to indict and were empowered to indict at least for the same crimes originally stated in the information." Analogizing the indictment replacing the information here to the superseding indictment upheld in prior cases the Court has established a point of law likely to withstand assail. It would be an obvious absurdity to require the grand jury to rehear the very testimony it has once acted upon. This is especially so in the absence of any showing that the defendant was substantially injured.

Revocation Of Driver's License

Section 71 of the New York Vehicle and Traffic Law makes revocation of an operator's license mandatory upon the third speeding conviction within eighteen months.[20]

Section 335-a of the New York Code of Criminal Procedure provides that magistrates, at the time of arraignment and before accepting a plea, must warn all residents of this state charged with traffic violations that a plea of guilty is

14. N.Y. CITY CRIM. CTS. ACT §31(1)(c).

15. The same issue has been affirmed against a defendant, without opinion, in *People v. Wasserberger*, 1 A.D.2d 952, 151 N.Y.S.2d 610 (1st Dep't 1956), and *People v. Gertner*, 2 A.D.2d 960, 158 N.Y.S.2d 749 (1st Dep't 1956).

16. N.Y. CODE CRIM. PROC. §245; People v. International Nickel Co., 155 N.Y. Supp. 156 (County Ct. 1914), *aff'd*, 168 App Div. 245, 155 N.Y. Supp. 295 (2d Dep't 1915), *aff'd*, 218 N.Y. 644, 112 N.E. 1068 (1916).

17. People ex rel. Hirschberg v. Supreme Court of New York, 269 N.Y. 392, 199 N.E. 634 (1936).

18. People v. Sweeney, 213 N.Y. 37, 106 N.E. 913 (1914); People v. Feld, 305 N.Y. 322, 333, 113 N.E.2d 440, 445 (1953).

19. People v. Falasco, 121 Misc. 538, 201 N.Y. Supp. 275 (Sup. Ct. 1923); *cf.* Commonwealth v. Clune, 162 Mass. 206, 213, 38 N.E. 435 (1894).

20. N.Y. VEHICLE AND TRAFFIC LAW §71(2)(c).

equivalent to a conviction after trial, and that conviction may mean suspension or revocation of the accused's operator's license.[21]

May a driver's license properly be revoked upon the third conviction for speeding within eighteen months if at any one of the three arraignments the magistrate failed to so warn the motorist? This question was before the Court in two cases decided on the same day, with results varying according to the circumstances.

In *Hubbell v. Macduff*,[22] the Court of Appeals affirmed the Appellate Division's order[23] reversing dismissal by the Supreme Court at Special Term of the petitioner's proceeding under Article 78 of the New York Civil Practice Act to annul the revocation by the Commissioner of Motor Vehicles of his license and remitting the matter to Special Term to ascertain whether or not the magistrate had in fact given the required warning at the arraingment which led to the petitioner's second conviction.

Rejecting the commissioner's argument that the warning need be given only in that case which resulted in the third conviction, the Court declared that, while such was the case under the law as it stood before July 1, 1953,[24] the amendment effective that date was designed to relieve the magistrate of the necessity of speculating as to the consequences of a conviction in the case before him and that it accomplished this by requiring a simple, uniform warning in prescribed language to be given in every case of traffic violation whether or not a revocation or suspension might be based upon it.[25]

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21. N.Y. CODE CRIM. PROC. §335-a:

> The magistrate upon the arraignment in this state of a resident of this state charged with a violation of the vehicle and traffic law, or other law or ordinance relating to the operation of motor vehicles or motor cycles, and before accepting a plea, must inform the defendant at the time of his arraignment in substance as follows: A plea of guilty to this charge is equivalent to a conviction after trial. If you are convicted, not only will you be liable to a penalty, but in addition your license to drive a motor vehicle or motor cycle, and your certificate of registration, if any, are subject to suspension and revocation as prescribed by law.

22. 2 N.Y.2d 563, 161 N.Y.S.2d 857 (1957).

23. Hubbell v. Macduff, 1 A.D.2d 407, 151 N.Y.S.2d 435 (4th Dep't 1956).

24. See, *e.g.*, Johnston v. Fletcher, 86 N.Y.S.2d 690 (Sup. Ct. 1949), *aff'd mem.*, 275 App. Div. 802, 88 N.Y.S.2d 915 (1st Dep't 1949), *aff'd mem.*, 300 N.Y. 470, 88 N.E.2d 657 (1949).

25. Before the 1953 amendment (N.Y. Sess. Laws 1953, c. 288) the section read as follows:

> §335-a. Provisions applicable to arraignments for traffic violations. The magistrate, after the arrest in this state of a resident of this state charged with a violation of the vehicle and traffic law, or other law or ordinance relating to the operation of motor vehicles or motor cycles, and before accepting a plea, must inform the defendant at the

(Footnote continued on following page.)

But in *Astman v. Kelly*[26] the Court held that, while it was error for the judge in a trial on charges of speeding to omit to give the defendant the prescribed warning, it was not, under the given circumstances, prejudicial error and did not require annulment of the commissioner's order revoking the defendant's license.

Astman was convicted of three speeding violations within a period of eighteen months, and in each case pleaded guilty. In the first two cases he received from the magistrate the prescribed warning before the pleas were entered. In the third case the magistrate failed to give the warning at any time. Shortly after the third conviction, upon which he was fined twenty-five dollars, he requested and was granted permission to withdraw his plea of guilty and enter a plea of not guilty in its stead. No reason for his request appeared in the record. After trial, at which he was represented by counsel, he was found guilty and fined the same amount. At no time in any of the proceedings leading to this conviction was he given the prescribed warning. The Commissioner of Motor Vehicles subsequently revoked his operator's license, and Astman thereafter instituted a proceeding under Article 78 of the Civil Practice Act for a review of the commissioner's action. The Appellate Division,[27] reversing an order of Special Term, directed the commissioner to restore the motorist's license. The Court of Appeals agreed with the Appellate Division's ruling that the requirement of Section 335-a is not waived by the entry of a plea of not guilty, but held that a failure to give the statutory warning will not invalidate a revocation of license unless the omission was prejudicial. The Court declined to find that the petitioner had been prejudiced in respect to a substantial right since he neither claimed to have had an unfair trial nor pointed to any errors transpiring during the trial, and since it appeared that he had been represented by counsel, that he had stated

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(Footnote continued from preceding page.)

> time of his arraignment that upon conviction, not only will he be liable to a penalty, but that, in addition, his license to drive a motor vehicle or motor cycle, or in the case of an owner, the certificate of registration of his motor vehicle or motor cycle, may or must be suspended or revoked in accordance with the provisions of law governing the charge involved, and must expressly inform the defendant that a plea of guilty is equivalent to a conviction after trial. (N.Y. Sess. Laws 1947, c. 418.)

After the amendment the section read substantially as set out in note 21, *supra*. The opinion of the Appellate Division (Hubbell v. Macduff, *supra* note 23 at 411, 151 N.Y.S.2d at 439) states: "It is unfortunate that the draftsmen of the amendment did not use more explicit language in expressing the legislative intent. Nevertheless, in the light of the language used, the circumstances under which it was enacted, and the difficulties of administration which were sought to be eliminated, we conclude that the Legislature intended by the amendment to provide a uniform warning in the form prescribed by the statute which must be given in every case involving a violation of the Vehicle and Traffic Law or other laws or ordinances relating to the operation of motor vehicles.

26. 2 N.Y.2d 567, 161 N.Y.S.2d 860 (1957).

27. Astman v. Kelly, 1 A.D.2d 449, 151 N.Y.S.2d 589 (4th Dep't 1956).

he was "ready" when called for trial, that he had not been denied the right or opportunity to produce witnesses, that the right of appeal was open to him, and that the withdrawal of his guilty plea had not been used against him.

Although the Court avoids making the point, it is submitted that a factor in reaching such a decision might well be the inference from circumstances that the reason for the defendant's withdrawal of his plea of guilty was that he had learned in the meantime that his license was to be revoked. If the inference is supported by a record which shows a diligent conduct of the defense at trial, then it could fairly be concluded that the statutory warning was in this case unnecessary to achieve the objective obviously intended by the legislature in prescribing it, *i.e.,* to put the defendant on notice of the consequences that might follow his conviction so that he might not enter a hasty or ill-considered plea of guilty or be too casual in his defense at trial after a plea of not guilty.

Judge Van Voorhis dissented, arguing that, since the majority opinion endorsed the rule that the requirement of section 335-a is not waived by the entry of a plea of not guilty, and since the Court had in a previous case[28] ruled that the warning must be read regardless of whether the defendant is represented by counsel, the mere combination of these two factors cannot convert the character of the failure to read the warning from prejudicial to non-prejudicial error.

It is submitted: (1) that the dissent lends support to the idea that the majority gave more weight than is expressed in its opinion to the circumstance that the record failed to show any reason for the defendant's withdrawal of his plea of guilty, and (2) that Judge Van Voorhis is unwilling to mitigate the effect of the failure to obey a "simple and imperative legislative enactment"[29] on the basis of such inference.

Unlicensed Practice Of Law

In *In re Roel*[30], the accused was charged with violation of section 270 of the Penal Law which provides that the practice of law without a license is illegal.[31] The defendant, a member of the Mexican Bar but not a member of

28. People v. Duell, 1 N.Y.2d 132, 151 N.Y.S.2d 15 (1956).
29. Astman v. Kelly, *supra* note 26 at 575, 161 N.Y.S.2d at 866.
30. 3 N.Y.2d 224, 165 N.Y.S.2d 31 (1957).
31. N.Y. PENAL LAW §270:
> It shall be unlawful for any natural person to practice or appear as an attorney at law . . . or to hold himself out to the public as being entitled to practice law aforesaid, or in any other manner . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state . . . .