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Criminal Law and Procedure—Coram Nobis—Proper Remedy Where Defendant Has Been Wrongfully Prevented from Taking of Perfecting an Appeal

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CRIMINAL LAW AND PROCEDURE

CORAM NOBIS—PROPER REMEDY WHERE DEFENDANT HAS BEEN WRONGFULLY PREVENTED FROM TAKING OR PERFECTING AN APPEAL

Defendant, who was convicted of murder in the second degree in May, 1950, alleged that at the time of his conviction he was 18 years old and indigent; that upon conviction, his court assigned counsel took an appeal to the Appellate Division of which defendant had no knowledge or information; that one year later the Appellate Division dismissed that appeal for failure to perfect it, and that defendant had no knowledge or information of the dismissal. Several years later he allegedly learned for the first time of the appeal and its dismissal, whereupon he presented a motion to the Appellate Division seeking vacatur of the dismissal of the appeal from the judgment of conviction. From the Appellate Division's denial of this motion for vacatur, defendant appeals by permission to the Court of Appeals. *Held*, defendant's appeal to the Court of Appeals, whether regarded as an appeal from an order refusing to vacate the dismissal of the past conviction appeal or as an order denying coram nobis relief, must be dismissed under Code of Criminal Procedure, sections 517(3) and 519. The Court continued, however, stating that the defendant does have a right and remedy through a coram nobis petition to the original trial court for a hearing. If, at that hearing, defendant can prove his allegations, he shall be entitled to a reinstatement of his right to appeal to the Appellate Division from his judgment of conviction. *People v. Adams*, 12 N.Y.2d 417, 190 N.E.2d 529, 240 N.Y.S.2d 155 (1963).

In New York State, under the Code of Criminal Procedure,[1] the only mode of review of a judgment or order in a criminal action or in a proceeding or special proceeding of a criminal nature, except criminal contempt, is by appeal.[2] The right to appeal in a criminal case is held to exist only by virtue of this statutory authorization and is not a matter of inherent or constitutional right,[3] so that review by an appellate court of final judgments in criminal cases is not a necessary element of due process of law.[4] With the exception of judgments imposing the death penalty where there is statutory right of appeal directly to the Court of Appeals,[5] criminal convictions are to be appealed either to the Appellate Division of the Supreme Court of the department in which conviction was had, or to the county court of the county where conviction was imposed if imposed by a court of special sessions, a police court, police magistrate or justice

1. N.Y. Code Crim. Proc. § 515.
2. People *ex rel.* Dawkins v. Frost, 129 App. Div. 498, 114 N.Y. Supp. 209 (2nd Dep't 1908).
3. People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (1945); People v. Sidoti, 1 A.D.2d 232, 149 N.Y.S.2d 371 (4th Dep't 1956).
4. People v. Gersewitz, *supra* note 3.
5. N.Y. Code Crim. Proc. § 517(1), as construed in People v. Lyons 17 N.Y. St. Rep. 766, 2 N.Y. Supp. 604 (Sup. Ct. 1888).

of the peace.[6] Appeals to the Court of Appeals from an intermediate appellate court are strictly controlled by statute, and are allowed only where permission is granted either by a judge of the Court of Appeals or by a justice of the Appellate Division through the granting of a certificate indicating that a valid question of law is involved.[7] The Code of Criminal Procedure creates in the people, as in the defendant, a statutory right to appeal certain orders affecting indictments and convictions in criminal cases, and such appeal is to be prosecuted in the same courts to which the defendant has recourse.[8] Where either party desires to appeal the result of a criminal case or proceeding, notice of appeal generally must be given within 30 days after judgment is rendered.[9] Time limitations of this sort are strictly adhered to for reasons of expediency and public policy,[10] and while there is statutory provision for extension in extreme instances,[11] such extension is not ordinarily granted.[12] Where an appellant in good faith serves a notice of appeal, but through mistake or excusable neglect fails to perfect the appeal, the court in its discretion may permit the correction of the defects as justice requires.[13] Argument on the appeal is to be held within 90 days of the termination of the notice period unless the court, upon motion, enlarges that time, or the Courts will consider the appeal abandoned and will dismiss it.[14] While there is in New York a clearly established statutory right to appeal in criminal cases,[15] and while there is also a clear right for the accused to be represented by counsel at trial and to have counsel assigned if he be indigent,[16] the right of an indigent appellant to have assigned counsel prosecute the appeal is not absolute. The appointment of counsel on appeal turns upon whether or not the indigent prisoner has a copy of the trial minutes. If he does, no counsel is appointed,[17] otherwise appointment is mandatory.[18]

The preceding material is a summary of the chief statutory provisions governing the proper conduct of appeals from criminal convictions in New York, as well as a general overview of the right to appeal such convictions and the rights of the indigent to be represented on such appeal by assigned counsel. Ordinarily it may be presumed that only if these prescribed procedures for appellate review

6. N.Y. Code Crim. Proc. § 517(3). Section 517(2) specifies the appropriate Court in New York City.
7. N.Y. Code Crim. Proc. § 520.
8. N.Y. Code Crim. Proc. § 518, as construed in People v. Goldstein, 192 Misc. 337, 78 N.Y.S.2d 256 (N.Y.C. Ct. Spec. Sess. 1948).
9. N.Y. Code Crim. Proc. § 521.
10. See People v. Solomon, 296 N.Y. 85, 70 N.E.2d 404 (1946).
11. N.Y. Code Crim. Proc. § 521-a.
12. See People v. Solomon, 296 N.Y. 85, 70 N.E.2d 404 (1946).
13. N.Y. Code Crim. Proc. § 524-a.
14. N.Y. Code Crim. Proc. §§ 535, 536; See People v. Solomon, 296 N.Y. 85, 70 N.E.2d 404 (1946).
15. N.Y. Code Crim. Proc. § 515; See People *ex rel.* Dawkins v. Frost, 129 App. Div. 498, 114 N.Y. Supp. 209 (2d Dep't 1908).
16. N.Y. Code Crim. Proc. § 308.
17. People v. Breslin, 4 N.Y.2d 73, 149 N.E.2d 85, 172 N.Y.S.2d 157 (1958).
18. People v. Pitts, 6 N.Y.2d 288, 160 N.E.2d 523, 189 N.Y.S.2d 650 (1959); People v. Kalan, 2 N.Y.2d 278, 140 N.E.2d 357, 159 N.Y.S.2d 480 (1957).

are closely adhered to, will appeal be allowed; conversely, it would be expected that if these rules were not followed explicitly the right to appeal would be lost.[19] There is, however, a body of case law (both New York and Federal) as well as Federal statutory provisions[20] which have allowed the right of appeal to continue in the face of direct failure to obey prescribed statutory procedures. The courts have granted this redress where the failure on the part of the defendant was due to excusable neglect or circumstances beyond the control of the defendant. Thus, where correct appellate procedure was not followed because of a defendant's insanity,[21] or because of the obstructive conduct of prison officials who blocked defendant's attempts to mail notice of appeal,[22] or because of erroneous advice of assigned counsel to the defendant that appeal was impossible,[23] or because of a trial court's failure to notify defendant that it would allow his appeal in forma pauperis,[24] the courts have held that these defendants had been denied their rights to appeal through extenuating circumstances which had rendered impossible obedience to procedural rules, and therefore appeal could still be taken.

In the instant case, the timely appeal of the judgment of conviction was begun by assigned counsel, who failed to perfect the appeal, whereupon it was dismissed as "abandoned." Defendant contends that he was at all times without knowledge or notice of this appeal and its subsequent dismissal. This court reasons that if in fact, defendant was unaware of this activity on the part of his assigned counsel, he was as effectively frustrated in his right to appeal as were the insane and imprisoned defendants in the cases cited above. The court concludes that if the defendant was ignorant of the dismissed appeal he was wrongfully prevented from taking and perfecting that appeal and therefore entitled to reinstatement of rights to appeal.

There is to be noted a definite and pronounced trend toward the granting of relief and remedies of an "equitable nature" by the courts in cases where appeal from criminal convictions have been thwarted. That it is desirable for the courts to seek substantial justice in these cases rather than to rely on technical procedural considerations is evidently a beneficial public policy as recognized in *Christoffel v. United States*:

> In a criminal case in which a sentence of imprisonment is involved, there is a public interest against denial of consideration on appeal of substantial questions as to the lawfulness of the conviction. For if the conviction is erroneous it is abhorrent to justice that a defendant shall nevertheless suffer such a penalty for the crime charged.[25]

19. People v. Caminito, 3 N.Y.2d 596, 148 N.E.2d 139, 170 N.Y.S.2d 799 (1958).
20. See the Court's use of Rule 45(b)(2), Fed. R. Crim. P. in the case of Blunt v. U.S. 244 F.2d 355, 360 (D.C. Cir. 1957); See also cases cited in footnotes 21, 22 & 23.
21. People v. Hill, 8 N.Y.2d 935, 168 N.E.2d 841, 204 N.Y.S.2d 172 (1960).
22. People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961).
23. People v. Coe, 16 A.D.2d 876, 228 N.Y.S.2d 249 (4th Dep't 1962).
24. Blunt v. United States, 244 F.2d 355, 361 (D.C. Cir. 1957).
25. 190 F.2d 585, 590 (D.C. Cir. 1950).

The remedy used to effect reinstatement of rights to appeal in the majority of these cases has been a writ of coram nobis and a hearing to determine the validity of the defendant's claim.[26] Once the validity of the claim is established, the right to appeal is simply considered as reinstated,[27] or the court may impose a new sentence *nunc pro tunc* so that the appeal period runs anew.[28] This is an expansion of the use of the writ coram nobis which ordinarily is used to bring to the attention of the trial court matters occuring during the trial, but the Court of Appeals has stated that it would not hesitate to expand the scope of the writ when necessary to afford a deserving defendant a remedy in those cases in which no other avenue of judicial relief appeared available.[29]

Joseph S. Forma

ARREST FOR MISDEMEANOR NOT COMMITTED IN PRESENCE OF OFFICER NOT SUPPORTABLE BY EVIDENCE SEIZED INCIDENT THERETO

In one opinion the Court of Appeals reversed the convictions of six defendants arrested without warrants on charges of book-making.[1] Defendants Caliente and Sessa were arrested after police officers observed them exchanging money and slips of paper with various people. Search incident to the arrest produced betting slips. Two other defendants, Cognetta and Grecco were arrested by police officers who entered a store through a transom after hearing telephone conversations indicating that bets were being received on horseraces and football games. Defendants Perlman and Bernstein were arrested by a police officer who had placed bets by telephone with individuals then unknown to him. After thus registering the bets, the officer proceeded to nearby premises and stationed himself outside of the room in which was located the telephone he had called. Peering through a mail slot the officer saw the defendants recording bets received by

26. See *e.g.*, People v. Stanley, 12 N.Y.2d 250, 189 N.E.2d 478, 238 N.Y.S.2d 935 (1963); People v. Hill, 8 N.Y.2d 935, 168 N.E.2d 841, 204 N.Y.S.2d 172 (1960); People v. Coe, 16 A.D.2d 876, 228 N.Y.S.2d 249 (4th Dep't 1962).

27. People v. Hill, *supra* note 26.

28. People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961).

29. *Ibid.*

1. The convictions were under § 986-b of the Penal Law. N.Y. Penal Law § 986 provides: "Any person who engages in . . . book-making with or without writing at any time or place; or any person who keeps or occupies any room . . . upon any public or private grounds within this state . . . for the purpose of recording or registering bets or wagers . . . and any person who records or registers bets or wagers . . . upon the results of any trial or contest of skill, speed, or power of endurance of man or beast . . . or any person who receives, registers or records . . . any money, thing or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered, by or for any other person . . . is guilty of a misdemeanor. . . ." N.Y. Penal Law § 986-b provides: "Any person other than a peace officer in the performance of his duty as such, who knowingly have possession of any writing, paper or document representing or being a record, made by a person engaged in book-making . . . of a bet or wager upon the results of any trials or contests . . . shall be guilty of a misdemeanor. Proof of the possession of any writing . . . of the kind mentioned herein is presumptive evidence of possession thereof knowingly."