

10-1-1957

Criminal Law—Appeal and Error

Jack Getman

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Recommended Citation

Jack Getman, *Criminal Law—Appeal and Error*, 7 Buff. L. Rev. 128 (1957).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol7/iss1/59>

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ex rel. Mauer v. Jackson,³⁵ where the defendant pleaded guilty to the offenses of attempted robbery in the first degree and assault in the first degree, the Court of Appeals held that concurrent sentences could be imposed.

The Court rested their decision on dual grounds. It was first held that robbery, and assault with the intent to kill are separate acts which may command separate punishments, thus rendering section 1938 inapplicable. Here it was pointed out that although a simple assault merges with the act of robbery,³⁶ an assault with the intent to kill is a separate and distinct act since such an intent is not a necessary element of the crime of robbery.³⁷

Secondly, and most notably, the Court held that concurrent sentences do not impose a double punishment on the defendant.³⁸ The Court felt that such sentences merge into a single punishment measured by the sentence for the highest grade offense. It was pointed out that section 1938 condemns only multiple punishment and is silent as to multiple convictions and concurrent sentences.

Defendant contended that concurrent sentences effected a double punishment since his chances for parole would be injured.³⁹ The Court rejected this, saying that even without concurrent sentences the record of multiple convictions would appear on defendant's record.

The practical effect of the above decision is to restrict the operation of section 1938 to cases involving consecutive rather than concurrent sentences. It is also noteworthy that this interpretation helps to insure against the defendant going unpunished if an error is found in the conviction for the highest degree crime.

Appeal And Error

Section 542 of the Code of Criminal Procedure states, "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."

35. 2 N.Y.2d 259, 159 N.Y.S.2d 203 (1957).

36. *Zovick v. Eaton*, 259 App. Div. 585, 20 N.Y.S.2d 477 (3rd Dep't 1940); *Richardson v. Morhaus*, 182 Misc. 299, 43 N.Y.S.2d 221 (Sup. Ct. 1943).

37. N.Y. PENAL LAW §2124 provides:

Robbery in first degree. An unlawful taking or compulsion, if accomplished by force or . . . when committed by a person:

1. Being armed with a dangerous weapon

38. This is an apparent reversal of the Court's former position in affirming lower court cases holding contra: *People v. Nelson*, 309 N.Y. 231, 128 N.E.2d 391 (1955); *People v. Goggin*, 281 N.Y. 611, 22 N.E.2d 174 (1939).

39. This argument has been accepted in other jurisdictions. *People v. Craig*, 17 Cal.2d 453, 110 P.2d 403 (1941).

Under this section the question of substantial rights is not the abstract question of guilt or innocence; a guilty man being in any event entitled to a fair trial.⁴⁰ Error affects substantial rights when it can be said that it tended to influence the verdict.⁴¹

In the cases of *People v. Ochs*⁴² and *People v. Mendes*,⁴³ the Court reversed convictions and ordered new trials on the grounds that in each case the substantial rights of the defendants had been affected. In both cases the Court felt that although the evidence was sufficient to find the defendants guilty, they had been deprived of a fair trial. In the former case the Court held that it was improper for the trial judge to include in the charge to the jury his opinion on the credibility of the defendant as an interested witness. In the latter case the Court held that it was improper for the trial judge to question defendant's witnesses in such a manner as to indicate a communicable disbelief of their testimony.

In the case of *People v. LaMarca*,⁴⁴ the Court affirmed a conviction on the grounds that the errors alleged were technical and not reversible errors. The Court held that although it may be error for a trial judge to fail to answer a question propounded by the jury,⁴⁵ after a full and proper charge has been given, that error will not be reversible unless there is a serious prejudice to the defendant's rights in the failure or refusal to answer the question. The Court also held that it was not error for the trial judge to fail to charge as to lesser degrees of homicide, since such a charge need not be given in a felony murder prosecution unless called for by the evidence.

The purpose of section 542 of the Code of Criminal Procedure is to do away with reversals upon technical errors which really had not affected the result,⁴⁶ or infringed upon the fundamental right to a fair and impartial trial.⁴⁷ Not only error, but harm to the defendant, must be shown to justify the reversal of a judgment of conviction.⁴⁸ Where the trial judge makes direct comments which are unfair and prejudicial to the defendant, the defendant is clearly not given a fair trial.⁴⁹ Whether a defendant is deprived of a fair trial because of

40. *People v. Sobieskoda*, 235 N.Y. 411, 139 N.E. 558 (1923).

41. *People v. Gerdvine*, 210 N.Y. 184, 104 N.E. 129 (1914).

42. 3 N.Y.2d 54, 163 N.Y.S.2d 671 (1957).

43. 3 N.Y.2d 120, 164 N.Y.S.2d 401 (1957).

44. 3 N.Y.2d 452, 165 N.Y.S.2d 753 (1957).

45. N.Y. CODE CRIM. PROC. §427; *People v. Gonzales*, 293 N.Y. 259, 56 N.E.2d 574 (1944).

46. *People v. Cummins*, 209 N.Y. 283, 103 N.E. 169 (1913); *People v. Bailey*, 215 N.Y. 711, 109 N.E. 1086 (1915).

47. *People v. Becker*, 210 N.Y. 274, 104 N.E. 396 (1914); *People v. De Martino*, 252 App. Div. 476, 299 N.Y.Supp. 781 (2d Dep't 1938).

48. *People v. Youns*, 151 N.Y. 210, 45 N.E. 460 (1896); *People v. Patrick*, 182 N.Y. 131, 74 N.E. 843 (1905).

49. *People v. Corey*, 157 N.Y. 332, 51 N.E. 1024 (1898); *People v. Scaringi*, 241 App. Div. 883, 271 N.Y. Supp. 1079 (2d Dep't 1934).

questions asked by a trial court is a closer issue, as indicated by the dissent in *People v. Mendes*. It is often a necessary and proper function of a trial judge to take part in the examination of a witness to elicit significant facts, to clarify issues or to facilitate the orderly progress of the trial.⁵⁰ But the trial judge must refrain from asking questions in such a way as to disclose his opinion on the merits or indicating a doubt on his part as to credibility of witnesses.⁵¹ Under section 427 of the Code of Criminal Procedure a trial judge may not decline to answer jury's request for further instructions, but not every failure to answer jury's questions constitutes reversible error.⁵² It is only where the court fails to give information requested on a vital point, or where the failure to answer does substantial harm to the defendant, that an appellate court may not disregard the error.⁵³

Coram Nobis

The writ of error coram nobis will be granted upon a showing that a conviction was obtained by coercion, fraud, misrepresentation, or in any situation where the defendant has been convicted without a preservation of his constitutional rights, and this does not appear on the record.⁵⁴ It is also a proper remedy to void a conviction where it is established that the defendant had been mentally incompetent at the time of his arraignment.⁵⁵ In *People v. Sullivan*,⁵⁶ *People v. Smyth*,⁵⁷ *People v. Silverman*,⁵⁸ and *People v. Shapiro*,⁵⁹ the Court of Appeals added both clarity and confusion to the problems surrounding the ancient writ.

In *People v. Sullivan*,⁶⁰ defendant contended that the failure of the trial clerk to ask him, after his plea of guilty, whether he had legal cause to show why judgment should not be rendered, was such a denial of due process as to permit use of the writ of error coram nobis.⁶¹ The Court denied this claim, and declared that

50. *People v. Ohanian*, 245 N.Y. 227, 157 N.E. 94 (1927.)

51. *People v. Mulvey*, 1 A.D.2d 541, 151 N.Y.S.2d 587 (4th Dep't 1956); *People v. Pecoraro*, 177 App. Div. 803, 164 N.Y. Supp. 1058 (2d Dep't 1917); *People v. Kachadourian*, 116 N.Y.S.2d 486 (County Ct. 1952).

52. *People v. Gezzo*, 307 N.Y. 385, 121 N.E.2d 380 (1954); *People v. Lay*, 279 N.Y. 737, 18 N.E.2d 686 (1938).

53. *People v. Gonzales*, 293 N.Y. 259, 56 N.E.2d 574 (1944); *People v. Shapiro*, 285 N.Y. 581, 33 N.E.2d 250 (1941); *People v. Wilkie*, 286 App. Div. 835, 142 N.Y.S.2d 271 (1st Dep't 1955).

54. *People v. Sadness*, 300 N.Y. 69, 89 N.E.2d 188 (1949). See 1 BUFFALO L. REV. 272 (1952) for a good discussion of the history of the writ of coram nobis in New York.

55. *People v. Boehm*, 309 N.Y. 362, 368, 130 N.E.2d 897, 900 (1955).

56. 3 N.Y.2d 196, 165 N.Y.S.2d 6 (1957).

57. 3 N.Y.2d 184, 165 N.Y.S.2d 737 (1957).

58. 3 N.Y.2d 200, 165 N.Y.S.2d 11 (1957).

59. 3 N.Y.2d 203, 165 N.Y.S.2d 14 (1957).

60. See note 56, *supra*.

61. Defendant relied upon section 480 of the CODE OF CRIMINAL PROCEDURE which declares:

When the defendant appears for judgment, he must be asked by the clerk whether he has any legal cause to show why judgment should not be pronounced.