Volume 71 | Issue 1 Article 8

December 1968

Criminal Law--Plea Bargaining

Larry Andrew Winter
West Virginia University College of Law

As the West Virginia Court of Claims is now established, it is a quasi-judicial body that advises the legislature as to the validity of claims against the state, to be approved or rejected as the legislature sees fit. Possibly the court's decisions would gain more importance if the Legislature would appropriate a fund, based on estimates of expected claims, from which an award approved by the court would be paid directly without the necessity of legislative approval in each case. This would give the court greater stature and relieve the Legislature of the time-consuming process of approving every award. Another solution might be for the state to follow New York[20] and allow itself to be sued in the courts of the state as a citizen, but this would require a constitution amendment. Nevertheless, the establishment of the Court of Claims in West Virginia marks a significant advance in West Virginia law toward the treatment of persons who deal with or who are injured by state employees.

Danny Lee Stickler

Criminal Law—Plea Bargaining

Ray Bailey was charged with murder in 1932. The prosecution and defense attorneys agreed that if Bailey would plead guilty to murder with a recommendation for mercy, then the solicitor and chief of police would recommend a pardon or parole after Bailey had served not more than ten years. Bailey's understanding was that he was to be released after serving no more than ten years. However this agreement between the prosecutor and the defense was entirely extrajudicial. Bailey pleaded guilty as agreed, but no inquiry or mention was made to determine whether Bailey understood the charges or whether his plea was voluntary. After the ten year period, the Governor and the State Parole Board refused to grant Bailey a pardon or parole. The Court of Appeals for the Fourth Circuit held that Bailey's plea was not voluntarily or understandingly made and therefore was void. *Bailey v. MacDougall,* 392 F.2d 155 (4th Cir. 1968).

I. The Practice of Plea Bargaining and Its Support

Plea bargaining is a commonly used technique in the administration of criminal justice. The most common forms of plea arrange-

[20] N.Y. CONST. art. 6, § 23 (1950). The constitution provides for a court of six judges, with power in the Legislature to increase the number. The court is one of record. It appoints its own clerk. It has jurisdiction to hear and determine "claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide."

ments are: (1) "sentence recommendation, (2) the plea to a lesser included offense, (3) and the dismissal of charges in an indictment, information or other charging paper."[1] The bargaining process is usually initiated by the prosecutor because of his obvious advantage over the accused. "In exchange for a guilty plea, the prosecutor may agree to recommend a lighter sentence, to accept a plea to a lesser included offense, or to dismiss other pending charges."[2]

The practice of sentence recommendation involves a promise by the prosecutor that he will recommend a lighter sentence to the court or that he will not seek the maximum punishment for the offense. In an idealistic sense this device permits the prosecutor to consider the individual offender in each case in an attempt to seek a sentence which will aid the defendant's rehabilitation.[3] The danger involved in sentence recommendation is that the defendant must enter a plea of guilty in reliance upon the prosecutor's promise, which has no binding effect upon the court.

In a Delaware case[4] the defendant was originally charged with forgery which is a felony.[5] Through plea negotiation he pleaded guilty to a lesser offense of obtaining money under false pretenses, a misdemeanor carrying no specific punishment.[6] The maximum penalty for the original charge of forgery was five years. However, the defendant was sentenced to seven years on the basis of his guilty plea to the misdemeanor charge. The cause was remanded and the majority of the court said "the bargain between the State and the prisoner should not have been summarily rejected. . . .[T]he court is not free to ignore the action of the State."[7]

However, in an Arizona case, the state supreme court took notice of the plea negotiation but refused to be bound by the bargain saying that the mere existence of such an agreement does not necessarily indicate that the lesser sentence would aid the defendant's rehabilitation.[8] Considering the uncertainty incident to sentence recommendation, the practice loses all value unless there exists a reasonable expectation that the court will accept the terms of the bargain.[9]

---

[1] Note, *Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas,* 112 U. PA. L. REV. 865, 866 (1964).
[2] Commonwealth v. Maroney, 423 Pa. 337, 345; 223 A.2d 699, 703 (1966).
[3] Note, *Prosecutor's Discretion,* 103 U. PA. L. REV. 1057, 1070 (1955).
[4] Hinckle v. State, 189 A.2d 432 (Del. 1963).
[5] 11 DEL. CODE ANN. § 541 (1953).
[6] 11 DEL. CODE ANN. § 554 (1953).
[7] Hinckle v. State, 189 A.2d 432, 435 (Del. 1963).
[8] State v. Maberry, 93 Ariz. 306, 380 P.2d 604 (1963).
[9] 112 U. PA. L. REV., *supra* note 1, at 866.

A less hazardous method of plea bargaining is for the prosecutor to ask that the court accept a guilty plea to a lesser included offense. This approach insures the court's participation in the bargaining process, and the defendant enters his plea only after the court has indicated its acceptance of the bargain.

The practice of dismissing other charges included in an indictment in exchange for a guilty plea to one or more charges has been unsuccessfully challenged in West Virginia. *State v. Ward*[10] involved a defendant who was charged in fourteen indictments of violation of banking laws. Through negotiation with the prosecution and the banking commissioner, both sides agreed that if the defendant would plead guilty to one of the charges and aid the banking commissioner in liquidation of the bank's accounts, the prosecutor would dismiss the other thirteen indictments. The defendant performed his side of the agreement; but, upon being released from prison he was brought into court on an indictment which was identical to one of the thirteen charges discharged by the court at his first trial in 1925. The West Virginia Supreme Court of Appeals, citing the case of *Denham v. Robinson,*[11] indicated that the practice of plea bargaining has been well established in West Virginia through a long period of usage and has been, at least "inferentially," recognized by statute for fifty years.[12] Accordingly, the court held that the promise of the prosecutor was a pledge of public faith, and therefore, should be honored.

A requirement essential to the validity of plea negotiations is that the defendant must enter the guilty plea voluntarily.[13] However, the courts have failed to formulate a clear definition of voluntariness or to establish any procedure to determine the voluntariness of a guilty plea.[14] It is established though that any form of coercion, whether physical or mental, renders any guilty plea involuntary and subjects the conviction to collateral attacks and the possibility of being declared constitutionally void.[15]

---

[10] 112 W. Va. 552, 165 S.E. 803 (1932).

[11] 72 W. Va. 243, 77 S.E. 970 (1913).

[12] The statute referred to is W. VA. CODE ch. 62, art. 2, § 25 (Michie 1966) which provides as follows:

> If any prosecuting attorney shall compromise or suppress any indictment or presentment without the consent of the court entered of record, he shall be deemed guilty of malfeasance in office, and may be removed therefrom in the mode prescribed by law.

[13] Machibroda v. United States, 368 U.S. 487, 493 (1962).

[14] Nunley v. United States, 294 F.2d 579, 580 (10th Cir. 1961), *cert. denied,* 368 U.S. 991 (1961).

[15] Waley v. Johnston, 316 U.S. 101 (1942); Walker v. Johnston, 312 U.S. 275 (1941); Kercheval v. United States, 274 U.S. 220 (1927); United States v. Cariola, 323 F.2d 180 (3d Cir. 1963); Perpiglia v. Rundle, 221 F. Supp. 1003 (E.D. Pa. 1963).

The case of *Shelton v. United States*[16] raised some questions concerning the legality of plea bargaining. Shelton attempted to vacate a one-year sentence by saying that his guilty plea was involuntarily entered because of the coercive nature of the prosecution's promise of a one-year sentence. Upon a confession of error by the Solicitor General,[17] the Supreme Court reversed the judgment without opinion. The *Shelton* case led to some speculation that any guilty plea induced by a promise of a reduced sentence from the prosecutor is void. However, subsequent lower court cases have held that the mere existence of a prosecutor's promise does not necessarily render the guilty plea involuntary.[18] The Federal District Court of Oregon has even said that if a "plea of guilty was coerced, [defendant] is entitled to have it set aside, and his guilt is irrelevant."[19]

In addition to the requirement of voluntariness the defendant's plea of guilty must be entered with an "understanding of the nature of the charge."[20] The reason for this is that a plea of guilty is of the same effect as a conviction because "the court has nothing to do but give judgment and sentence."[21] However it is not required that the defendant know of "all collateral legal consequences of the conviction."[22] In the case of *Twining v. United States*[23] the court held that where the defendant was aware of the severity of the offense charged and the possible punishment involved, he had an adequate understanding of the charges to plead guilty.[24] In the instant case, Bailey's plea of guilty was held to be involuntary because no effort was made at the arraignment to determine if Bailey understood the consequences of his plea.

---

[16] 242 F.2d 101, *rev'd en banc on rehearing,* 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam on confession of error,* 356 U.S. 26 (1958).

[17] In this case the judge admitted his failure to comply with Rule 11 of the Federal Rules of Criminal Procedure.

[18] Anderson v. North Carolina, 221 F. Supp. 930 (W.D.N.C. 1963). In this case the court assumed the constitutionality of a bargained plea. *See also* Sorrenti v. United States, 306 F.2d 236 (5th Cir. 1962), *cert. denied,* 373 U.S. 916 (1963); Watts v. United States, 278 F.2d 247 (D.C. Cir. 1960); Kent v. United States 272 F.2d 795 (1st Cir. 1959).

[19] Barber v. Gladden, 220 F. Supp. 308, 313 (D. Ore. 1963).

[20] FED. R. CRIM. P. 11.

[21] Kercheval v. United States, 274 U.S. 220, 223 (1927).

[22] United States v. Cariola, 323 F.2d 180, 186 (3rd Cir. 1963).

[23] 321 F.2d 432 (5th Cir. 1963).

[24] Some jurisdictions hold that the wording of the charging papers alone is adequate to give the defendant an understanding of the nature of the charge. *See* Mora v. United States, 317 F.2d 818 (5th Cir. 1963); People v. Doyle, 20 Ill. 2d 163, 169 N.E.2d 250 (1960); Johnson v. State, 223 Md. 479, 164 A.2d 917 (1960); However, the mere presence of a defense attorney does not insure that the plea is understandingly made. United States v. Davis, 212 F.2d 264 (7th Cir. 1954).

II. Criticism

Critics of plea bargaining have based their arguments largely upon philosophical considerations[25] and upon the motivation behind the practice.[26] However, the most convincing argument is usually based upon the realistic assumption that the practice of plea bargaining tends to encourage an innocent man to plead guilty.[27] Ordinarily the motivation for confessing guilt is to ease one's conscience. Yet, it is not unreasonable to assume that many innocent persons have pleaded guilty falsely in the face of overwhelming circumstantial evidence and aroused public sentiment which would practically insure conviction.[28]

Commentators have also given attention to the psychological motivations of an innocent man falsely confessing guilt.[29] For example, the psychologically defective personality known as a "pathological liar" may satisfy his own psychological abnormal need by confessing falsely to a crime.[30] Another form of psychological defect supplying the necessary motivation for false confessions is "mendacious self-impeachment."[31] Also individuals of "sub-marginal mentality" are easily induced to falsely confess guilt to a crime.[32] Furthermore, in many cases a simple "morbid desire for notoriety" provides ample motivation for false confessions.[33]

The common criticism of plea bargaining is that it "precludes society from imposing its full sanction upon the convicted criminal."[34] Also the practice provides for little public record of the process and therefore "is rarely subject to review by a higher court. . . ."[35] Society has a vital interest in the sentencing of criminal offenders which

---

[25] Commonwealth v. Maroney, 423 Pa. 337, 223 A.2d 699 (1966).

[26] Dash, *Cracks In The Foundation Of Criminal Justice,* 46 ILL. L. REV. 385 (1951).

[27] *See The Influence Of The Defendant's Plea On Judicial Determination Of Sentence,* 66 YALE L.J. 204 (1956).

[28] *Id.* at 221. "The judicial practice of reducing sentence following guilty pleas works a subtle coercion upon the defendant incompatible with the constitutional guarantee of due process."

[29] Note, *Voluntary False Confessions: A Neglected Area In Criminal Administration,* 28 IND. L.J. 374 (1953).

[30] *Id.* at 379.

[31] *Id.* "Mendacious self-impeachment" is descriptive of an abnormal personality which receives gratification by deliberately being untruthful for purposes of self-degradation and self-destruction.

[32] *Id.* at 380.

[33] *Id.* at 382.

[34] 103 U. PA. L. REV., *supra* note 3, at 1070.

[35] *Id.* at 1071.

should not be abrogated by arbitrary bargains between prosecutors and defense attorneys.[36]

III. Some Needed Safeguards

Plea bargaining, when accompanied with proper safeguards, is frequently in the best interest of both the state and the accused.[37] From the state's viewpoint, the benefits of plea bargaining are based primarily on saving time, expense, and manpower. The benefits accruing to the defendant include reduction in sentence, dismissal of other charges, and reduction in the degree of offense originally charged.

At the beginning of any plea negotiation the defendant should be informed of the legal significance and effect of pleading guilty.[38] In states which have "habitual criminal statutes" the effect of a guilty plea in relation to this statute should be fully explained. To insure that a defendant completely realizes the effect and consequence of a guilty plea, the collateral results such as loss of voting privileges, the inability to qualify for certain jobs, the stigma placed by society upon convicts, and the fact that prior convictions may be used to determine the length of sentence in a subsequent conviction should be outlined in detail. The defendant should also understand the prosecutor's inability to bind the court with his promises.[39]

Plea bargaining should no longer be a *sub rosa* procedure, but every promise from both sides should be made a part of the public record. Since the function of the administration of criminal justice is to protect the community, then it follows that the community as such should exercise primary control over the punishment of its offenders. Bringing the process of plea bargaining from the depth of secret and sometimes false promises to an open atmosphere of honest exchange would benefit not only the public's interests, but also the lot of criminal offenders.[40]

Larry Andrew Winter

---

[36] Ohlin and Remington, *Sentencing Structure: Its Effect Upon Systems For The Administration Of Criminal Justice,* 23 LAW AND CONTEMPORARY PROBLEMS 495 (1958).

[37] Commonwealth v. Maroney, 423 Pa. 337, 223 A.2d 699 (1966).

[38] *See* Kercheval v. United States, 274 U.S. 220, 223 (1927).

[39] *See* State v. Maberry, 93 Ariz. 306, 380 P.2d 604 (1963); People v. Bannon, 364 Mich. 471, 110 N.W.2d 673 (1961).

[40] For an excellent list of needed safeguards in the practice of plea bargaining see 112 U. PA. L. REV., *supra* note 1, at 893-95.