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Intermediate Court of Kanawha County

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THE JUDGE'S RESPONSIBILITY ON A PLEA OF GUILTY*

JUDGE WILLIAM J. THOMPSON**

One of the most serious responsibilities which rests on the shoulders of a trial judge in a criminal case is that of accepting a plea of guilty from an offender. Such pleas are received in approximately ninety per cent of all the cases he handles. In each instance he is confronted with three constitutional guaranties which belong to every defendant and which are found in both the federal and state constitutions: (1) that he shall have the assistance of counsel;¹ (2) that he shall be entitled to a trial by jury;² and (3) that he shall not be deprived of life or liberty without due process of law.³

From time to time the West Virginia Supreme Court of Appeals must devote considerable time to hearing writs complaining of abuses by the trial court in connection with the handling of guilty pleas. A few years ago some inmates of the penitentiary at Moundsville directed a petition to the members of the West Virginia Legislature, in which it was charged that under the present practice in this state of accepting pleas it was common "to extract pleas suitable to the prosecution" through "bargaining, compromises, various types of pressure, malice, and prejudice." The petition further complained that numerous persons were presently confined in that institution under pleas improperly received by the trial courts. These courts were accused of use "every shabby trick" in order to "expedite and clear their docket." According to the petitioners "this condition

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¹ U.S. CONST. amend. VI; W. VA. CONST. art. III, § 14.
² Ibid.
³ U.S. CONST. amend. V, XIV § 1; W. VA. CONST. art. III, § 10.

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certainly reflects upon the dignity of the courts.” The matter received state-wide publicity with the result that the Legislative Interim Committee made some study of it.4 Those of us who exercise trial court responsibility in criminal cases can curtail much very unfavorable and often unfair and embarrassing accusation and criticism of the judiciary by following appropriate procedure and using precaution attendant upon accepting such pleas.

The West Virginia Supreme Court of Appeals has said that “before receiving a plea of guilty in a criminal case, the court shall see that it is made by a person of competent intelligence, freely and voluntarily, and with a full understanding of its nature and effect, and of the facts on which it is founded.”5 And later in State v. Stone, the court wrote: “To authorize the acceptance and entry of a plea of guilty and judgment and sentence thereon, the plea must be entirely voluntary. It must not be induced by fear, by misrepresentation, by persuasion, or by the holding out of false hopes, nor be made through inadvertence, or by ignorance.”6 A plea of guilty entered other than voluntarily by the defendant has consistently been held incapable of supporting a sentence imposed thereon for the obvious reason that it deprives the defendant of a trial by jury and violates his rights guaranteed under the due process clause of the Federal Constitution.7 A defendant cannot, however, plead guilty with the expectancy of receiving a shorter sentence and then have his sentence set aside if he knew his rights and the consequences of his act at the time he entered the plea, providing he was not induced to do so by someone such as his counsel, the law enforcement officers or the prosecuting attorney.

The criterion, it would seem, leaves no room for compromised pleas or agreements entered into between the prosecuting attorney and the defendant or even his counsel, although there might be acquiescence therein by the trial judge. Pleas received with the

4 The petition was presented to the 1957 session of the legislature as was styled, “Petition Urging the Abolishment of the State Habitual Criminal Law on the Basis of the Evidence Presented.” The matter was referred to the Legislative Interim Committee with the result that some study was made of the problem under the direction of Dr. Carl Frazier and Professor Londo H. Brown of the West Virginia University. See, Brown, West Virginia Habitual Criminal Law, 59 W. Va. L. Rev. 50 (1956) and Brown, West Virginia Indeterminate Sentence and Parole Laws, 59 W. Va. L. Rev. 142 (1957).
5 Nicely v. Butcher, 81 W. Va. 247, 94 S.E. 147 (1917) (Syl. 3).
understanding that the state will not file an information for prior convictions are not proper under these pronouncements of the court. In light of modern decisions the West Virginia Supreme Court of Appeals no doubt would have little patience with the argument that such pleas are justified because they were taken in the economy of time, the hurry of business, or to save the state the costly expense of a jury trial. Several courts have held that the law favors a trial on the merits in criminal matters.

Manifestly the trial court receives more protection and the defendant is less likely to be denied his constitutional right of a jury trial, or deprived of his life or liberty without due process of law when the defendant is ably represented by counsel at all stages of the case. A notion prevails among many members of the bar that one of the first things an inexperienced lawyer just out of law school should do is get the court to appoint him to represent indigent defendants in criminal cases where a person's liberty is at stake. The basis for such reasoning seems to be that these prisoners cannot afford, and therefore cannot expect, better legal assistance. This is not only an unsound concept but the practice, so often followed in our state courts, is plagued with many pitfalls for the judge as well as the defendant.

Under the common law the accused was not entitled to the assistance of counsel. Originally in England counsel was not permitted to be heard upon the general issue of not guilty of any indictment for felony. It was the practice of the English judges, however, to permit counsel to advise with the defendant as to the conduct of his case and with respect to questions of law. In 1695 the rule was relaxed by statute to the extent of permitting one accused of treason the privilege of being heard by counsel. But the rule forbidding counsel participating in felony cases continued until 1836. The founders of our country and the framers of our state constitution took a different view of the matter from the very beginning. The Sixth Amendment of the Federal Constitution guarantees the right of assistance of counsel to a defendant for his defense in a federal court, and a similar protection is found in Section 14 of the Bill of Rights for our state constitution. However, formerly no decision

8 4 BLACKSTONE, COMMENTARIES *355.
9 Ibid.
10 Act of Settlement, 1695, 7 & 8 Will. 3, c. 3, § 1.
11 Prisoners' Counsel Act, 1836, 6 Will. 4, c. 114, § 1. See, 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 285 (1926).
held that there was a constitutional duty to appoint counsel for indigent defendants, and the earlier cases do not discuss the question of the court's duty to advise accused of his right to representation by counsel.

In 1938 the Supreme Court of the United States initiated a new trend in constitutional and criminal law in the celebrated case of Johnson v. Zerbst. The court's opinion in that case radically modified the guaranty of the right to counsel in federal prosecutions as embodied in the Sixth Amendment. That provision of the Constitution, according to the court, entitled one charged with crime to assistance of counsel, compliance with which was a jurisdictional prerequisite to a federal court's authority to deprive the accused of his life and liberty. The court, in effect, held that it was not only the trial court's duty to appoint competent counsel to assist accused at certain stages of the prosecution upon his request, but the court must advise him that he is entitled to assistance of counsel; and if he is unable to obtain services of an attorney, the trial court will appoint or designate a competent one to assist him. The decision reiterated the principle that courts indulge in every reasonable presumption against waiver of constitutional rights. In its opinion the court said there is imposed upon the trial judge "the serious and weighty responsibility . . . of determining whether there is an intelligent and competent waiver by the accused." If an accused has no knowledge of his rights, a fortiori, he cannot intelligently and competently waive them. This case involved a conviction upon the plea of not guilty where defendant undertook his own defense. The court also stated it would be fitting and appropriate for the determination of whether there was a waiver to appear upon the record.

In Walker v. Johnston the United States Supreme Court applied the Johnson v. Zerbst ruling to a situation where the defendant indicated his desire to plead guilty. The petitioner, according to the court, not having been advised by the trial judge that he was entitled to have counsel appointed if he were unable to pay an attorney, and not having been asked by the court whether he desired counsel, and having been without advice of counsel which he had not waived, and having pleaded guilty, was entitled to the

12 304 U.S. 458 (1938).
13 Id. at 465.
14 312 U.S. 275 (1940).
relief prayed for. Then followed *Glasser v. United States*\(^ {15} \) in which there was a possibility of inconsistent interest where a lawyer represented two co-defendants and the court said: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."\(^ {16} \)

While provisions similar to that found in the Federal Constitution with respect to assistance of counsel are embodied in the constitutions of several other states, state courts for the most part have not given their own constitutional guaranty such a broad interpretation as the United States Supreme Court has done. Our state constitution is one of those that employs language almost identical to that in the Sixth Amendment, and the West Virginia Supreme Court of Appeals, in *State v. Abdella*,\(^ {17} \) stated that the decisions of the United States Supreme Court, which deal with a pertinent clause of the United States Constitution, are entitled to the greatest consideration where the West Virginia Constitution employs identical language.

State policy, either legislative or judicial, or both, denying or limiting the duty to advise an accused of his right to counsel is, however, restricted by the due process clause of the Fourteenth Amendment and must be considered in light of that amendment, which fundamentally guarantees the accused a fair trial. While in this new trend, the United States Supreme Court does not hold that the specific guarantees of the Sixth Amendment as applied to federal prosecutions are incorporated as such in the Fourteenth Amendment, and thus equally applicable to state procedures, there have been a number of state convictions set aside by the United States Supreme Court on the ground that the failure of the trial court to advise an accused of his right to counsel,\(^ {18} \) The absence of counsel, combined with other factors, was held, in such instances to contravene the requirements of due process within the purview of the Fourteenth Amendment. In *Foster v. Illinois*\(^ {19} \) the Court said its duty did not go beyond safeguarding "'rights essential to

\(^ {15} \) 315 U.S. 60 (1941).
\(^ {16} \) Id. at 76.
\(^ {17} \) 199 W. Va. 428, 82 S.E.2d 913 (1954).
\(^ {19} \) 332 U.S. 134 (1946).
a fair hearing’ by the States.”20 However, in Foster v. Illinois, which was a case involving an indeterminate sentence for burglary and larceny, four of the nine members of the court, dissented and affirmatively stated that the Sixth Amendment guaranty of the right to counsel in criminal cases is applicable to such proceedings in the state courts. They accused the majority of “watering down” the Bill of Rights guarantee. In the dissenting opinion they said that whenever men appear in court for trial or plea, on serious charges without counsel, that in itself should keep the courts from closing their eyes with respect to constitutional rights, unless they are so calloused of the rights of men without any conception of fairness so as to tolerate such action.

The right to effective assistance of counsel in a criminal proceeding, whether on a plea of guilty or not guilty, exists at every stage of the proceedings including that of sentencing. It is said that the attorney should be present on a sentencing date for the purpose of presenting extenuating circumstances in the case, or explaining defendant’s conduct, to correct errors or report in the defendant’s past record, and in short, to appeal to the equity of the court.

In cases where the defendant has waived his right to counsel, the responsibility resting on the judge in accepting a guilty plea is even much greater. In performing this “serious and weighty responsibility” the trial judge, according to the United States Supreme Court in Van Moltke v. Gilles “must investigate as long and thoroughly as the circumstances of the case before him demand . . . To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishment thereunder, possible defenses to the charges and circumstances in mitigation thereof and all other facts essential to a broad understanding of the whole matter.”21 The court said the examination must be a “penetrating and comprehensive” one. This precaution must be exercised at every stage of the proceeding and cannot be discharged as though it were a mere procedural formality. The West Virginia Supreme Court in discussing circumstances under which a plea of guilty could be properly received in State ex rel. Eplin,22 cited with approval portions of the language used by Justice Frankfurter in Von Moltke v. Gilles, supra.

20 Id. at 139.
A situation sometimes arises in a criminal court where the defendant announces he wants to waive his right to counsel and plead guilty, but before he does so he desires to consult with the prosecuting attorney. The state's attorney is in no position to represent an accused and therefore, should not be called upon to advise him. In Von Moltke v. Gilles, supra, the United States Supreme Court said, "The constitution does not contemplate that prisoners shall be dependent upon government agents for...aid."23 In United States v. Lester the Second Circuit Court of Appeals said "[This] requirement [that a plea of guilty be made voluntarily] is not satisfied if the plea is entered by one who is not fully aware of...the extent to which reliance may safely be placed upon any representations which may have been made by the prosecutor..."24

Many of the earlier decisions, in determining whether relief should be granted in cases where there was a guilty plea, turned on the question of whether there was a miscarriage of justice or whether the plea spoke the truth. But the present emphasis of the courts is primarily one of whether there has been an intelligent waiver of constitutional rights. Such waivers are frowned upon unless, as the West Virginia Court said in State ex rel. Eplin, supra, they were made with "observance of the precautions and solemnities required by law." However, a guilty plea should always "speak the truth," and the judge should determine this fact before he accepts it. He can have no self-satisfaction if otherwise.

There is serious question whether a judge should accept a plea to a lesser offense included in the indictment if in fact the lesser included offense "does not speak the truth." Particularly: Is a plea to a lesser offense not justified on the ground that the state has a weak case against the defendant which might result in an acquittal? On the other hand, a trial judge sometimes finds himself in a dilemma because of the impossibility of the law to meet adequately every factual situation. He may feel that to apply the law in its common and ordinary meaning will cause an unduly harsh and an unconscionable result. Therefore, he may, out of the kindness of his heart, accept a plea which doesn't speak the truth for he feels that the ends of justice require such a course. Since his actions are not supported by the law it is doubtful that he could expect much protection from an appellate court once he is attacked, berated, and

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23 332 U.S. at 725.
24 247 F.2d 498, 501 (2d Cir. 1957).
degraded by some unscrupulous attorney or ungrateful prisoner who wants his freedom at any cost.

Of course, we are cognizant of the fact that men under long penitentiary sentences want out. With abundant opportunity for reflection on how to get out, they will imagine and invent all sorts of spurious charges concerning the denial of constitutional rights. Conceivably these people can create serious problems in the administration of criminal law. We, as state trial judges, can, by following certain procedures and using certain precautions, have an effective means of protecting ourselves from such false or unfounded charges, and at the same time safeguard the constitutional rights and interests of a defendant.

The first precaution involves the appointment of counsel. The proper procedure which should be followed is well stated in Rule 44 of the Federal Rules of Criminal Procedure which is as follows: “If the defendant appears in court without counsel the court shall advise him of his right to counsel, and assign counsel to represent him at every stage of the proceeding, unless he elects to proceed without counsel or is able to obtain counsel.” In this respect if a defendant waives his right to counsel he can only do so intelligently if he knows what it is he is waiving this right to, such as a charge of breaking and entering, which is a felony punishable by an intermediate sentence of one to ten years in the state penitentiary. No doubt, many of our state trial courts follow the procedure set forth in this rule.

Secondly, the judge should always very carefully confront the defendant with the exact nature of the charge. In some instances he can do this best by reading the indictment, but the West Virginia Supreme Court of Appeals said it was not required by law that it be done in this manner. In many cases the indictment, which is usually couched in technical language, is more understandable to the defendant if the charge is explained to the defendant by the judge in simple everyday language. Along with this the judge should explain to the defendant the nature of the possible punishment which the charge carries. This is advisable even though our court held in Boggess v. Briers that a failure by the trial court to inform the defendant of the possible punishment was not ground for relief.

Thirdly, the trial court should make a searching inquiry into the facts and circumstances of the case at the time the plea is taken. The court wants sufficient information from the defendant himself which will disclose the commission of the crime, and the defendant’s participation therein, and not just a conclusion. The judge is entitled to this consideration. He is not required to take a plea of guilty just because an accused wants to plead guilty in order “to get it over with.”

Then the judge should determine whether the defendant is entering his plea of his own free will, that is, whether it is being given completely voluntarily by him. Also, in connection with this “searching inquiry” it should be ascertained by the court whether any promise has been made to the defendant with respect to punishment or probation in the case either by the defendant’s lawyer, if he has one, the prosecuting attorney, the judge, or anyone else. The one way to avoid a misunderstanding between the defendant and the court in this matter is for the judge to ascertain this from the defendant himself. Then the judge should ask the defendant whether he understands that by entering a plea of guilty he is waiving his right to a trial by jury, and on the other hand, if he pleads not guilty he will get a jury trial.

In some courts the questions involved in the “searching inquiry” are propounded to the defendant by counsel where he has a lawyer. Whether the task is performed by the attorney or the trial judge it should all be done in open court. It is not necessary to put the defendant under oath to answer these questions, and appellate courts have so held, although in some jurisdictions he is sworn and put in the witness box to answer.

The fourth safeguard is that of a record itself. Some courts record only the evidence taken at a trial. In others the court reporter is required to take down all proceedings in any criminal case. Where there is a waiver, all inquiries concerning such waiver made by the court should be recorded. Likewise, the questions propounded by the judge or counsel to the defendant with respect to facts and circumstances surrounding the crime, the questions bearing on the voluntariness of the plea, those with respect to whether any promises have been made, and any other questions concerning waiver of constitutional rights such as the waiver of a jury trial and whether the defendant understands the nature of the charge and the seriousness of his action in pleading guilty should all be made a
matter of record. The "penetrating and comprehensive examination of all the circumstances under which the plea is tendered" and the "exacting inquiry" which is demanded of a trial judge in certain situations should be taken down by the court reporter in shorthand notes and these notes filed with the papers in the case. Such records are not readily impeached and constitute firm evidence long after the recollections of all the parties involved in the case have dimmed.

While we might say that this procedure takes us somewhat beyond our obligation under the Fourteenth Amendment and under the West Virginia Constitution and state statutes and decisions of the West Virginia Supreme Court of Appeals, yet no judge can take pride in holding his procedure to the very minimum of fairness as required by the law. After all, we are dealing primarily here with constitutional guaranties, and the life and liberty of an individual is involved.