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Criminal Procedure—Coram Nobis: More Cases

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to Dannemora.[69] No judicial hearing on the issue of sanity is required by the statute. On the other hand, if a physician of a county penitentiary reports to the warden that a prisoner serving a term of one year or less or convicted of a misdemeanor is insane, the warden may not on the basis of this one report transfer him to a hospital for the criminally insane. The warden must apply to a judge of a court of record for a further examination to be made by two other physicians.[70] Subsequent provisions of the statute provide for notice to the prisoner and to his relatives[71] and for a hearing, which may be demanded by the relative, on the issue of sanity.[72] If no hearing is demanded, the judge will proceed to determine the issue of sanity and either grant or dismiss the order for the transfer.[73]

The failure of the Legislature to provide specifically for a hearing on the issue of sanity on behalf of a prisoner convicted of a felony and transferred to Dannemora should not preclude a hearing. A state prison and a state hospital for the criminally insane differ so radically that if a hearing on the issue of sanity is requested, it should be granted to prevent any possible injustice. The Court of Appeals, although ignoring any possible constitutional issues, wisely afforded the present defendant appropriate relief through the writ of habeas corpus.

Bd.

CORAM NOBIS: MORE CASES

Coram nobis is an extraordinary writ of error designed to afford a convicted defendant a remedy against substantial injustice when no other means of judicial relief is, or was ever, open to him. The application for the writ is generally always sustained, if the error committed affected a constitutionally guaranteed right.[74] During the past term, the Court of Appeals was required to determine whether coram nobis would lie in regard to alleged error not apparent on the record and committed in the information,[75] by the prosecution's failing to inform the jury of a promise of leniency extended to a witness,[76] by the defense counsel and the court interpreter's misconduct,[77] and by the prison authorities' preventing the taking and perfection of an appeal.[78]

In *People v. Hamm*,[79] the defendant, a school teacher, was apprehended during a gambling raid and charged with disorderly conduct.[80] The arresting

69. N.Y. Correction Law § 383. (It is not clear from the opinion whether this procedure was used in the instant case, but it is reasonable to assume so.)
70. N.Y. Correction Law § 408(1).
71. N.Y. Correction Law § 408(2).
72. N.Y. Correction Law § 408(4).
73. N.Y. Correction Law § 408(3).
74. See Frank, Coram Nobis § 3.01 at 23 (1953); Paperno and Goldstein, Criminal Procedure in New York, Ch. 37 at 709 (1960).
75. People v. Hamm, 9 N.Y.2d 5, 210 N.Y.S.2d 508 (1961).
76. People v. Mangi, 10 N.Y.2d 86, 217 N.Y.S.2d 72 (1961).
77. People v. Hernandez, 8 N.Y.2d 345, 207 N.Y.S.2d 668 (1960).
78. People v. Hairston, 10 N.Y.2d 92, 217 N.Y.S.2d 77 (1961).
79. Supra note 75.
80. N.Y. Penal Law § 722(1).

officer prepared a written, unsworn information which did not designate the defendant by name. The defendant, along with numerous others, paraded before a judge, who had established court at the raided premises, pleaded guilty and paid a small fine. After these proceedings had concluded, a typewritten information, identical with the pencil copy except that it named the defendant, was filed as a record of the court, although the pencil copy was not recorded. Defendant was thereupon dismissed from his position by the School Board, at which Board meeting he learned for the first time of the filed typewritten information. The time to appeal from the conviction had expired; therefore, a coram nobis proceeding was commenced to vacate the conviction on the ground that the information was fatally defective.

As a general rule, coram nobis is not available to test the sufficiency of an information, as the defect is apparent on the record;[81] however, in the present case the allegedly invalid information was never part of the record and could not have been attacked on appeal. Only going beyond the record could the court discover the invalid information. Therefore, coram nobis, the Court of Appeals held, was the proper and exclusive remedy of the defendant.

The more important phase of this case lies in the Court's answering of the State's unsuccessful contention that the penciled paper prepared by the officer was a sufficient information. It would appear that the trial court acquired jurisdiction of the person of the defendant by a valid arrest. The defendant argued that he did not realize that he was under arrest, since neither the arresting officer nor the trial judge informed him of the fact; however, the Court of Appeals declined to upset the finding of the lower courts that the defendant must have known his status. The information, therefore, served as a pleading.[82] Although there is no explicit constitutional or statutory requirement that an information used as a pleading be sworn to, it will be defective if not so sworn to.[83] The present information was also defective in that it did not specifically charge the defendant by name with the offense.[84]

The State's further contention was, however, that even though the information was fatally defective, that fact is irrelevant because no written information is required to charge the defendant with an offense, such as the disorderly conduct charge in the present case, as compared to a misdemeanor.[85] The Court of Appeals rejected this contention. A prosecution, be it for a felony, misdemeanor, or offense, shall be based on a formal, sworn accusation in writing, be it indictment or information.[86] This apparently new extension of the

81. People v. Eastman, 306 N.Y. 658, 116 N.E.2d 494 (1953); People v. Parker, 8 A.D.2d 863, 186 N.Y.S.2d 787 (3d Dep't 1959); People v. Fortson, 7 A.D.2d 139, 180 N.Y.S.2d 945 (3d Dep't 1958).

82. See People v. Belcher, 302 N.Y. 529, 534, 99 N.E.2d 874, 876 (1951).

83. People v. James, 4 N.Y.2d 482, 176 N.Y.S.2d 323 (1958).

84. People v. Knapp, 152 Misc. 368, 274 N.Y. Supp. 85 (County Ct. 1934), aff'd, 242 App. Div. 811, 275 N.Y. Supp. 637 (1st Dep't 1934).

85. See People ex rel. Jackson v. Fennelly, 5 A.D.2d 71, 168 N.Y.S.2d 1018 (3d Dep't 1957), aff'd, 4 N.Y.2d 966, 177 N.Y.S.2d 494 (1958).

86. See dissenting opinion of Fuld, J., in People v. Jacoby, 304 N.Y. 33, 44, 105 N.E.2d

requirement of a sworn, written information, irrespective of whether the information serves as a pleading or a means of vesting jurisdiction, is indeed sound and encouraging in light of the fundamental purposes an information serves.

The failure to inform the jury of a promise of leniency extended to the prosecution's principal witness formed the basis for the application of a writ of coram nobis in *People v. Mangi*.[87] A violation of due process occurs, if the prosecutor during the trial knowingly uses perjured testimony of an accomplice,[88] and coram nobis would lie. In a previous application of this rule in *People v. Savvides*,[89] the Court of Appeals held that where a witness falsely testified that there existed no agreement by which he was to receive leniency for testifying against the defendant, the prosecution's failure to expose the perjured testimony was substantial error warranting a reversal of the conviction.

The defendant in the present case was convicted mainly on the basis of testimony of the witness Gordon, an accomplice, and Gordon's wife. The majority of the Court, by examining the stenographic minutes of the sentencing of Gordon, found that a promise of leniency was extended to the witness by the prosecutor;[90] however, the dissent, emphasizing other language of the prosecutor at the sentencing,[91] refused to find such a promise. It must be admitted that no promise was made to induce the witness to cooperate, but the prosecutor clearly indicated that he would request leniency for the witness and call to the attention of the court the cooperation of the witness.

In sustaining the application for coram nobis and vacating the conviction, the Court declared that "the existence of such a promise might be a strong factor in the minds of the jurors in assessing the witness' credibility and in evaluating the worth of his testimony";[92] therefore, such a promise must be disclosed to the jury by the prosecution. The Court placed very little emphasis on the fact that the witness denied the existence of a promise, although the witness' denial was mentioned at the conclusion of the opinion. It would appear that the Court feels that the prosecution should disclose all such promises, even though the witness does not falsely deny the existence of such a promise. By eliminating the element of perjury, the Court would be clearly extending the former law as established by *People v. Savvides*.[93]

In *People v. Hernandez*,[94] the defendant claimed that he and his attorney,

613, 618 (1952); People v. Sheriff of Otsego County, 3 Misc. 2d 231, 154 N.Y.S.2d 748 (Sup. Ct. 1956).

87. Supra note 76.

88. Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1934); People v. Fischer, 23 Misc. 2d 391, 192 N.Y.S.2d 741 (Ct. Gen. Sess. 1958).

89. 1 N.Y.2d 554, 154 N.Y.S.2d 885 (1956).

90. ". . . but I did tell him, your Honor, that if he did testify as a People's witness, that that cooperation would be called to the Court's attention at the proper time."

91. ". . . I was in no position to make any promises to him of any kind whatsoever. . . ."

92. People v. Mangi, supra note 76 at 89, 217 N.Y.S.2d at 74.

93. Supra note 89.

94. Supra note 77.

selected by him, never spoke about the case because of the impassable language barrier between them. On the occasion of the defendant's withdrawal of his plea of guilty, the trial judge asked him, through the court interpreter, whether he had "talked this over with [his] lawyer," and the defendant answered in the affirmative. The defendant then, in the application for a writ of coram nobis, swore that the interpreter did not ask him that particular question in Spanish. Furthermore, before setting a date for sentencing, the trial judge inquired of counsel whether he had "advised [his client] as to what the minimum sentence might be in a plea of robbery in the first degree." The attorney answered in the affirmative, and the defendant then denied any consultation with the attorney on this subject.

The Court of Appeals refused to grant a hearing on the allegations raised in the writ of coram nobis on the alternative grounds that the alleged facts were unquestionably false,[95] or even if they were established as true, the defendant's claim would not entitle him to relief.[96] The defendant would be entitled to coram nobis relief where his plea of guilty has been induced by the trickery, deceit, coercion, fraud, or misrepresentation of the district attorney or the court.[97] The writ, however, does not include within its scope the claim of fraud in the making of the plea induced by statements or representations of the accused's own counsel.[98]

The defendant, however, contended that the fraud of the interpreter, who is an officer of the court,[99] constituted fraud on the part of the court and, therefore, entitled him to relief. In reply to this argument, the Court declared that the trial judge was not required to ask the questions. If the interpreter had never asked any questions on this subject to the defendant, there still would be no grounds for vacating the conviction.[1] This argument of the Court is weak, but it is sounder than stating that the defendant is a liar, since the entire tone of the opinion indicates that the Court felt that these allegations were conceived by a desperate defendant. In addition, if these allegations were true, the defendant should have brought to the attention of the trial court the fact that he was not receiving effective representation from counsel and should not have waited until the present coram nobis proceeding to raise the points.[2]

In *People v. Hairston*,[3] the defendant was wrongfully prevented by prison authorities from complying with the statutory requirements for taking and perfecting an appeal. The Court of Appeals, in affirming the Appellate

95. Cf. People v. Piccioti, 4 N.Y.2d 340, 175 N.Y.S.2d 32 (1958).
96. People v. Brown, 7 N.Y.2d 359, 361, 197 N.Y.S.2d 705, 707 (1960).
97. Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943).
98. People v. Brown, 7 N.Y.2d 359, 197 N.Y.S.2d 705 (1960); People v. Tomaselli, 7 N.Y.2d 350, 197 N.Y.S.2d 697 (1960); People v. Saladak, 15 Misc. 2d 506, 183 N.Y.S.2d 276 (County Ct. 1958).
99. See N.Y. Code Crim. Proc. § 55. Cf., People v. Randazzio, 194 N.Y. 147, 157, 87 N.E. 112, 116 (1909).
1. But see Kercheval v. United States, 274 U.S. 220, 223-224 (1927).
2. People v. Moore, 284 App. Div. 925, 134 N.Y.S.2d 377 (3d Dep't 1954).
3. Supra note 78.

Division,[4] directed that if at a hearing before the county court, the defendant proves the allegations, the judgment of conviction must be vacated and the sentence must be imposed on the verdict. Thus the time to appeal would commence anew.

The writ of coram nobis is usually held to matters occurring during the trial; however, the Court of Appeals has not hesitated to expand the scope of the writ to cases where no other judicial relief is available.[5] The right to a criminal appeal is not a necessary part of constitutionally-guaranteed due process,[6] but if the defendant has been prevented from complying with the statutory requirements for the taking and perfecting an appeal because of action by law enforcement or prison authorities, he has been denied a right guaranteed by the equal protection clauses of the Federal Constitution[7] and the New York Constitution,[8] and some method of judicial review must be afforded him.[9]

In *People v. Guhr*,[10] a case with facts analogous to the present, the Appellate Division declined to state whether coram nobis or habeas corpus was the correct remedy in such a case. The court, in an effort to avoid distinguishing between the remedies, placed the burden of affording adequate relief on the district attorney and the trial court at a subsequent hearing. The Court of Appeals in the present case made no attempt to distinguish between coram nobis and habeas corpus, as the Court was more interested in affording adequate relief to a defendant whose constitutional rights had been impaired.

From these four cases, it can be seen that specific boundaries beyond which the writ of coram nobis will not lie have been drawn. The Court of Appeals, however, will not hesitate to readjust these boundaries within reason. The Court will, in reality, examine the particular fact situation and manipulate the boundaries in order to achieve substantial justice.

Bd.

DECEDENTS' ESTATES AND TRUSTS

More Remote Descendants Excluded from a Disposition to "My Grandchildren Then Living"

In the case of *In re Welles Will*,[1] decided by the Court of Appeals in 1961, the Court held that a trust for the testator's daughter for life with remainder

4. 12 A.D.2d 721, 208 N.Y.S.2d 138 (4th Dep't 1960).
5. People v. Sullivan, 3 N.Y.2d 196, 165 N.Y.S.2d 6 (1957); People v. Kronick, 308 N.Y. 866, 126 N.E.2d 307 (1955); People v. Hill, 9 A.D.2d 451, 195 N.Y.S.2d 295 (2d Dep't 1959), aff'd, 8 N.Y.2d 935, 204 N.Y.S.2d 172 (1960).
6. People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (1945), cert. denied, 326 U.S. 687 (1945).
7. U.S. Const. amend. XIV, § 11.
8. N.Y. Const. art. I, § 11.
9. Dowd v. United States ex rel. Cook, 340 U.S. 206 (1951). See also Cochran v. State of Kansas, 316 U.S. 255 (1942).
10. 5 A.D.2d 688, 169 N.Y.S.2d 256 (2d Dep't 1957).

1. 9 N.Y.2d 277, 213 N.Y.S.2d 441 (1961).