



1-1-1970

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### Recommended Citation

Santa Clara Law Review, Case Note, *Recent Case*, 11 SANTA CLARA LAWYER 184 (1970).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol11/iss1/12>

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## RECENT CASE

CRIMINAL PROCEDURE: CONSTITUTIONALITY OF A PLEA BARGAINING AGREEMENT BETWEEN A CRIMINAL DEFENDANT, ATTENDED BY COUNSEL, AND THE PROSECUTING COUNSEL UPHELD WHERE THE PLEA BARGAIN IS FULLY DISCLOSED AND INCLUDED IN THE RECORD OF THE CASE. (*People v. West*, 3 Cal. 3d 595, — Cal. Rptr. — (1970).

On December 15, 1967, an information was filed charging Dale Irven West with violating California Health and Safety Code section 11530.<sup>1</sup> Upon the denial of defendant's motion to dismiss the information,<sup>2</sup> defendant entered a plea of not guilty. Defendant then moved to suppress the evidence.<sup>3</sup> This motion was denied.

When defendant appeared with counsel for trial, he withdrew his plea of not guilty and entered a plea of *nolo contendere*<sup>4</sup> to a violation of California Health and Safety Code section 11557,<sup>5</sup> pursuant to a plea bargaining agreement between defendant West and the district attorney. Defendant's counsel and the district attorney had agreed to stipulate that the latter offense<sup>6</sup> be deemed a lesser and included offense<sup>7</sup> within the offense charged in the information.<sup>8</sup> The court addressed the defendant and verified the fact that he agreed to the stipulation and plea, understood the charge of violation of section 11557, knew of his constitutional rights, and had conferred with defense counsel.<sup>9</sup>

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<sup>1</sup> CAL. HEL. & SAFETY CODE § 11530 (West 1964) (amended by Stats. 1968, c. 1465, p. 2930, § 1): "Every person who . . . possesses any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not less than one year nor more than 10 years."

<sup>2</sup> CAL. PEN. CODE § 995 (West 1970).

<sup>3</sup> *Id.* § 1538.5.

<sup>4</sup> *Id.* § 1016(3). "*Nolo contendere*, subject to the consent of the district attorney and with the approval of the court. The legal effect of such a plea shall be the same as that of a plea of guilty."

<sup>5</sup> CAL. HEL. & SAFETY CODE § 11557 (West 1964). "Every person who opens or maintains any place for the purpose of unlawfully selling, giving away or using any narcotic shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years."

<sup>6</sup> See note 5, *supra*.

<sup>7</sup> CAL. PEN. CODE § 1159 (West 1970) (amended by Stats. 1951, c. 1674, p. 3849, § 111): "The jury or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." See *People v. Greer*, 30 Cal. 2d 589, 596, 184 P.2d 512, 516 (1947), and WITKIN, CALIFORNIA CRIMINAL PROCEDURE (1963) § 542, at 553-54.

<sup>8</sup> See note 1, *supra*.

<sup>9</sup> *People v. West*, 3 Cal. 3d 595, 603 (1970).

Upon sentencing, the court ordered that imposition of sentence be suspended and defendant was granted probation.

West appealed the decision on the grounds that the search which produced the marijuana had been illegal, and that the motion to suppress the evidence be allowed. The appellate court, however, reversed<sup>10</sup> the order of probation on procedural grounds.<sup>11</sup> Applying the *necessarily included rule*,<sup>12</sup> the court (per Christian, J.) reasoned that neither the language of the information, nor the elements of the offense charged<sup>13</sup> included the facts necessary to prove a violation of California Health and Safety Code section 11557.<sup>14</sup> Since a violation of California Health and Safety Code section 11557 is not necessarily included within the charged violation of California Health and Safety Code section 11530,<sup>15</sup> the appellant's plea of *nolo contendere*, ". . . was apparently done on the misunderstanding that the offense to which appellant pleaded was included within the offense charged."<sup>16</sup>

Thus, the appellate court avoided confronting the issue of the judicial propriety of the plea bargain by benignly referring to the stipulation as a misunderstanding of the law by counsel.<sup>17</sup>

The judicial eye of the appellate court had been unduly myopic in narrowing the issues of the case to one of improper procedure and misunderstanding. On further appeal, the California Supreme Court, in a unanimous decision (per Tobriner, J.), harbored no such fiction that the stipulation by and between defense counsel and the prosecution was merely the consequence of a misunderstanding of law.<sup>18</sup> The paramount issue before the Court was the legal propriety of plea bargaining<sup>19</sup> in the administration of criminal justice.<sup>20</sup>

<sup>10</sup> West v. People, 3 Cal. App. 3d 386, 83 Cal. Rptr. 338 (1970).

<sup>11</sup> The only specification of error raised on appeal was the denial of appellant's motion to suppress evidence under California Penal Code section 1538.5. However, "because the order must be reversed on procedural grounds, it is not necessary to state the evidence received at the hearing on the motion to suppress evidence." West v. People, 3 Cal. App. 3d at 387, 83 Cal. Rptr. at 339.

<sup>12</sup> See note 7, *supra*.

<sup>13</sup> West v. People, *supra* note 10, at 389, 83 Cal. Rptr. at 340.

<sup>14</sup> See People v. Horn, 187 Cal. App. 2d 68, 9 Cal. Rptr. 578 (1960), for the elements required to prove a violation of CAL. PEN. CODE § 11557 (West 1970).

<sup>15</sup> See People v. West, 3 Cal. 3d 595, 611, 612 (1970).

<sup>16</sup> See West v. People, *supra* note 10, at 387, 83 Cal. Rptr. at 339.

<sup>17</sup> Brief for Plaintiff-Respondent at 2 n.1. "The opinion of the Court of Appeal fails to mention this stipulation and erroneously states that the entry of the *nolo contendere* plea 'was apparently done on the misunderstanding that the offense to which appellant pleaded was included within the offense charged.'"

<sup>18</sup> People v. West, 3 Cal. 3d 595, 613 (1970): "[W]e see no need to fashion such a fiction; we hold that the court, in accepting a knowing and voluntary plea of guilty or *nolo contendere*, is not limited in its jurisdiction to the offenses charged or necessarily included in those charged."

<sup>19</sup> The most complete descriptions of plea bargaining are found in D. NEWMAN,

Recognition of the legal status of plea bargaining, the California Supreme Court believes, is a constitutionally legitimate and salutary time-saving method<sup>21</sup> of disposing of criminal cases. The plea bargaining process may benefit both the state and the defendant. However, in remarking on the benefits which the defendant derives from the plea bargaining, the justices made a questionable assumption that, "the benefit to the defendant from a lessened punishment does not need elaboration . . ."<sup>22</sup> An exhaustive review by the California Supreme Court of the benefits to a defendant might have been appropriate to dispel any constitutional doubts as to the legal propriety of plea bargaining, except for the significance given to the decision in *Brady v. United States*.<sup>23</sup>

In *Brady*, the United States Supreme Court upheld the validity of the bargained guilty plea<sup>24</sup> against a claim by appellant that the

CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966) (hereinafter cited as Newman), and Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) (hereinafter cited as Alschuler).

<sup>20</sup> The Court prefaces its argument for upholding the constitutionality of plea bargaining by noting that plea bargaining is, ". . . an integral part of the administration of justice in the administration of justice in the United States." *People v. West*, 3 Cal. 3d 595, 604 (1970); see *Barber v. Gladden*, 220 F. Supp. 308, 314 (D. Ore. 1963) cert. denied, 377 U.S. 971 (1964). See also THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). In the federal system during the year ended June 30, 1968, approximately sixty-nine per cent of all dispositions of persons charged with crimes were pleas of guilty or *nolo contendere*. See Newman, *supra* note 19, at 3, where he states that roughly 90 per cent of all criminal convictions (includes felonies and misdemeanors) are by pleas of guilty.

<sup>21</sup> See Note, 19 STAN. L. REV. 1082, 1086, 1087 (1967).

<sup>22</sup> See *People v. West*, 3 Cal. 3d 595, 604 (1970). The Court does suggest benefits which may accrue to the defendant. For example, plea bargaining allows a greater flexibility in moulding the sentence to the particular emotional and physical characteristics of the defendant. See also Newman, *supra* note 19, at 105: "From a defendant's point of view most charge reductions are for the purpose of avoiding mandatory sentences or of obtaining a lenient sentence, such as probation, in cases where probation is precluded by legislation if the defendant is convicted of the higher charge." By pleading to the lesser offense of violating California Penal Code section 11557, the judge could exercise his discretion and place West on probation. However, these advantages are stated with reference to a condition of post-conviction. The Constitution of the United States establishes an accusatorial system of public trials, where the state has the burden of proving guilt beyond a reasonable doubt. The Constitution also provides for the privilege against self-incrimination, trial by jury, and the right to have witnesses called who are favorable to the defendant. On the other hand, plea bargaining undermines these protections by offering the waiver of such rights and privileges in exchange for an administrative determination of guilt. See also Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 89 HARV. L. REV. 1 (1970).

<sup>23</sup> 397 U.S. 742 (1970).

<sup>24</sup> The majority opinion, per Justice White, stated: "We decline to hold . . . that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged. . . . [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant

plea was in fact involuntary.<sup>25</sup> In order to give full force to the Court's decision, in light of United States Supreme Court and California Supreme Court decisions requiring procedural due process of law,<sup>26</sup> the California Supreme Court undertook to extend *Brady* by suggesting a procedure to satisfy the due process and adequate notice standards.

In *People v. West*, the California Supreme Court indicated that not only has the judiciary recognized and developed the beneficial aspects of the plea bargaining process, but legislative enactments also confirm the appropriateness of such bargains.<sup>27</sup>

A further consideration which has given impetus for the recognition of the legal status of plea bargaining is that criticism against plea bargaining often is not based on any antagonism towards the plea itself.<sup>28</sup> Rather, the theory of the illegitimacy of plea bargaining is essentially grounded in its being carried on behind closed doors<sup>29</sup> with no records having been kept of the procedure or terms of the bargain. If plea bargaining is openly recognized as being an appropriate procedure in the orderly administration of the criminal law, the courts may not have to be as skeptical of the voluntariness of the plea.

The significance of the *West* decision, following the recent ap-

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who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correction system in a frame of mind which affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Id.* at 751, 753.

<sup>25</sup> The basic requirement for the acceptance of any guilty plea is that it be made, "voluntarily with the understanding of the nature of the charge." FED. R. CRIM. PROC. 11. See *Brady v. U.S.*, *supra* note 23, at 755: "A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."

<sup>26</sup> See *In Re Oliver*, 333 U.S. 257 (1955), and *In Re Hess*, 45 Cal. 2d 171, 288 P.2d 5 (1955). Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at trial.

<sup>27</sup> See CAL. PEN. CODE §§ 1192.3, 1192.5 (West 1970). For another example of a statutory effort to develop a plea bargaining procedure, see N.Y. CODE CRIM. PROC. § 342-a (McKinney Supp. 1966). Also, D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966), at 30-31. The object of such a procedural framework is to protect the defendant from misinterpretation of the prosecutor's commitments and to aid the judge in his inquiry into the plea's validity.

<sup>28</sup> See *People v. West*, 3 Cal. 3d 595, 606 n.6 (1970).

<sup>29</sup> See Baker, *The Prosecutor-Initiation of Prosecution*, 23 J. CRIM. L. C. & P.S. 770, 790 (1932-1933). "The chief loss to orderly administration of the criminal law which comes from bargaining for pleas of guilty . . . is that it is all extra-legal, secret and undercover."

proval of plea bargaining by the United States Supreme Court,<sup>80</sup> is that California courts may now constitutionally accept negotiated pleas of guilty or *nolo contendere* where the terms of the negotiated plea are fully disclosed and constitute a part of the official trial record.<sup>81</sup> If the plea bargain is later collaterally or directly attacked, the recordation will afford to the appellate court a complete account of the proceedings.

A question of particular importance is the range or limits to which charges may be reduced. The California Supreme Court stated that the acceptance by the trial court of a bargained-for plea of guilty or *nolo contendere* is permissible where the lesser offense to which a defendant pleads is reasonably related to the defendant's conduct.<sup>82</sup> This rule presumably will limit the extent to which offenses could be downgraded so as not to be in contravention of the due process requirement of adequate notice.<sup>83</sup> However, granting adequate notice and full disclosure of the plea bargain in the record, the "bargain" may still only offer an illusory boon to the defendant who may necessarily forego the protective checks and balances of the accusatorial system of criminal justice.<sup>84</sup>

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<sup>80</sup> See note 23, *supra*.

<sup>81</sup> "We hold that in every case in which a plea bargain is accepted, it should be recorded. . . . The selection of the method by which the plea bargain should become a part of the record must rest in the discretion of the trial court." *People v. West*, 3 Cal. 3d 595, 610 (1970).

<sup>82</sup> *Id.* at 30. See ABA STANDARDS, standard 3.1(b)(ii), at 68: "In this way, the defendant's record . . . , while not a completely accurate portrayal of his criminal history, will not be grossly misleading and thus will not likely result in inappropriate correctional treatment or police suspicion."

<sup>83</sup> See note 26, *supra*.

<sup>84</sup> See generally Newman, *supra* note 19.