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Criminal Procedure - Court Consent to Plea Bargains

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CRIMINAL PROCEDURE — COURT CONSENT TO PLEA BARGAINS

A plea bargain is an agreement by one accused of a crime to plead guilty to a certain crime in return for a promise from the district attorney, the court, or both, that the accused will receive a moderate sentence or immunity from prosecution for other offenses. Plea bargains may involve matters within the sole discretion of the trial judge, or of the district attorney, or within the discretion of both; thus, the question arises who are the necessary parties to the agreement. Since sentencing is a function of the trial judge,[1] plea bargains involving promises of less severe sentences necessarily require court's consent to be enforceable. However, in many plea bargains the accused pleads guilty to one offense and receives a promise of immunity from prosecution for other offenses for which he is or may be charged, or he pleads guilty to a felony on the promise that he will not be charged as a multiple offender.[2] It is in this situation that the requirement of court consent to enforce plea bargains is subject to question.

The question whether plea bargains promising immunity from further prosecution require court consent has sometimes been solved by determining the prosecutor's power to *nolle prosequi* an indictment.[3] A number of states require court consent before the prosecutor can *nolle prosequi* an indictment; they also require court consent before the prosecutor can grant the accused immunity from prosecution.[4] Other states allow the prosecutor to *nolle prosequi* without court consent;[5] of these only one[6]

1. LA. R.S. 15:529 (1950): "Whenever any person is sentenced to imprisonment, after having been found guilty of a crime upon verdict or plea, it shall be the duty of the judge to impose a determinate sentence."

2. The Habitual Offender Law does not make it a crime to be a multiple offender but merely provides enhanced sentence for the basic offense. *E.g.*, Graham v. West Virginia, 224 U.S. 616 (1912); State v. George, 218 La. 18, 48 So. 2d 265 (1950); State v. Hardy, 174 La. 458, 141 So. 27 (1932); State v. Guidry, 169 La. 215, 124 So. 832 (1929).

3. See Smith v. Embry, 103 Ga. App. 375, 119 S.E.2d 45 (1961); Kidd v. Commonwealth, 255 Ky. 498, 74 S.W.2d 944 (1934); Earl v. Winne, 34 N.J. Super. 605, 112 A.2d 791 (1955); State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959); Hughes v. James, 86 Okla. Crim. 231, 190 P.2d 824 (1948); State v. Keep, 85 Ore. 265, 166 Pac. 936 (1917); Commonwealth v. Barnard, 94 Pa. Super. 403 (1928); Surginer v. State, 86 Tex. Crim. 438, 217 S.W. 145 (1919); State v. Persons, 117 Vt. 556, 96 A.2d 818 (1953); Denham v. Robinson, 72 W.Va. 243, 77 S.E. 970 (1913); State *ex rel.* Kowaleski v. District Court of Milwaukee County, 254 Wis. 363, 36 N.W.2d 419 (1949).

4. Scribner v. State, 9 Okla. Crim. 465, 132 Pac. 933 (1913); State v. Anderson, 119 Tex. 110, 26 S.W.2d 174 (1930).

5. LA. R.S. 15:329 (1950); State v. Dennington, 51 Del. 322, 145 A.2d 80 (1958); People v. Bogolowski, 326 Ill. 253, 157 N.E. 181 (1927); State *ex rel.* Griffin v. Smith, 363 Mo. 1235, 258 S.W.2d 590 (1953).

6. The scarcity of jurisprudence indicates the problem is avoided either by

has directly passed upon the question whether court consent is needed for the granting of immunity from prosecution, holding no consent is necessary.[7]

The American Law Institute Model Code of Criminal Procedure recommends that no prosecution should be dismissed except by court order and for good cause accompanied by a written statement to be entered on the record.[8] The Federal Rules of Criminal Procedure require "leave of court" for the dismissal of an indictment by the United States Attorney.[9]

In Louisiana the district attorney is empowered to enter a *nolle prosequi* without court consent.[10] The validity of a plea bargain granting immunity from further prosecution entered without court approval was at issue *res nova* in *State v. Hingle*.[11] Defendant had withdrawn a plea of not guilty and pleaded guilty to a lesser offense after receiving the district attorney's promise that all other offenses against him would be dismissed, and that no multiple offender charges would be filed. Subsequently, defendant was charged as a multiple offender. On original hearing the Louisiana Supreme Court held a plea bargain granting immunity from sentence not binding unless the trial judge was a party to the agreement. On rehearing, however, the trial judge's consent was admitted by the district attorney and the court held the plea bargain barred a multiple offender sentence. The court

prosecutors obtaining court consent or consistently keeping their part of the bargain. Although not faced directly with the question whether court consent is needed to grant immunity from prosecution, some courts in dicta have indicated bargains made by the prosecutor alone will be enforced. State v. Ward, 112 W.Va. 522, 165 S.E. 803 (1932); People v. Siciliano, 185 Misc. 149, 56 N.Y.S.2d 80 (1945).

In Tullis v. State, 41 Tex. Crim. 87, 88, 52 S.W. 83, 84 (1899) the court said granting immunity from prosecution was a function of the trial judge and although an agreement to turn state's evidence, made with the prosecuting officer, "should be made . . . with the consent of the court, yet . . . where . . . made [without its consent] . . . and . . . defendant has acted in perfect good faith, it should be recognized by the court." However, if made over the objection of the court *Tullis* indicated it should not be enforced.

In some jurisdictions in which the prosecuting attorney is powerless to *nolle prosequi* without consent of court, courts have intimated in dicta that the prosecutor could, if he had complete authority to *nolle prosequi*, grant immunity by contract without court approval. Commonwealth v. St. John, 173 Mass. 566, 54 N.E. 254 (1899); Scribner v. State, 9 Okla. Crim. 465, 132 Pac. 933 (1913).

7. People v. Bogolowski, 326 Ill. 253, 157 N.E. 181 (1927).

8. MODEL CODE OF CRIM. PROC. § 295 (1930).

9. FED. R. CRIM. PROC. Rule 48(a).

10. LA. R.S. 15:329 (1950): "The exercise of the power to enter a nolle prosequi is a matter that shall be subject to the sound discretion and control of the district attorney, and in order to exercise that power he shall not have to obtain the consent or permission of the court."

11. 242 La. 844, 139 So. 2d 205 (1962).

on rehearing intimated in dictum, however, that such an agreement made without approval of the trial judge would be enforced.[12] The effect of *Hingle*, therefore, is to enforce promises of immunity consented to by the court; but it left unsettled whether court consent is necessary in Louisiana for the district attorney to be bound by a plea bargain promising the accused immunity from further prosecution, either as a multiple offender[13] or upon other charges.

The enforcement of promises of immunity from prosecution made by a prosecuting officer with consent of the court has been justified on grounds of public policy.[14] These promises are treated as pledges of public faith by some courts,[15] while others have held the defendant has an equitable right of immunity in the absence of express statutory authorization.[16] Promises of immunity in cases involving a co-defendant who agrees to testify as a state's witness have been held binding on the rationale that an opposite result would be a denial of due process, since the accused has a constitutional right to refuse to offer testimony that might tend to incriminate him.[17] The Louisiana Supreme Court has upheld a plea bargain made with court consent on the theory that by pleading guilty the defendant surrendered "substantial

12. A strong concurring opinion disagreed with this dictum, pointing out that in Louisiana a *nolle prosequi* does not bar a subsequent prosecution for the same offense, the district attorney's power to *nolle prosequi* being procedural, whereas a grant of immunity from prosecution is a complete bar to prosecution. The concurring Justice also expressed the view that verbal agreements made between the accused and the district attorney would provide a prolific source of litigation and open the door to many abuses in plea bargaining.

13. Although the Multiple Offender Act has been construed as providing an enhanced sentence for the basic offense rather than constituting a separate crime (see note 2 *supra*), the majority opinion on rehearing in *Hingle* indicated that the district attorney could enter into plea bargains granting immunity from such enhanced sentences as well as immunity from prosecution for other crimes. This would seem justified since LA. R.S. 15:529.1 (1950), as amended, La. Acts 1958, No. 469, § 1, gives the district attorney full discretion to bring multiple offender charges.

14. Plea bargains have been recognized as a useful and necessary part of the executive and judicial criminal process which furnishes a means of disposing of numerous cases which would otherwise clog the court dockets. When properly used it has been looked upon favorably by lawyers, district attorneys, courts, and defendants alike. See generally Comment, 50 YALE L.J. 107 (1940).

15. *E.g.*, Commonwealth v. St. John, 173 Mass. 566, 54 N.E. 254 (1899); State v. Ward, 112 W. Va. 552, 165 S.E. 803 (1932).

16. *E.g.*, Cortes v. State, 135 Fla. 589, 185 So. 323 (1938). See generally Baker, *The Prosecutor-Initiation of Prosecution*, 23 J. CRIM. L., C. & P.S. 770, 789 (1933).

17. Scribner v. State, 9 Okla. Crim. 465, 132 Pac. 933 (1913). See Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L., C. & P.S. 780, 789 (1956).

rights" and that a denial of the benefits promised would have been a violation of due process.[18]

Jurisdictions requiring court consent before the prosecuting attorney can *nolle prosequi* an indictment have refused to recognize a prosecuting attorney's authority to grant immunity from further prosecution on the theory that holding otherwise would defeat the very purpose for which the requirement of court consent was adopted.[19] Further, it has been held that a court should not enforce pledges of immunity made by the executive department and that the defendant's only remedy is a pardon from the department that purported to grant the immunity.[20]

Enforcement of a plea bargain involving a plea of guilty to an offense in return for a promise from the prosecuting attorney which is within his power to fulfill seems justifiable even though the plea bargain lacks the court's consent. Not only is the prosecuting attorney a public representative whose promise is a pledge of the public faith which should be duly kept,[21] but it seems a defendant who pleads guilty to an offense in consideration of a plea bargain would be giving up the same "substantial right" — the right to stand trial — whether the court consented to the plea bargain or not. Furthermore, statutes which have placed the power of *nolle prosequi* solely within the discretion of the district attorney seem indicative of a legislative intent that the district attorney should be able to promise to *nolle prosequi* certain charges in return for a plea of guilty. Thus, it is submitted that courts may properly enforce promises made by the district attorney without court consent where those promises are within the district attorney's power to fulfill and that justice would be better served by protecting defendants who enter into such agreements believing the district attorney will be bound thereby.[22]

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18. State v. Mockosher, 205 La. 434, 17 So. 2d 575 (1944).

19. People v. Groves, 63 Cal. App. 709, 219 Pac. 1033 (1923); Frady v. People, 96 Colo. 43, 40 P.2d 606 (1934).

20. Whisky Cases, 99 U.S. 594 (1878); United States v. Blaisdell, 24 Fed. Cas. 1162 (No. 14,608) (D.C.S.D. N.Y. 1869); Lowe v. State, 111 Md. 1, 73 Atl. 637 (1909); State v. Lopez, 19 Mo. 254 (1853); Bruno v. State, 192 Tenn. 244, 240 S.W.2d 528 (1951).

21. See Commonwealth v. St. John, 172 Mass. 566, 54 N.E. 254 (1899); Camron v. State, 32 Tex. Crim. 180, 22 S.W. 682 (1893).

22. To assure better understanding of the terms and conditions of plea bargains, and to protect the defendant in the event the prosecutor has a lapse of memory or is succeeded by a prosecutor knowing nothing of an oral agreement between his predecessor and the accused, it seems the better practice is to have