Authors: Frank V. Ariano
John D. Countryman

Vol. 46 1969.

THE ROLE OF PLEA NEGOTIATION IN MODERN CRIMINAL LAW

The basic principle of American criminal jurisprudence is that every individual is entitled to a fair and impartial trial in a competent court of law. It is from this principle that an accused party is assured protection of his constitutional rights. Idealistically, this is the manner in which every criminal case is handled. Realistically, however, the majority of criminal convictions are obtained by admission of guilt. Of these admissions, a large percentage are the result of plea negotiation.

In Cook County, the total number of defendants in felony cases in 1967 was 4,486.[1] Only 16% of these Cook County prosecutions involved actual trials. Thus, 84% of all the felony cases were disposed of without resort to the available trial procedure.[2] This percentage reflects the prevalence of plea negotiation in the current criminal system.

While the above figures do illustrate the prevalence of plea negotiation, they fail to accurately illustrate the complexity of criminal practice. Dismissals account for approximately 32% of the total disposition of cases.[3] In the remaining cases which do not proceed to trial, pleas of guilty are entered, either with or without negotiation. It has been estimated that between 70 and 80% of these guilty pleas have been negotiated.[4] Of those defendants finally convicted, therefore, 63% negotiated the plea.[5] It is thus apparent that plea negotiation not only enters into a large number of criminal felony cases, but also accounts for the majority of all felony convictions in Cook County.

Probably the main reason for the development of plea negotiation is the large criminal caseload. "In many cities, the criminal caseload has doubled within the past decade, while the size of the criminal bench has remained constant."[6] Cook County is no exception to this trend. Recent estimates indicate that each Cook County state's attorney in the criminal division handles at least eight to fifteen cases per day.[7] This volume necessitates disposition without going to trial.

1 *1967 Annual Report to the Supreme Court of Illinois* 55 as prepared by the Administrative Office of the Illinois Courts.

2 *Supra* note 1. It must be noted that this percentage includes all dismissals which may or may not have been the product of plea negotiations. Also, there are some guilty pleas entered without any plea discussions.

3 *Supra* note 1. In 1967 Cook County had 4,486 cases of which 1,450 were dismissed.

4 Interview with James Stamos, Assistant Cook County State's Attorney, in Chicago, Illinois, Oct. 9, 1968.

5 *Supra* note 1.

6 Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 51 (1968).

7 *Supra* note 4. Also to be considered are the limitations placed upon prosecution by the limited number of prosecutors and defense lawyers as well as courtroom facilities and court officials.

Another factor which necessitates resort to plea negotiation is the weakness of the prosecutor's case.[8] Proving guilt beyond a reasonable doubt is a time consuming burden, often impossible to meet. Generally, the strength of the State's case is directly related to the time available for preparation. The offer of a lesser included offense in return for an admission of guilt is a practical way to insure punishment. As a result, the prosecutor is often pressured into offering sentence concessions.

On the other hand, pressures evolve from this atmosphere which induce the defendant to accept the plea. The caseload and the shortage of court personnel not only affect the prosecutor, but also the defendant. A large percentage of the criminal cases today are handled by public defenders. The lack of adequate time to prepare a proper defense may justifiably cause the defendant to fear a stiffer sentence if he goes to trial. This fear may also arise from a lack of knowledge of the strength of the State's case.[9] In addition, a defendant with a prior criminal record may fear that his presumption of innocence will be ignored.[10] The mere appearance of a courtroom, even without a consideration of the consequences, may induce a defendant to admit guilt in order to avoid subjection to trial procedure.[11] These pressures, when viewed as a whole, create the atmosphere out of which the practice of plea negotiation has developed.

An Analysis of the Problems of Plea Negotiation

Arising from these pressures is the problem of whether a guilty plea was entered voluntarily and with full knowledge of the consequences. It is in this area that most of the litigation concerning the practice of plea negotiation has evolved.[12]

Generally, the courts will consider a plea of guilty, entered in due course, as voluntary unless it appears that the defendant failed to comprehend the consequences or that he was coerced. Mere disappointment in the sentence will not be ground for reversal. In the case of *People v. Walston*,[13] the defendant pleaded guilty to a charge of armed robbery and was sentenced to three to ten years imprisonment. He originally pleaded not guilty, but changed his plea when his motion to suppress evidence was

8 *Supra* note 4.

9 Interview with John Castle, former Assistant Cook County State's Attorney, in DeKalb, Illinois, Nov. 6, 1968.

10 Interview with Robert Bailey, Chicago defense attorney, in Chicago, Illinois, Nov. 4, 1968.

11 *Ibid.*

12 *See* People v. Riebe, 40 Ill. 2d 565, 241 N.E.2d 313 (1968); People v. Brown, 41 Ill. 2d 230, 242 N.E.2d 242 (1968); People v. Walston, 38 Ill. 2d 39, 230 N.E.2d 233 (1967); People v. Milani, 34 Ill. 2d 524, 216 N.E.2d 816 (1966); People v. Schmidt, 10 Ill. 2d 221, 139 N.E.2d 726 (1957); People v. Heirens, 4 Ill. 2d 131, 122 N.E.2d 231 (1954); People v. Ross, 409 Ill. 599, 100 N.E.2d 923 (1951); People v. Gaston, 85 Ill. App. 2d 403, 229 N.E.2d 404 (1st Dist. 1967).

13 38 Ill. 2d 39, 230 N.E.2d 233 (1967).

denied. When the defendant heard the prosecutor's recommendation of eight to twelve years, he asked to withdraw his plea because he had thought he would only receive probation. The Illinois Supreme Court, citing *People v. Morreale,*[14] stated that:

> Permission to withdraw a plea of guilty and enter a plea of not guilty is a matter within the discretion of the trial court, yet it is a judicial discretion which should always be exercised in favor of innocence. . . . Where it appears that the plea of guilty was entered on a misapprehension of the facts or of the law, or in consequence of misrepresentation by counsel or the State's Attorney or someone else in authority, or the case is one where there is doubt of the guilt of the accused, or where the accused has a defense worthy of consideration by a jury, or where the ends of justice will be better served by submitting the case to a jury, the court should permit the withdrawal of the plea of guilty and allow the accused to plead not guilty. . . . The mere fact, on the other hand, that an accused, knowing his rights and the consequences of his act, hopes and believes that he will receive a shorter sentence or milder punishment by pleading guilty than he would upon a trial and conviction by a jury, presents no ground for permitting the withdrawal of the plea after he finds that his expectation has not been realized.[15]

The case was reversed and remanded, however, because of error in failure to permit the defense counsel's testimony as to exactly why the plea was withdrawn. This decision supports the American Bar Association's suggestion that ". . . the court should allow the defendant to withdraw his plea of guilty . . . whenever the defendant, upon a timely motion for withdrawal, proves that the withdrawal is necessary to correct a manifest injustice."[16]

In line with the reasoning of the American Bar Association is the case of *People v. Riebe.*[17] The defendant pleaded guilty to murder subsequent to a conference between his defense counsel, the prosecutor and the judge. It appears that an agreement was reached whereby the defendant was to receive a sentence of not less than twenty-five nor more than forty years in return for the plea of guilty. The prosecutor then recommended the sentence of not less than thirty nor more than forty-five years. Concurring with this recommendation, the judge so sentenced the defendant. On appeal to the Illinois Supreme Court, it was held that fairness required that the defendant be informed of the conviction and remanded the cause on the ground that the defendant should have been afforded the opportunity

14 412 Ill. 528, 531-2, 107 N.E.2d 721, 723 (1953). *See also* People v. Grabawski, 12 Ill. 2d 462, 147 N.E.2d 49 (1958); People v. Temple, 2 Ill. 2d 266, 118 N.E.2d 271 (1954).

15 *Supra* note 13, at 42, 230 N.E.2d at 234-5.

16 American Bar Association, *Standards Relating to Pleas of Guilty* § 2.1, at 9 (Tent. Draft 1967).

17 40 Ill. 2d 565, 241 N.E.2d 313 (1968).

to withdraw his plea.[18] Although this case seems to conflict with *People v. Walston*[19] a distinction exists in the fact that here there was a plea agreement, participated in by the judge, whereas there, apparently no agreement was made at all. "An unfulfilled promise by the trial judge is ordinarily grounds for reversal by the appellate court, but an unfulfilled promise by a prosecuting attorney has not always been treated in the same way."[20] Evidently, therefore, in the absence of participation by the judge, a defendant who pleads guilty pursuant to a plea agreement has no absolute guarantee that he will receive the sentence for which he bargained.

The question of coercion is the other factor in determining whether a plea is voluntarily made. The coercion necessary to negate a plea of guilty is that which is caused by ". . . threats or promises of illegitimate action by law enforcement officials."[21] In the case of *People v. Darrah,*[22] the defendant pleaded guilty to burglary. During the course of the trial, the defense counsel was informed by the judge that a "considerably greater" sentence would be imposed if the case went to the jury. It was not clear whether this discussion took place before or after the plea of guilty was entered. On appeal of the conviction and sentence, the defendant contended that the pressures stemming from the fear of a more severe sentence amounted to coercion. The court held that the plea of guilty was not coerced because the defendant failed to prove that the alleged coercion occurred before he entered the plea.[23] The coercion must, therefore, be the proximate inducement for the plea of guilty.

Another illustration of this problem is found in the case of *People v. Gaston.*[24] The defendant was charged with three counts of armed robbery and one count of assault with the intent to commit robbery. He pleaded not guilty to one of the armed robbery charges but the jury returned a verdict against him. After this, the trial judge commented that the defendant ". . . should have come in and pled guilty. This man is a professional robber. . . ." Following this statement, the defendant pleaded guilty to the remaining charges. On appeal, the defendant contended, *inter alia,* that this comment by the trial judge coerced him into pleading guilty. The Appellate Court for the First District did not agree, and the convictions were affirmed.[25] It is obvious, therefore, that while there are numerous pressures which may strongly influence the defendant, the required degree of coercion is seldom found.

18 *Ibid.*

19 People v. Walston, 38 Ill. 2d 39, 230 N.E.2d 233 (1967).

20 Newman, *Conviction, The Determination of Guilt Or Innocence Without Trial* 37 (1966).

21 People v. Bowman, 40 Ill. 2d 116, 239 N.E.2d 433, 439 (1968).

22 33 Ill. 2d 175, 210 N.E.2d 478 (1965).

23 *Ibid.*

24 85 Ill. App. 2d 403, 229 N.E.2d 404 (1st Dist. 1967).

25 *Ibid.*

Finally, a related issue may exist involving communication of the offer from the prosecutor to the defendant. The general practice in plea negotiation is that the discussions take place between the proscutor and the defense counsel, without direct participation by the defendant.[26] The defendant's absence may affect his decision regarding the plea. The defendant's knowledge of the plea offer is limited to what his defense counsel tells him. In the case of *People v. Whitfield*,[27] an offer to reduce a charge from murder to manslaughter with the recommendation of probation was made to the defendant's counsel. This offer was not communicated to the defendant because the defense counsel thought he could win the case. The defendant was found guilty of murder. On appeal, the Illinois Supreme Court reversed and stated that:

> It follows logically that if a defendant has the right to make a decision to plead not guilty, he also has the right to make the decision to plead guilty. Due process demands this protection. It was his choice, not that of his counsel. . . .[28]

While this opinion clearly establishes the right of the defendant to make the final decision, it does not erase the possibility of influence exerted by the defense counsel in communicating the offer. The defendant may therefore become the victim of the attorney seeking trial experience, or conversely, the one who finds it more convenient not to go to trial.[29]

An Analysis of the Advantages of Plea Negotiation

The main value of the use of plea negotiation, as previously mentioned, is that it allows the prompt disposition of today's large volume of cases. It has been argued that, "It is . . . not an exaggeration to say that criminal procedure would totally break down, at least for a time in Cook County, if we were to eliminate plea negotiations at this juncture of judicial history."[30] This creature of necessity, therefore, even with all its inherent shortcomings, has become institutionalized as a major part of today's criminal practice.

Incidental to the main value of efficiency, the use of plea negotiation in certain cases may be beneficial to the parties involved. The American Bar Association, in its *Tentative Draft of Standards Relating to Pleas of Guilty*, stated that:

> In some cases there may be good reason for avoiding a public trial. This is particularly true in rape and indecent liberties cases,

26 Interview with James Stamos, Assistant Cook County State's Attorney, in Chicago, Illinois, Oct. 9, 1968.

27 40 Ill. 2d 308, 239 N.E.2d 850 (1968).

28 *Id.* at 311, 239 N.E.2d at 852.

29 Lecture by John Cleary, Chicago defense attorney, on *Plea Bargaining*.

30 From the reply brief for the defense in People v. Whitfield, 40 Ill. 2d 308, 239 N.E.2d 850 (1968).

> where the victim would have to appear in court and repeat the details of what transpired. Testifying in public these kinds of criminal cases is not only humiliating but may be a severely traumatic experience for the victim, especially for a child. Similarly, in other cases publicity concerning the victim's involvement with the offender would be unduly harmful to him. In cases of this kind, it would seeem most appropriate to grant charge or sentence concessions to the defendant who by his plea protects the interests of the victim. This is currently the practice of many courts.[31]

As a benefit to the prosecution, and consequently to the public, plea negotiation may enable the prosecutor to bargain for information which may lead to the conviction of others engaged in equally serious or more serious criminal conduct. The American Bar Association considers this factor important in the final disposition of a criminal case.[32] Illustrative of the sentiment toward informants is the statement by Judge Kaufman in *United States v. Rosenberg*.[33]

> The fact that I am about to show you some consideration does not mean that I condone your acts or that I minimize them in any respect. They were loathsome; they were comtemptible. I must, however, recognize the help given by you in apprehending and bringing to justice the arch criminals in this nefarious scheme. . . . You confessed and told a complete story in this case and it has been of great assistance to the Government. . . . [I]t is obvious that the Government gave due consideration to your assistance in their recommendation. I have to be realistic in a situation such as this, and I recognize that despite my own inclination to be more severe on your sentence, due to the revolting nature of this offense, I must subordinate my own feeling. Our national security is more important than any personal feeling that I might have on the subject, and it is indeed more important, I think, than punishment of any single individual. . . .[34]

The disposition of pending cases, therefore, is not the sole motive for plea negotiation.

The final significant advantage of plea negotiation is the psychological effect of any admission of guilt as a step toward rehabilitation.[35] While this view is theoretical, and certainly open to argument, the general opinion appears to be that:

> [A]n . . . alternative to punishment is a confession, in which the culprit avows his guilty thoughts or acts, suffering in the process

31 American Bar Association, *Standards Relating to Pleas of Guilty* § 1.8, at 47-8 (Tent. Draft 1967).

32 *Supra* note 3, § 1.8(v), at 9. Listed as a factor in determining sentence concessions is the fact that cooperation by a defendant may lead to the successful prosecution of others engaged in similar or even more serious criminal conduct.

33 195 F.2d 583 (2d Cir. 1952).

34 *Id.* at 606, n.28.

35 Interview with John Castle, former Assistant Cook County State's Attorney, in DeKalb, Illinois, Nov. 6, 1968.

> self-reproach or reproach from the moral authorities to whom he confesses. Almost all of us can testify from personal experience to the relief of guilt that may follow confession, and our criminal procedure shows that we regard confession as in some degree a substitute for punishment, by passing a lighter sentence on those who have freely acknowledged their guilt or who have spontaneously delivered themselves into the hands of justice. Confession is indeed the mildest way of satisfying the need for punishment, and increasing weight is attached to it by both the individual and by society as moral development proceeds.[36]

Acceptance of this view is evidenced by its adoption by various courts and authorities.[37] There is some support, however, for the contrary position, *i.e.*, ". . . the very fact that a defendant realizes a guilty plea may mitigate punishment impairs the value of the plea. . . ."[38] In reality, an overall adoption of either view is impractical. The rehabilitative effect on each defendant should be considered only on an individual basis.

Conclusion

Plea negotiation is a by-product of today's overburdened criminal law system. The plea of guilty in lieu of trial has become the general practice, not only in the criminal courts of Cook County, but in the entire American system of criminal justice.[39] The inherent problems emanating from plea negotiation often cause detriment to the defendant. The advantages that arise from the employment of this practice are based mainly on its necessity. From this viewpoint of practical necessity, any argument for abolition of the practice fails. Theoretically, however, the development of plea negotiation within the system diminishes resort to the impartial trial in a competent court of law. This practice takes justice from the courts and puts it into private negotiations.[40] Years out of a man's life are often bargained for by overburdened prosecutors and underpaid defense counsels. The result is a form of "meter justice"[41] which plays an ever increasing role in the modern system of criminal law.

Frank V. Ariano
John W. Countryman

36 Fugel, *Man, Morals and Society* 148 (1945).

37 *See, e.g.*, American Bar Association, *Standards Relating to Pleas of Guilty* § 1.8, at 37-47 (Tent. Draft 1967); Goodhart, *English Law and Moral Law* 92-93 (1953); Newman, *Conviction, The Determination of Guilt Or Innocence Without Trial* 95-96 (1966).

38 Comment, 66 Yale L.J. 204, 210 (1956).

39 From a brief for defense in People v. Whitfield, 40 Ill. 2d 308, 239 N.E.2d 850 (1968).

40 Lecture by John Cleary, Chicago defense attorney, on *Plea Bargaining*.

41 *Ibid.*