

1-1-1956

Criminal Law—Procedure; Appeal

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Recommended Citation

Paul A. Foley, *Criminal Law—Procedure; Appeal*, 5 Buff. L. Rev. 194 (1956).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol5/iss2/30>

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though his record was bad and he himself maintained that he was beyond the pale. In addition, though the trial court exceeded its powers in recommending that defendant serve the maximum term, this was not reversible error; proper procedure would be followed when the determination as to his release was made.

The Court thus tacitly recognized that it cannot police the discretion of trial judges as to whether an offender is incorrigible, even when the trial court (as here) betrays its true motivation for using the Correction Law machinery. If the trial court wishes to utilize this to imprison defendants for a longer period of time than would be possible by using the determinate sentences, and then refuses to concur in the Parole Board's recommendation for an early release,¹³ judicial review is powerless to intervene. It is deplorable that a trial judge may thus subvert the clear legislative intent to rehabilitate offenders by using the corrective statutes to impose a heavier sentence than a strict punishment statute would allow.

Procedure; Appeal

In *People v. Fromen*,¹⁴ after a conviction had been reversed by the Appellate Division,¹⁵ the state appealed, but they failed to note the case for argument for more than seven months. The Court, in a per curiam opinion, held that the appeal must be dismissed.

The Code of Criminal Procedure § 536 provides unequivocally that failure by either party to bring an appeal to argument within ninety days after it is granted, in the absence of any enlargement will result in a dismissal of the appeal on the theory that it has been abandoned. The Court has been very liberal in the past in excusing delays, even where both parties have been remiss in bringing the appeal to argument,¹⁶ or counsel misinterpreted the law,¹⁷ or assigned counsel was lax in noting the argument.¹⁸ In *People v. Solomon*,¹⁹ however, the Court warned against future delays of this type, and the instant case is indicative of their change of policy. It is suggested, however, that where strict application of

13. N. Y. CORRECTION LAW §204 (a)-2; "The parole commission shall have power to: Parole . . . provided the . . . court who made the commitment . . . shall . . . approve in writing such parole . . ."

14. 308 N. Y. 324, 125 N. E. 2d 591 (1955).

15. 284 App. Div. 576, 132 N. Y. S. 2d 376 (4th Dep't 1954).

16. *People v. Sprager*, 215 N. Y. 266, 109 N. E. 247 (1915), three and a half year delay excused.

17. *People v. Solomon*, 296 N. Y. 85, 70 N. E. 2d 404 (1946), nine month delay excused.

18. *People v. Nelson*, 188 N. Y. 234, 80 N. E. 1029 (1907), delay of one year excused.

19. See Note 17, *supra*.

§ 536 would deprive a convicted defendant of an appeal, the Court may well revert to their former policy of liberal forgiveness.²⁰

In *People v. Blakeslee*,²¹ an appeal from a conviction in the Recorder's court of Jamestown was transferred to the Supreme Court because of the voluntary disqualification of the County Court Judge. A unanimous Court upheld the Supreme Court's affirmation of the conviction, rejecting a contention that since only an appeal to the County Court is authorized by statute, review by the Supreme Court was void.

Code of Criminal Procedure § 517, which authorizes an appeal to the County Court of the county where a conviction was had by a court of special sessions, must be read in conjunction with Code of Criminal Procedure § 44, which specifically authorizes a transfer because of the incapacity of the county judge. The phrase "having jurisdiction of such an action or proceeding" found in § 44 was held not to limit the Supreme Court's jurisdiction in such transfers to actions wherein it has original jurisdiction over appeals. The phrase is but surplusage retained when the old territorial limitations on city courts were abolished.

It is to be noted that the instant case is a relatively rare situation, because in the more populous counties, where there is a special County Judge, he would preside on the incapacity of the regular judge, and a recent addition to the statute also gives the Surrogate authority to preside if both the regular and special County Judges are incapacitated.²²

Conclusiveness of Magistrate's Return

One appeal from a criminal conviction in New York may be taken as a matter of right.²³ Thus an appeal from a Court of Special Sessions will be heard by the County Court.²⁴ Any further appeal in such an instance would be to the Court of Appeals upon a certification by a Justice of the Appellate Division that a question of law is involved which ought to be reviewed.²⁵ The first appeal is heard by the County Court on the basis of the return prepared and filed by the magistrate

20. See notes 17, 18, and 19, *supra*, where the delay in each case was by the defendant rather than the state, but *cf. People v. Triola*, 174 N. Y. 324, 66 N. E. 966 (1903), where the Court took a very strict view of the statute against a defendant.

21. 308 N. Y. 289, 125 N. E. 2d 573 (1955).

22. N. Y. CODE CRIM. PROC. §517.

23. N. Y. CODE CRIM. PROC. §520.

24. *Id.*, §520 (2).

25. *Id.*, §520 (3).