WestVirginiaUniversity
THE RESEARCH REPOSITORY @ WVU

Volume 39 | Issue 3 Article 8

April 1933

Criminal Law--Effect of Agreement to Plead Guilty in Consideration of Promise to Drop Other Charges

Bonn Brown
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

 Part of the Criminal Law Commons

Recommended Citation

Bonn Brown, *Criminal Law--Effect of Agreement to Plead Guilty in Consideration of Promise to Drop Other Charges*, 39 W. Va. L. Rev. (1933).
Available at: https://researchrepository.wvu.edu/wvlr/vol39/iss3/8

This Recent Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

concerning proper individual conduct.[23] Unfortunately there are no statistics available to verify that opinion; and until there is more definite information on the practical results of entrapment methods courts should proceed slowly in changing the existing rules of law.

—TRIXY M. PETERS.

CRIMINAL LAW — EFFECT OF AGREEMENT TO PLEAD GUILTY IN CONSIDERATION OF PROMISE TO DROP OTHER CHARGES. — The defendant was indicted for violation of the banking laws. He plead that the charges were identical with those alleged in one of thirteen indictments previously returned against him, on which occasion the prosecuting attorney had agreed, with the court's approval, to discharge the defendant from further prosecution under these thirteen indictments if he would plead guilty to the fourteenth indictment, and assist in liquidating the bank's accounts; that the defendant had performed his part of the agreement; that the entries of nolle prosequi were made under the other indictments; and that he had served a prison sentence following conviction under the remaining indictment. A demurrer to this plea was sustained and its sufficiency certified. *Held,* that the plea was a bar. *State v. Ward.*[1]

This decision is squarely in conflict with the rule adopted by most courts to the effect that such agreements create merely an "equitable right" to a pardon, which the courts will recommend but cannot effect.[2] The court has in effect assumed the power to pardon, which is expressly reserved to the governor alone by the West Virginia Constitution.[3] A nolle prosequi in itself is no bar to a subsequent prosecution.[4] The entry of a nolle prosequi could

[23] The words of Mr. Justice Holmes to this effect are famous: "Tradition and the habits of the community count for more than logic." Laurel Hill Cemetery v. City and County of San Francisco, 216 U. S. 358, 30 S. Ct. 301 (1910).

[1] 165 S. E. 803 (W. Va., 1932).
[2] Whiskey Cases, 99 U. S. 594, 24 S. Ct. 399 (1878); State v. Kiewel, 166 Minn. 302, 207 N. W. 646 (1926); State v. Keep, 85 Ore. 265, 166 Pac. 936 (1917); People v. Groves, 63 Cal. App. 709, 219 Pac. 1033 (1923). See Note (1910) 24 L. R. A. (N. S.) 439.
[3] W. Va. Const., Art. 7, § 11.
[4] State v. Crawford, 83 W. Va. 556, 98 S. E. 615 (1919); Eastham v. Holt, 43 W. Va. 599, 27 S. E. 883 (1897); State v. Kiewel, *supra* n. 2.

not be held to have the legal effect of a retraxit[5] by reason of the agreement.[6]

The result reached by the court in the principal case seems to be based more on an equitable theory that they will not be a party to a proceeding that will cause them to reach an unjust result.[7] To do this it would seem that the court will have to "judicially legislate", a procedure that courts have universally condemned.[8] The granting of a minimum or suspended sentence, together with a recommendation for a pardon, would, therefore, seem to be the only means by which courts should give effect to such agreements.[9]

The principal case raises further the issue of use or abuse of the authority to "nol pros" indictments in prosecutions of this jurisdiction. According to a survey recently undertaken in some twenty-three counties, the termination of criminal cases by the process of nolle prosequi has become increasingly common,[10] the practice varying from circuit to circuit.[11] Little statutory control exists,[12] hence the possibility of improper abandonment of pending cases is never far remote, even though theoretically the nolle must have the approval of the court.[13] Change in present conditions should include not only more care by prosecutors in obtaining indictments, but adoption of legislation prescribing meticulously a nolle proceeding with adequate safeguards.[14] No doubt absence of these features in the administration of criminal justice has directly led to the unfortunate result in the instant case.

—BONN BROWN.

[5] Wortham v. Commonwealth, 5 Rand. 669 (Va., 1827) (court declared that a retraxit is unknown to the criminal law).

[6] State v. Lopez, 19 Mo. 255 (1853).

[7] Sorrells v. U. S., 53 S. Ct. 210 (1932). Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L. ed. 520 (1864).

[8] Sorrells v. U. S., *supra* n. 7; *Ex parte* U. S., 242 U. S. 27, 37 S. Ct. 72 (1916).

[9] Commonwealth v. St. Johns, 173 Mass. 566, 559, 54 N. E. 254 (1899).

[10] Statistics tend to show that in total of 2097 indictments returned, 373 nolle prosequi were entered or approximately eighteen per cent of all indictments were dismissed by the prosecutor by this method.

[11] A composite summary of three terms of court in Monongalia County tends to show that over sixty per cent of all the indictments found by the grand jury were nolled by the prosecutor. While in Upshur County none of fifty-eight indictments returned by the grand jury were dismissed in this manner.

[12] W. VA. REV. CODE (1931) c. 62, art. 2, § 25.

[13] Denham v. Robinson, 72 W. Va. 243, 77 S. E. 970 (1913).

[14] See CODE OF CRIMINAL PROCEDURE (Am. L. Inst., 1930) §§ 302-305. West Virginia might well adopt a statute similar to section 305: "The court either on the application of the prosecuting attorney or on its own motion may in its discretion for good cause order that prosecution by indictment or information be dismissed. The order for dismissal shall be entered on the minutes with the reasons therefor." To this should be added a further provision that the order for dismissal be entered in open court.