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Criminal Procedure - Plea Bargaining

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under this rule, in both situations, the defendant's negligence rests upon his engaging in conduct which created an unreasonable risk of "bodily harm"; a reasonable man under the circumstances would have recognized the risk and refrained from such conduct. The defendant who chooses to engage the risk is liable to the injured plaintiff for all "objectively ascertainable" personal injuries flowing from the conduct.

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CRIMINAL PROCEDURE—PLEA BARGAINING—The Supreme Court of Pennsylvania has held that any participation by a trial judge in the plea bargaining process prior to trial is forbidden.

Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969).

Petitioner was charged with five crimes on which indictments had been returned against him—one count of assault and battery and four counts of aggravated robbery. Before trial, petitioner's lawyer met with the prosecuting attorney and the trial judge in two side bar conferences and in the judge's chambers. Following these meetings, the three parties came to an agreement as to concurrent sentences on the five indictments. Petitioner agreed to plead guilty to all counts in exchange for concurrent sentences of one to five years. All five counts resulted from a single series of events involving five victims.

After he was sentenced, petitioner filed a petition under the Pennsylvania Post Conviction Hearing Act[1] alleging that his earlier plea had been involuntary because of the trial judge's participation in the plea bargaining process. The petition was dismissed by the Court of Quarter Sessions of Philadelphia County. The Superior Court affirmed the dismissal and the Pennsylvania Supreme Court granted allocatur to review the decision.

The Pennsylvania Supreme Court reached the conclusion that a procedure which includes the trial judge in the plea bargaining process "is not consistent with due process and that a plea entered on the basis

1. PA. STAT. ANN. tit. 19, § 1180 (1970).

of a sentencing agreement in which the judge participates cannot be considered voluntary."[2]

In reaching its conclusion, the court was not interested in and no inquiry was directed to the exact activity of the trial in the instant case. There was no indication that the judge made any threats to the defendant regarding imposition of the maximum sentence if defendant would decide to go through with the trial and be found guilty, as was the case in *Euziere v. United States*;[3] nor did he, as the judge did in the case of *United States v. Tateo*,[4] raise a threat of consecutive sentences on several counts unless defendant pleaded guilty. Such statements by the trial judges are generally found to be coercive and convictions based on those pleas reversed. On the other hand, there is no indication that the trial judge's activities greatly benefited petitioner and enabled him to obtain a substantially lighter sentence than he would most probably have received following a trial, as was the finding of the court in *Kimbrough v. United States*,[5] nor, as in *United States ex. rel. McGrath v. LaVallee*,[6] was there a finding that the trial judge's statements were "merely a fair description of the consequences attendant upon prisoner's choice of plea . . . ."[7] In this case there was no discussion at all of what part the trial judge took in the bargaining. The mere presence of the trial judge during the conferences between defense and prosecuting attorneys was considered sufficient to render defendant's plea involuntary.

In reaching its conclusion, the court relied principally on *Commonwealth ex rel Kerekes v. Maroney*,[8] the American Bar Association Project on Minimum Standards for Criminal Justice, and *United States ex. rel. Elksnis v. Gilligan*.[9] It is submitted that the cited cases decidedly do not support the decision in *Evans*.

"First," the Court reasoned,

> the defendant can receive the impression from the trial judge's participation in the plea discussions that he would not receive

2. Commonwealth v. Evans, 434 Pa. 53, 54, 252 A.2d 689, 691 (1969).
3. 249 F.2d 293 (10th Cir. 1957).
4. 214 F. Supp. 560 (S.D.N.Y. 1963).
5. 226 F.2d 485 (5th Cir. 1955).
6. 319 F.2d 308 (2d Cir. 1963).
7. *Id.* at 314.
8. 423 Pa. 337, 223 A.2d 699 (1966).
9. 256 F. Supp. 244 (S.D.N.Y. 1966).

> a fair trial if he went to trial before the same judge. Second, if the judge takes part in the pre-plea discussion, he may not be able to judge objectively the voluntariness of the plea when it is entered. Finally, the defendant may feel that the risk of not going along with the disposition which is apparently desired by the judge is so great that he ought to plead guilty despite an alternative desire.[10]

Quoting *Elksnis*, the Court noted that,

> The unequal positions of the judge and the accused, one with the power to commit to prison, and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining process he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands on his right to trial and is convicted, he faces a significantly longer sentence.[11]

The Court, however, did qualify its decision. Referring to the ABA Minimum Standards, the Court stated that while the judge's participation in the plea-bargaining process before an agreement has been reached between prosecution and defense would be precluded, the

> standards clearly indicate that the judge may be informed of the final bargain once it has been reached and before the guilty plea is formally offered. . . . This limited action by the trial judge is allowed on the theory that a greater degree of certainty that the bargain will be accepted is necessary for the operation of the system.[12]

The court emphasized that the judge becomes involved only after the participants have reached agreement. At that time, the court said,

> the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefore in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition.[13]

The sole dissent, by Chief Justice Bell, is a general statement of sup-

10. 434 Pa. at 55, 252 A.2d at 691.
11. 256 F. Supp. at 254.
12. 434 Pa. at 56, 252 A.2d at 692.
13. *Id.*

port for the plea bargaining system. The inference to be drawn from it is that the majority opinion is a threat to the very existence of that system. The *complete* removal of the judge from the plea bargaining process would make his acceptance of the bargain after tendering of the plea too risky for most defendants to chance and if this were the case, Chief Justice Bell's fear would be justified. Permitting the judge to learn of the agreement *after* it has been reached, but *before* the plea, on the other hand, while slightly reducing the probability of the judge's accepting the bargain, still gives to the defendant the opportunity to maintain his plea in tentative status while he learns of the judge's reaction. In this light, a statement of general support for the plea bargaining system is actually unresponsive to the majority position.

The Pennsylvania law on this narrow subject is sparse, a condition which appears to exist throughout the country. The authority consists primarily of three cases, the *Kerekes* case,[14] which did not even involve judicial participation, *Commonwealth v. Senauskas,*[15] and *Commonwealth v. Scoleri.*[16] These two latter cases do not provide reason for the court's action in *Evans.* There is no hint in either of these cases that an *Evans* decision would be forthcoming. The *Senauskas* case involved a question of judicial misconduct—a judge allegedly committing himself to a particular lenient sentence during a conference from which the prosecution was absent. The *Scoleri* case involved misconduct by a judge and by the defense attorney. Thus, the two cases in Pennsylvania which deal directly with judicial participation in plea bargaining involve questions of judicial or professional misconduct, and not, significantly, questions of the violation of defendant's due process.

Evans appears to represent a major departure from the general approach taken in other jurisdictions toward the problem of judicial participation in plea-bargaining. Participation by the trial judge in pre-plea bargaining had been considered simply one factor to take into consideration in determining when a voluntary and knowing plea had been made. Since the *Evans* court relies on a federal case for its basic premise, a comparison to the federal law is appropriate. Whereas the *Evans* court states flatly that a judge who participates in plea-bargaining cannot thereafter weigh the voluntariness of the plea, the

14. 423 Pa. 337, 223 A.2d 699 (1966).
15. 326 Pa. 69, 191 A. 167 (1937).
16. 415 Pa. 218, 203 A.2d 319 (1964).

federal courts have been prone to treat each case individually, assessing the effect in each instance of the trial court's participation on the defendant.

In the most flagrant cases, if the judge, intentionally or otherwise, has provided the defendant with erroneous information which may have played a part in defendant's decision to plead, the plea-based conviction will be voided, usually on the grounds that the plea was not knowingly and intelligently entered.[17]

In another type of case which arises frequently, the trial court, prosecution and defense will reach an agreement on the basis of which the trial judge will make a commitment as to the sentence, which commitment is later broken. Such, in fact, was the situation in *Elksnis*,[18] where petitioner, facing deportation if convicted a second time for a felony, agreed to plead guilty in exchange for the judge's promise not to impose sentence in excess of 10 years. The judge claimed that he had acted on the assumption that petitioner was a first felony offender. When the district attorney filed an information charging petitioner as a second felony offender, the judge imposed a sentence of 17½ to 35 years. The court said,

> The fact that a promise which induced a guilty plea was subsequently kept does not establish that the plea was voluntary. *Whether it was must be decided in the light of events at the time of its entry.* The issue does not lend itself to precise mathematical determination; its resolution is one of fact which "involves an evaluation of psychological factors and elements that may be reasonably calculated to influence the human mind." A crucial question here is the impact, if any, of the judge's promise upon the defendant. The fact that the promise may not have been deliberately designed or intended to induce the defendant to plead guilty is not material—the question is did it have that impact.[19]

The *Evans* court relied heavily on the *Elksnis* case as supporting the prohibition of participation by the trial judge in plea bargaining prior to the offering of the plea. A careful reading of *Elksnis,* however, will indicate that it does not stand for that proposition at all; and if it does stand for that proposition, the case has been emasculated by *United States ex rel Rosa v. Follette*,[20] a case decided by the Second Circuit Court of Appeals two years after *Elksnis*. In order to understand the

17. Pilkington v. U.S., 315 F.2d 204 (4th Cir. 1963).
18. 256 F. Supp. 244 (S.D.N.Y. 1966).
19. *Id.* at 253.
20. 395 F.2d 721 (1968).

Elksnis case, it is necessary to distinguish two fact situations: the first is that in which the acquiescence of the defendant is induced by a promise of the trial judge; the second is where the trial judge, following defendant's acquiescence to an agreement with the prosecution and prior to the plea, promises that he will impose a specific sentence. The *Elksnis* case is limited to the first situation and stands only for the proposition that a plea *induced* by a promise of the trial judge is not a voluntary plea. If the case stands for that, and no more, it is representative of the law on the subject in substantially all 50 states and federal courts. If, however, it stands for the proposition that any participation in plea-bargaining by the judge prior to the entering of the plea is prohibited, then it is not good law. The *Rosa* court stated that

> [I]n any event, we would be hesitant to hold that the mere participation of the trial judge in any aspect of plea negotiation,—no matter how tangential and unlikely to be coercive—necessarily renders a plea of guilty involuntary . . . . The issue ultimately to be resolved is not so much who participated in the plea discussions, but whether the defendant's decision to plead guilty was coerced or otherwise invalid. And that determination can be made only after a careful examination of the facts in each particular case.[21]

The *Rosa* court continued:

> [W]hile some of the dicta in *Elksnis* lends support of Rosa's position (that participation by the trial judge per se in plea-bargaining makes the plea involuntary), that case was correctly decided on its facts. Two essential elements present in *Elksnis* are missing here: the trial court conferred informally with Elksnis and promised a specific term *if* he would change his plea from not guilty of murder in the second degree to guilty of manslaughter in the first degree; and, the court imposed a longer imprisonment than had been promised because after the plea was changed the court learned that Elksnis was a second felony offender.[22]

Not only did the *Rosa* court distinguish *Elksnis*, but it further stated that "[W]hile we certainly adhere to the proposition that a trial judge must always act with full awareness of the awesome power of his office, this court has held that the participation of the trial judge in plea discussions does not in itself render the plea involuntary."[23]

21. *Id.* at 725.
22. *Id.*
23. *Id.*

The *Rosa* court cited *United States ex. rel. McGrath v. LaVallee*,[24] where the court, while refusing petitioner's request for a reversal, had granted a hearing to determine the accuracy of a transcript made of the plea bargaining discussion which had included the judge. Petitioner claimed that his plea was the product of deceit, promise or threat. His plea was found to have been voluntary and that decision was affirmed. In an opinion concurring in part and dissenting in part, Judge Friendly made the following observation on the attitude of the court:

> Perhaps in order to avoid a later claim of coercion and consequent denial of due process, a judge would be wiser to abstain from any conversation about a guilty plea with a criminal defendant awaiting trial before *him*—even when, as here, the judge is acting in what he soundly considers the defendant's best interest and in line with the recommendation of experienced defense counsel, and the result of the abstention is likely to be a heavier sentence for the defendant whose rights the due process clause aims to protect. However, no one contends that such a conversation by a judge is, per se, a denial of due process; decision turns on what was said and its probable effect.[25]

The appearance of *Commonwealth ex. rel. Kerekes v. Maroney*[26] in the majority opinion is not much more support for the Court. Not only did the *Kerekes* court uphold the validity of the plea, but it was a plea derived from discussions to which the trial judge was not a party. In addition, the "warning" which the *Evans* court speaks of as having been stated in *Kerekes* consisted of a quotation from the *McGrath* case, a case which, we have seen, does not support the *Evans* court's refusal to examine the specific facts surrounding the trial judge's participation in that case. Moreover, the *Kerekes* Court stated:

> . . . our cases have not set forth a fixed procedure for determining the validity of a guilty plea; rather we have held that this is a factual issue which must be resolved on a case by case basis according to the defendant's actual understanding of his plea and his willingness to enter it.[27]

Whether or not the *Evans* case will result in substantial practical changes in the conduct of the plea-bargaining process has yet to be

24. 319 F.2d 308 (2d Cir. 1963); *cert. denied*, 369 U.S. 808 (1962).
25. *Id.* at 315. *See* Kimbrough v. United States, 226 F.2d 485 (5th Cir. 1955), for a case in which the court held that defendant had benefited from the trial judge's participation in the plea bargaining process.
26. 423 Pa. 337, 223 A.2d 699 (1966).
27. *Id.* at 343, 223 A.2d at 705.

seen. The practice in the criminal courts of Philadelphia 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 discuss 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.

If the discussion with counsel by the trial judge can be considered the prohibited "participation," it is unclear exactly how it is more coercive on defendant than the procedure outlined in *Evans*. In addition, it is equally unclear how the judge, at this point, can, once all the evidence has been explained to him and he indicates his acceptance of the plea, any less judge its voluntariness with objectivity.

It is, of course, foolish to believe that the judge can be excluded from the plea bargaining process prior to the time the plea is entered. If *Evans* required such exclusion, plea bargaining would without doubt end in Pennsylvania. Prior to the entering of a plea of guilty, an accused must have assurance that the bargain will be accepted by the judge. Accused persons cannot be expected to bind themselves to guilt unless the bargains on which they depend are upheld.

In addition, the plea must be entered by the accused voluntarily and with understanding. And an accused must in fact be guilty. The judge may not, under present law, accept a plea of guilty from an accused who enters a bargain although believing himself to be innocent. Too, the state has an interest which must be protected against "over-cooperative" prosecutors.

All of the above considerations require that the judge be informed of the facts of the case and the arguments on both sides sometime prior to the entering of the plea by the accused. If *Evans* is followed, the agreement will be arrived at through consultation only between defense and prosecution. The judge will then hear the recommendation of the prosecution and, in determining the justification for the recommendation and its acceptability, will be informed of the facts of the case. If he finds no undue compromise of the state's interest, he should then inquire of the defendant to determine the voluntariness and understanding with which the plea is entered. During the inquiry

the judge should explain to the defendant the terms of the bargain, and should extract from him not merely a plea of guilty, but the equivalent of an in-court, on the record confession. The plea may then be accepted and sentence according to the bargains imposed.

If the plea is not accepted, however, *Evans* may require that the case be removed to another judge for trial, and it is this requirement, not the exclusion of the judge from the actual bargaining, which is likely to have a real and practical effect in terms of criminal court process, and which raises numerous questions.

If, following rejection of the bargain and before the trial, defense and prosecution reach another agreement, must it be presented to the same judge, or should it be presented to a second judge? If the first judge, is that judge not participating in the bargaining process if he rejects several agreements in a row, finally accepting one more to his liking? May a rejected agreement be presented to the second judge for acceptance? May the second judge be informed of the rejected first agreement and its contents? In rejecting the bargain, may the judge point out strategies and considerations which the prosecution may have overlooked in assessing the potential of the case? May he cite overlooked defenses? May he even request any information concerning defenses in the presence of the prosecution? Must the contents of the agreement and the decision to accept or reject it be recorded.

If plea bargaining is to be an accepted practice, can rejection of a bargain and plea even constitute an abuse of discretion by the hearing judge? At what point is the defendant bound by the plea? Should defendant be permitted to withdraw the plea after the judge has heard all the facts but before he has formally accepted the plea? If the first judge is permitted to explain the reason for his refusal to accept the bargain, and the defense and prosecution enter a second agreement on the basis of that explanation, has the judge "participated" in the plea bargaining in violation of Evans? How many judges can the parties go through if there is more than one rejection?

Resourceful lawyers and desparate defendants will eventually require the court to answer these and other questions. *Evans*, therefore, may have created more problems than it solved. That is not, however, the test of a bad decision. Conceptually, *Evans* is undoubtedly correct in placing the judge in a position of neutrality to protect the rights of both the state and defendant. What *Evans* will do, however, is not to

simply postpone the judge's entrance on stage; it will require the treatment of plea bargaining as an integral part of the criminal justice system, complete with a body of specific and perhaps complicated court rules and delineated procedures.

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