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Guilty Plea Negotiation

Joseph N. Bongiovanni Jr.

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The vast majority of criminal prosecutions are concluded not by trial but by a guilty plea,[1] which is usually the result of an agreement negotiated by prosecution and defense counsel and approved by the trial judge. The range of plea arrangements is broad and perhaps impossible to catalogue. Among them are:

1. sentence recommendations,
2. acceptance of plea to lesser offense,
3. dismissal of some counts in an indictment[2] and
4. agreements not to seek conviction of a higher degree of a crime in exchange for defendant's not seeking to reduce the degree.

Negotiated pleas should be encouraged by full judicial recognition, which would make possible substantive and procedural safeguards either by rule of court or by legislation.[3]

Theory and Practice

Conviction without trial will and should continue to be the prevalent method of disposing of criminal cases, not because of expediency but because it is a valid method which furthers social values. It provides the defendant with an opportunity to acknowledge his guilt and manifest his willingness to assume responsibility for his conduct. It spares him the notoriety of a sometimes protracted trial. It relieves the prosecution from the necessity of exaggerating its case during litigation. In addition, it strengthens the trial method by releasing facilities and personnel for cases which must be tried.

Guilty plea negotiation is not merely a matter of convenience, but is another method of disposing of criminal charges. Opponents of plea

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† Member, Pennsylvania Bar Association.

1. Schwartz, Cases on Professional Responsibility and the Administration of Criminal Justice (1962). Note *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 Pa. L. Rev. 865 (1964); Comm. ex rel. Kerekes v. Maroney, 423 Pa. 337 (1966) 345 note 5. R. Polstein, *How To "Settle" a Criminal Case*, 8 Prac. Lawyer 35.
2. Note, *Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas*, 112 Pa. L. Rev. 865 (1964).
3. Comm. ex rel Kerekes v. Maroney, 423 Pa. 337 (1966).

bargaining evidence a devout faith in the infallibility of trial as a method of learning the truth. While trial is a sound procedure, it is at best only an imprecise method of determining the truth. As any trial judge or lawyer of experience can attest, it is certainly not infallible. A trial is a legal contest; its outcome depends to a great degree on the preparation and skill of the contestants. Negotiation is certainly dependent on the same factors but not to the same extent.

The major problem with the plea negotiation procedure is that it has not received full and realistic judicial approbation, thus forcing the negotiations to be carried on sub rosa. Thus, the difficulty with the plea negotiation technique lies in the necessity of explaining it away.[4]

The courts in Pennsylvania have given only grudging approval to one of the essential elements of plea negotiation, namely, the participation of the trial judge, despite the fact that the use of the technique is certainly prevalent, at least in Philadelphia, its largest metropolitan area. In *Commonwealth v. Scoleri*,[5] the Supreme Court held that there was no legal justification for the withdrawal of a guilty plea which defendant entered on the belief that as a result of his plea he would be sentenced to life imprisonment and not death. The Court quoted with approval its decision in *Commonwealth v. Senauskas:*

> It may be stated generally that for a judge to make a bargain, engagement or promise in advance of the hearing of a case *irrespective of what the evidence might thereafter show the facts to be* and as to what judgment he should reader therein, would be judicial misconduct. Such agreements have uniformly been held to have no binding effect, and they are incompatible with the powers or duties of a judicial officer. The failure of a judge, who enters into an agreement of this type, to comply with his promise gives to the defendant the right to withdraw his plea of guilty and enter a plea of not guilty, under the theory that the plea of guilty is not binding upon a defendant when induced by fear, promises, persuasion or ignorance.[6]

Query whether the bargain, engagement or promise would be valid if given with the understanding that if the evidence or pre-sentence report should not be in accord with the representations on which the promise was made the plea could be withdrawn. It is also interesting that the court would allow a defendant to withdraw his plea upon fail-

4. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 18 (1932).
5. 415 Pa. 218, 202 A.2d 521 (1964).
6. 326 Pa. 69, 191 A. 167, (1937) 71-72.

ure of the judge to comply with his invalid commitment. This would seem to be judicial enforcement of the invalid promise except that the rationale (namely that a defendant has a right to withdraw a plea when induced by fear, promises, persuasion (improper) or ignorance) would apply with equal force even where the improper commitment had been honored.

The holding in the *Scoleri* case, supra, is hard to reconcile with *Commonwealth ex rel. Kerekes v. Maroney*,[7] which, although decided later, does not purport to change the law. In that case the defendant offered a plea of guilty to second degree murder which the trial judge accepted after ascertaining that the district attorney would not introduce evidence to prove that defendant was guilty of first degree murder. On a writ of habeas corpus, defendant attempted to upset his plea on the ground, *inter alia*, that his counsel failed to present available evidence that the offense did not rise above voluntary manslaughter. The Commonwealth, conceding this, alleged that it was done in consideration of an agreement by the Commonwealth to forego seeking a first degree conviction. The Supreme Court refused to upset the plea and upheld the bargain and plea bargaining generally with the statement that "when surrounded by proper safeguards, [plea bargaining] is frequently in the best interest of both the Commonwealth and the accused."[8] The court drew a "distinct line" between bargaining undertaken by defense and prosecuting attorneys on the one hand and discussions with judges who determine the sentence. The "distinct line" is difficult to understand when the Supreme Court affirmed a procedurally incorrect acceptance of a guilty plea to second degree murder. Certainly the acceptance of this plea was a commitment by the trial judge that the sentence would not be longer than the legal maximum for second degree murder, irrespective of what the evidence might show. Thus a judicial commitment on sentence was condemned, but a judicial promise on reduction of the charges was approved. It would seem that this unrealistic distinction is perpetuated by 319(b) of the Pennsylvania Rules of Criminal Procedure, which provides:

> The court, with the consent of the attorney for the Commonwealth, may accept a plea of guilty to any included offense or to any count in an indictment and may discharge the defendant on the other offenses or counts charged.

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7. 423 Pa. 337, 223 A.2d 699 (1966).
8. *Id.* at 347, 223 A.2d at 704.

Although it would be appropriate, there is no rule providing that the court may express its concurrence to a sentence tentatively agreed to by the district attorney and defense counsel.

While the question of judicial participation remains uncertain, plea bargaining has received judicial approbation, not only in the *Kerekes* case, supra, but also in *Commonwealth v. McCauley*,[9] and *Commonwealth v. Garrett*.[10] The necessity of judicial recognition of the propriety of a judicial commitment on sentence under specified circumstances is becoming increasingly evident. As *The Report of the President's Commission on Law Enforcement and Administration of Justice* highlights:

> [t]he agreed disposition should be openly acknowledged and fully presented to the judge for review before the plea is entered. A desirable change might be that before the plea is finally entered, the judge would indicate whether the disposition is acceptable to him and will be followed. Should the judge feel the need for more information or study, the plea may be entered conditionally and if a more severe sentence is to be imposed, the defendant should have an opportunity to withdraw his plea.[11]

The tentative drafts of February 1967 and December 1967 on *Pleas of Guilty of the American Bar Association Project on Minimum Standards for Criminal Justice* recognize plea negotiation and judicial approval of an agreement,[12] although they do not approve of judicial participation in plea discussions. Section 3.3 would authorize the judge to indicate his concurrence in the proposed disposition if the information in the pre-sentence report is consistent with the representations made to him, and the defendant would be allowed to withdraw his plea if the trial judge later decided that he could not sentence in accordance with the plea agreement which he had approved.

If the negotiated plea and sentence practice is to be properly and effectively used in the administration of justice, its role must be reexamined. This has never been done judicially because the process has never been accorded full and realistic approbation by the courts. There has been concern about the voluntary character of a plea.[13] Thus the law

9. 428 Pa. 107; 237 A.2d 204 (1968).
10. 425 Pa. 594; 229 A.2d 922 (1967).
11. P. 136.
12. Section 1.5.
13. A conviction based on an involuntary guilty plea is constitutionally void and may be collaterally attacked; mental or physical coercion vitiates voluntariness. Machibroda v. U.S., 368 U.S. 487 (1962). Walker v. Johnston, 312 U.S. 275 61 S.C. 574 (1941).

is clear that a plea induced by threats is invalid.[14] There is also a great deal of concern whether it is proper for trial judges to grant leniency to defendants because they plead guilty for fear that such leniency violates the concepts of impartiality and fairness which guide the judicial function.[15]

A sound legal principle is that a guilty plea is valid even if induced by a prosecutor's promise which was judicially honored. No one can quarrel with the rule that a plea induced by threats is a violation of due process, but the concern about the propriety of granting leniency on a guilty plea is unrealistic. Settlement in a criminal case should be, in the main, viewed in the same light as settlement of a civil case. Admittedly there are some important differences. Parties to civil litigation can usually settle their case without court approval. On the other hand, criminal cases have to be settled not only with the prosecutor but also with the court. In the main, however, the considerations are the same, since trial or settlement are the principal tools. The parties settle to avoid the risk of an adverse verdict or a verdict (or sentence) less favorable than can be obtained through settlement. In a civil injury claim, plaintiff often settles for an amount which may be less than he might obtain by verdict, because of the risk that he might obtain less. There is no threat or promise affecting the voluntary character of his act. It is a decision reached after considering the probabilities and possibilities of trial. Plaintiff may reject an offer and go to trial and obtain a verdict in the same amount as was offered in settlement. This is also true in the settlement of a criminal case.[16]

In the typical plea, defense counsel and the district attorney enter into negotiations. They more or less frankly discuss their case; each presents his theory and the evidence in support of it. Each then points out the difficulty of the opposing theory and the weaknesses of the evidence supporting it. This type of discussion goes on while opposing counsel are trying to agree on the crime, or degree of the crime, to

14. Waley v. Johnston, 316 U.S. 101, 62. Sup. Ct. 964, 86 L.E. 1302 (1942).

15. Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956).

16. Admittedly there are cases which would not lend themselves ethically or practically to plea negotiation *e.g.*, a defendant accused of a crime of which he is innocent. The typical situation would be a murder charge in which the defendant denies that he was even at the scene and has an alibi. In such a case defense counsel cannot either ethically or tactically accept or offer to enter into plea negotiation. However, the typical homicide is usually negotiable because it involves a situation where the defendant clearly did the act which caused the death, but the possible verdicts are often not guilty (self defense) to murder in the first degree. Negotiation, therefore, is usually feasible in situations where the basic facts are not in dispute, but the surrounding circumstances and the legal results are not clear.

which a plea can be appropriately offered and accepted. At this stage, or afterwards, there will be a discussion about the recommended sentence. Defense counsel is ready with a thorough summary of the defendant's background, e.g., that he has no record or no recent record, or perhaps no record for this particular type of crime; that he is a family man with dependents; his employment record; his military record; his educational record, etc. At the conclusion, opposing counsel may arrive at an agreement on what they are willing to recommend—defense counsel to his client and prosecution counsel to the court. Throughout all this negotiation, there is ordinarily no threat by the prosecutor. Defense counsel makes his recommendation about a plea by measuring the risks of conviction against the chances of acquittal. He also realizes that the presentation of evidence in a non adversary type of proceeding may make an entirely different (although not necessarily a less accurate) impression on the thirteenth juror, who usually has the responsibility of imposing sentence. But any experienced lawyer has seen cases where the sentence after conviction by trial was exactly the same as the one offered during plea negotiations.

In Philadelphia, the most recent practice has been for counsel to appear before the Calendar Judge in the afternoon preceding trial. The Calendar Judge often invites counsel to confer with each other and discusses the possibility of a plea with them. With counsel's consent, the judge hears a summary of evidence presented by each and the status of their negotiations. He often will then indicate what he would consider to be an appropriate disposition and sentence. If counsel and the defendant agree, the case is heard by the Calendar Judge; but if they do not agree, it is assigned for trial before another judge. This practice has worked effectively and fairly in Philadelphia, although it is not in complete accordance with the recommendations of the American Bar Association Project on Minimum Standards for Criminal Justice (Section 3.3) that the trial judge should not participate in plea discussions.

Because of the hazy limbo to which plea negotiation is consigned, the entry of a negotiated plea produces a scene in which counsel has to use all his legal ingenuity to make it possible for the defendant to comply with all the required fictions of the law without committing perjury. Before the plea is accepted, defendant is directly interrogated by the trial judge to determine whether his plea is knowingly and understandingly made. He is required to answer that he does know that if he pleads guilty he can be sentenced to the maximum term provided

for the crime in question. He is told the maximum term and is required to deny that any promises have been made to him. He is usually admonished that no promises can bind the court.

With this kind of fairy tale script it is often difficult for defense counsel to persuade his client to accept his advice and plead guilty, because what counsel must do is tell the client that as a result of his discussions with the district attorney and the trial judge and based on his knowledge of the case and his appraisal of the judge, it is his opinion that a guilty plea will result in a certain disposition and sentence. This will, of course, be the same disposition and sentence which have been agreed upon by the judge and prosecutor. One could only imagine getting a client to sign a release in a civil suit under the same circumstances!

Beyond question, the better practice would be to put the entire plea agreement on the record, including the statements of counsel relied on by the court. The defendant should be asked whether he understands and approves of the agreement and should be advised that if the presentence report precludes the judge from honoring the agreement, he may withdraw his plea. An attempt should be made both before and after accepting the plea to determine its accuracy. Evidence should also be produced to verify the accuracy of the representations which were the basis of the agreement.

Conclusion

The negotiated plea and sentence should be openly recognized as a valid method of disposing of criminal cases. If the decisional law does not fully approve this tool, appropriate legislation or rules of court should be promulgated. The proces should be surrounded by proper safeguards, such as a complete record of the agreement reached and the basis for the conditional judicial approval of the same. The defendant should be asked in open court whether he understands the agreement and whether he approves of it. He should be told that the judge's approval may be withdrawn, but if it is, he will be entitled to withdraw his plea. On appellate review of negotiated pleas, the chief concern should be whether the trial judge abused his discretion in approving the negotiated plea. The defendant should not be allowed to second guess his agreement on the ground that his plea was not voluntary because induced by a promise which was kept.