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CASE COMMENTS

Criminal Law — Knowledge of Consequences to Plea of Guilty

D pleaded guilty to interstate transportation of a stolen vehicle, after being told the maximum penalty was five years imprisonment. *D* was sentenced to an indefinite term under the Federal Youth Correction Act, 18 U.S.C. § 5010, which provided a maximum of six years confinement. At the end of five years, *D* moved to have the sentence vacated, under 28 U.S.C. § 2255 (1949). *D* contended the court had violated Rule 11 of the Federal Rules of Criminal Procedure, which provides that the trial court "shall not accept a plea of guilty without first determining that the plea is made voluntarily with understanding of the charge." *D*'s motion was denied. *Held*, affirmed, in a short per curiam opinion without discussion of the merits of *D*'s motion. A dissenting judge held that Rule 11 had been violated, and that *D* was entitled to the relief sought. *Marvel v. United States*, 335 F.2d 101 (5th Cir. 1964).

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The court's position in the principal case differs from that taken by other circuits. In an earlier case in the fourth circuit, under an almost identical set of facts, the petitioner moved to have his sentence set aside, and the appellate court remanded the case for a hearing on petitioner's claim. Petitioner alleged that he had been told his maximum imprisonment could only be five years, without being told he could be confined under the Youth Correction Act for a longer period. The court held that if the petitioner could establish as true the facts alleged, he would be entitled to relief under 28 U.S.C. § 2255. The court said that "understanding of the nature of the charge," as used in Rule 11, cannot be interpreted to mean anything less than a complete understanding of the possible sentence. *Pilkington v. United States*, 315 F.2d 204 (4th Cir. 1963).

The conflict between the principal case and the *Pilkington* case raises a question with definite constitutional overtones. In both cases the petitioners contended only that Rule 11 had been violated, without suggesting that this was also a violation of their constitutional rights. However, the underlying issue here would seem to be whether "due process," as provided for in the fifth and fourteenth amendments to the federal constitution, is violated when a defendant is convicted upon his plea of guilty, and he is not aware of the maximum penalty or penalties which may be imposed upon his conviction. This question seems never to have been squarely answered by the United States Supreme Court.

Many cases have reached the Court where the defendant had pleaded guilty without full knowledge of the consequences of his plea. E.g., *Von Moltke v. Gillis*, 332 U.S. 708 (1947); *Smith v. O'Grady*, 312 U.S. 329 (1941). Although the Court has always held these convictions were obtained in violation of constitutional guarantees, there have always been other important issues present which have held the Court's attention. A majority of these cases involved a denial of counsel, or an unintelligent waiver of counsel, and the Court has stressed this lack of counsel, with only a passing reference made to the fact that the defendant did not know the consequences of his plea. As a result, it is impossible to say with certainty that the Court has held that a conviction based upon a plea of guilty, without the defendant's full knowledge of the maximum penalties prescribed, would of itself, be sufficient grounds for setting aside the conviction, or vacating the sentence. In *Smith*

v. O'Grady, supra, the Court stated that notice of the charge against the defendant was the first and most universally recognized requirement of due process. However, the Court did not amplify this statement to say whether knowledge of the nature of the charge must include knowledge of the maximum penalties prescribed for the offense.

The sixth amendment to the federal constitution provides that, "In all criminal prosecutions, the accused shall be . . . informed of the nature and cause of the accusation. . ." This requirement has generally been held to be satisfied if (1) the defendant is furnished with sufficient information to enable him to make his defense and avail himself of conviction or acquittal for protection against prosecution for the same cause, and (2) to inform the court of the facts alleged, so that it might decide whether they are sufficient at law to support conviction, if one should be had. *United States v. Seeger*, 303 F.2d 478 (2d Cir. 1962). It could be argued that a liberal interpretation of the sixth amendment should lead to the conclusion that the "nature of the accusation" includes information as to the possible consequences of conviction. It is the very similar language found in Rule 11 which the court used to justify its holding in *Pilkington v. United States, supra*.

Although the United States Supreme Court has not answered the question with finality, the language it has used in many of the cases where the question has been raised, and the holdings of the great majority of the lower federal courts, would seem to indicate that on a plea of guilty, knowledge of the prescribed penalties is a requirement of due process. *Carter v. United States*, 306 F.2d 283 (D.C. Cir. 1962); *United States v. Lester*, 247 F.2d 496 (2d Cir. 1957). However, it does not necessarily follow that the court must itself inform the accused of the prescribed penalties. The defendant is not prejudiced by the court's failure to inform him of the possible consequences of his plea, if, in fact, the defendant is fully aware of, and fully understands, the penalties prescribed at the time he enters his plea. *United States v. Lo Duca*, 274 F.2d 57 (2d Cir. 1960); *Bergen v. United States*, 145 F.2d 181 (8th Cir. 1944).

This comment has not considered those cases wherein an accused pleads guilty with full knowledge of the prescribed penalties, but who is disappointed with the severity of the sentence actually imposed. Generally, unless other factors are present, the disappoint-

ment alone is not sufficient grounds for setting aside the judgment. *United States v. Norstrand Corp.*, 168 F.2d 481 (2d Cir. 1948). Neither has this comment touched upon those cases where an accused enters a plea of guilty with full knowledge of the penalties prescribed for the crime with which he is charged, but who is quite unaware of the important and often harsh collateral consequences which may frequently flow from a conviction, e.g., deportation, sentencing under habitual criminal laws, loss of civil rights, etc. Although these collateral consequences are much more apt to take the accused unaware, and many times are more harsh than the penalty for the crime itself, the courts are not concerned with these extraneous consequences, and generally refuse to give any relief in these cases. *United States v. Parrino*, 212 F.2d 919 (2d Cir. 1954), *cert. denied*, 348 U.S. 840 (1954).

The courts of most of the states have held that a plea of guilty is valid only when made with full awareness of the maximum legal penalties which might be imposed. Some states appear to make a distinction between a capital offense and a lesser crime, or between a felony and a misdemeanor. *Burton v. State*, 112 Tex. Crim. 334, 16 S.W.2d 828 (1929). Some states have statutes which place an affirmative duty on the court to explain the consequences of a plea of guilty. See, e.g., COL. REV. STAT. ch. 39, art. 7, § 8 (1953); ILL. REV. STAT. ch. 38, § 732 (1959).

West Virginia would seem to agree with the majority view. In *State v. Hill*, 81 W. Va. 676, 95 S.E. 21 (1918), the court said that no plea of guilty should be accepted in a capital case until the defendant has been warned and cautioned of the consequences of his act, and until the court is satisfied that the defendant understands and appreciates the same. This case was cited with approval in *In re State ex rel. Eplin*, 132 W. Va. 610, 53 S.E.2d 614 (1949), where the court said that although the *Hill* case had referred to a capital offense, the same protection should also be afforded those accused of a lesser crime. Although the court did not say whether they were thinking of misdemeanors, it is quite possible they were, because the opinion spoke only of "criminal cases." The court was careful to point out, however, that before it would constitute reversible error, it must first appear that the defendant's guilty plea was entered "under some mistake, misapprehension, compulsion, or inducement, or circumstance, working injustice."

In a later case, *Bogges v. Briers*, 134 W. Va. 370, 59 S.E.2d 480 (1950), the court said the trial court was under no duty to advise the defendant of the possible punishment his plea of guilty might entail. The court said that "whatever may be the rule in some courts, there is no such requirement in the courts of this state." However, in this case, the court pointed out that the defendant was himself an attorney, and had competent counsel by his side when he entered his plea. Other evidence also refuted the idea that the defendant had entered his plea in ignorance of the consequences. *Accord*, *State ex rel. Post v. Boles*, 124 S.E.2d 697 (W. Va. 1962).

In conclusion, it would seem that the requirements of "due process" are not met where an accused is permitted to plead guilty to a criminal charge without being aware of the direct penalties which might legally be imposed following the conviction. The concepts of justice and fair play to which the courts so frequently refer in defining "due process" would seem to dictate such a conclusion. With the United States Supreme Court's present tendency to extend increasingly greater safeguards to those accused of crime, it seems likely that a case similar to the principal case will soon reach the Court. If and when it does, it is probable the Court will hold that the petitioner was denied "due process" in being permitted to plead guilty under a misapprehension, honestly held, of the maximum prescribed period of confinement.

Charles Edward Barnett

Contracts—Holder's Liability for Unauthorized Purchases on Credit Card

D's credit card was lost or stolen by an unknown imposter who used it to incur substantial charges before the required notice of the loss was given to *P*, the issuer of the card. *P* paid the merchants for the charges and sought recovery from the *D* under the terms set out on the back of the card, holding the issuer liable for all purchases made prior to the issuer's receiving notice of the loss or theft of the card. *Held*, recovery denied. A cardholder is not absolutely liable. The issuer and the merchants each owe a duty of reasonable care to prevent improper charges from being made. *P* failed to show that either it or the merchants were free from