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Criminal Law—Conclusiveness of Magistrate's Return

Leon Schulgasser

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§ 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).

rendering the judgment.²⁶ The magistrate may be compelled to file this return²⁷ or, if it is defective, may be compelled to file an amended return.²⁸

In *People v. Mason*²⁹ the Court decided that a magistrate's return, once filed and not challenged by the appellant, is to be deemed sufficient and correct, and is to be deemed so admitted by the appellant. In the instant case, affidavits were filed by the appellant, assigning errors including failure of the magistrate to advise defendant of his right to counsel and failure to warn that a conviction or a guilty plea to the charge of driving while intoxicated³⁰ might lead to the revocation or suspension of the defendant's operator's license.³¹ The magistrate's return definitely controverted these allegations of error, but the appellant in no way moved to have the return amended. Thus the return must be deemed correct, and defendant's affidavits could not stand before it.³²

New Trial

The New York Code of Criminal Procedure provides that a new trial may be granted on the ground of newly-discovered evidence³³ only if³⁴, (1) the evidence is such as will probably change the result if a new trial is ordered, (2) it has been discovered since the trial, (3) it could not have been discovered before the trial by the exercise of due diligence, (4) it is material to the issue, (5) it is not cumulative to the former issues, and (6) it does not merely impeach or contradict the former evidence. In *People v. Salemi*³⁵ the defendant, awaiting execution for murder, claimed that he had unearthed evidence that the only witness who identified him as the killer had been committed to an insane asylum the day the verdict had been returned, and also that the victim's dying declaration, which identified defendant as the assailant, could not possibly have been spoken because of decedent's physical condition. Defendant also claimed that new evidence would show that the witness to whom the dying declaration was supposedly addressed could not have been in decedent's presence at the time he claimed the declaration was made to him.

26. *Id.*, §756.

27. *Id.*, §757.

28. *Id.*, §758.

29. 307 N. Y. 570, 122 N. E. 2d 916 (1954).

30. N. Y. VEHICLE AND TRAFFIC LAW §70 (5).

31. N. Y. CODE CRIM. PROC. §335-A.

32. *People v. Hilliker*, 50 N. Y. S. 2d, 509 (1944); *People v. Chambers*, 189 Misc. 502, 74 N. Y. S. 2d 293 (1947).

33. N. Y. CODE CRIM. PROC. §465 (7). See *People v. Priori*, 164 N. Y. 459, 472, 52 N. E. 668, 672 (1900); *People v. Eng Hing and Lee Dock*, 212 N. Y. 373, 392, 106 N. E. 96, 102 (1914).

34. 309 N. Y. 208, 128 N. E. 2d 377 (1955).

35. N. Y. CODE CRIM. PROC. §528 provides: ". . . When the judgment is of death, the court of appeals may order a new trial, if it be satisfied . . . that justice requires"