Buffalo Law Review

Volume 7 | Number 1 Article 60

10-1-1957

Criminal Law—Coram Nobis

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Recommended Citation
Thomas T. Basil, *Criminal Law—Coram Nobis*, 7 Buff. L. Rev. 130 (1957).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol7/iss1/60

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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 witnessess.[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 denal 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.

where only "the validity of the sentence is in question, the defendant is limited"[62] to other forms of appeal. In reaching its result, it stated that, before entertaining a motion for a writ, it was first necessary to determine the *nature* of the underlying error, such as conviction through coercion, or fraud.[63] Second, and more important, it viewed the writ itself as an emergency measure, a tool of the court used in the exercise of discretion, when *all* other avenues of judicial relief were closed to a defendant. To be successful, the defendant must satisfy the two criteria formulated by the Court. Since the defendant in *People v. Smyth*[64] could not produce evidence of his mental incompetence at the time of arraignment, he could not demand a writ by demonstrating that the nature of the error allowed for the use of the writ.

Both of these standards were applied in *People v. Shapiro*,[65] where the Court affirmed an order denying a motion to vacate judgment through an attempted use of the writ, since errors of fact were apparent on the face of the record, *and* another means of appeal was available, although not taken by counsel.[66] The result in the *People v. Silverman* case was not so satisfying. There the contention of the defendant that the trial court improperly assigned counsel to him, and refused to grant counsel of his own choosing, was held to be error of such a nature as to entitle him to a hearing on his motion.[67] Although the Court examined the nature of the underlying error, and found for the defendant, it did not satisfy the other criterion set forth in the *Sullivan* case; that it, the unavailability of *any* other avenue of judicial relief by way of appeal, since the Court found the error to be obvious and a regular appeal would lie.[68] Because a post-conviction remedy was available, the writ should have been denied, even though the nature of the error allowed for a use of the writ of error coram nobis.

If the Court in the *Sullivan* decision meant that a defendant need only meet *one* of the criteria set forth, then the decisions are consistent. But, there was great emphasis placed upon the extraordinary quality, the emergency use, of coram nobis, and the need to meet that criterion along with the other relating to the nature of the mistake. Even a desire to treat each case according to its own equities can not satisfactorily explain the misapplication or non-application of the two standards established in the *Sullivan* case. A contrary result in the case of *People v. Silverman* would have established much sounder footing for future case problems

62. People v. Sullivan, 3 N.Y.2d 196, 198, 165 N.Y.S.2d 6, 9 (1957).
63. *Id.* at 198, 165 N.Y.S.2 at 9. For a discussion of the types of cases where relief has been afforded, and which provide the basis for the narrow use of the writ, see 1 BUFFALO L. REV. 274 (1952), and cases cited therein.
64. 3 N.Y.2d at 186, 165 N.Y.S.2d at 739.
65. See note 59 *supra*.
66. People v. Shapiro, 3 N.Y.2d 203, 204, 165 N.Y.S.2d 14, 15 (1957).
67. People v. Silverman, 3 N.Y.2d 200, 165 N.Y.S.2d 11 (1957).
68. *Id.* at 201, 165 N.Y.S.2d at 13.

involving coram nobis where both the nature of the writ and its emergency application are brought into dispute.

Parole Violation

The Correction Law, section 219, provides that if any prisoner, who has been paroled from a state prison commits and is convicted of a crime in another state, which if committed in this state would be a felony, he shall upon his return to this state be confined in prison to serve the remaining portion of the maximum sentence from which he had been paroled.[69] The Court held (4-3) in *People ex rel. Watkins v. Murphy,*[70] a habeas corpus proceeding, that section 218 of the Correction Law,[71] which provides that a parole board should declare a prisoner to be delinquent whenever there is reasonable cause to believe he has violated his parole, does not terminate the prisoner's parole so as to immunize him from the penalty imposed by section 219.

The defendant, a parolee from a New York prison, had been declared delinquent from such parole in accordance with section 218. A month later he was arrested, convicted and sentenced to a term in a Texas prison for the commission of a crime, which all of the Court agreed would be a felony if committed in this state. Upon being released from the Texas prison, he was returned to New York to serve the remainder of the maximum sentence from which he had originally been paroled.

When a prisoner is paroled, he is in fact being permitted to serve part of his sentence outside of prison.[72] As of the time he is declared delinquent from this parole however, his sentence stops and the "time owed shall date from such delinquency."[73]

The dissenting judges upheld the defendant's contention that he did not commit the crime while he was on parole for he had previously been declared delinquent thereby terminating his parole. As soon as the parole is declared delinquent, he assumes the status of an escaped convict.[74] Therefore, since he is no longer lawfully out of prison, he cannot be said to be a charge of the Board of Parole;[75] nor can he be said to be on parole within the meaning of section 219 if he is no longer on parole within the meaning of section 218.

The majority however views the parolee as a prisoner on parole and until

69. N.Y. CORRECTION LAW §219.
70. 3 N.Y.2d 163, 164 N.Y.S.2d 719 (1957).
71. N.Y. CORRECTION LAW §218.
72. People ex rel. Rainone v. Murphy, 1 N.Y.2d 367, 153 N.Y.S.2d 21 (1956).
73. N.Y. CORRECTION LAW §218.
74. Hutchings v. Mallon, 245 N.Y. 521, 157 N.E. 842 (1927).
75. Dote v. Martin, 294 N.Y. 330, 62 N.E.2d 217 (1945).