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Criminal Procedure - Pleas of Guilty Not Responsive to Bill of Information - Right of State to Correct Proceedings

Bernard E. Boudreaux Jr.

CRIMINAL PROCEDURE — PLEA OF GUILTY NOT RESPONSIVE TO BILL OF INFORMATION — RIGHT OF STATE TO CORRECT PROCEEDINGS

Two bills of information charged the defendant with possession and sale of narcotics. The defendant, pursuant to an agreement with the state, pleaded guilty to addiction, and sentence was imposed. Subsequently, it was discovered that the defendant had not been charged with the offense of addiction as no new bills of information charging addiction had been filed. Three months after the plea of guilty was accepted, the state filed a pleading styled "Motion to Set Aside and Vacate Judgment and Sentence," contending that the court lacked jurisdiction to accept the plea of addiction since it was not responsive to the charge, and that the judgments and sentences should be annulled and set aside. The trial court ruled in favor of the state. On certiorari to the Louisiana Supreme Court, *held*, reversed. A plea of guilty when accepted and entered upon the record is a conviction, and the district court was without authority to vacate the judgments and sentences. *State v. Braud*, 238 La. 811, 116 So.2d 676 (1959).

The Louisiana Code of Criminal Procedure has no single article which adequately covers a situation where a defendant pleads guilty to an offense with which he is not charged. Article 263[1] states that the plea of guilty admits guilt only in the manner and form charged in the indictment.[2] It is generally admitted that the plea of guilty is equivalent to a conviction,[3] and that a conviction is synonymous with a verdict of guilty.[4] Article 405 states that a verdict of guilty must be responsive to the indictment and that no one can be found guilty of an offense not charged in the indictment, or not necessarily included in the offense charged. The crime of addiction is not responsive to, nor included in, the charge of sale and possession of narcotics.[5] Therefore, the statutes seem to indicate that *judgments* such as those in the instant case should be declared invalid.

1. LA. R.S. 15:263 (1950).
2. Although the instant case concerns two bills of information, *id.* 15:216 provides that the rules contained in the Code of Criminal Procedure apply as much to informations as to indictments, unless it is clear that reference is only to a finding of the grand jury.
3. Stokes v. State, 122 Ark. 56, 182 S.W. 521 (1916); Cummings v. Perry, 194 Ga. 424, 21 S.E.2d 847 (1942); 22 C.J.S., *Criminal Law* § 424 (1940).
4. Schireson v. State Board of Medical Examiners, 130 N.J.L. 570, 33 A.2d 911 (1943); Martin v. State, 30 Okla. Crim. 49, 234 Pac. 795 (1925).

A valid *sentence,* as provided by Article 522, must rest upon a valid verdict, indictment, and statute, and *everything essential to punishment must be found by the verdict and alleged in the indictment.* Article 527 provides that when sentence is illegal, review by defendant or state may be had by appeal in an appealable case, or by certiorari and prohibition in an unappealable case. In view of the intent of these two articles it seems that the *sentences* imposed in the instant case should have been set aside.

The court has been consistent in striking down *convictions* and *sentences* which are not responsive to the indictments. However, the language employed in each case has varied. For example, in *State v. Roberts,*[6] the court said, "it is vital to the validity of any verdict for a lesser offense that all the elements of that offense are necessarily contained in the definition of the greater." And in *State v. Calvo,*[7] in a discussion of the possibility of an unresponsive verdict, the court stated, "such a verdict would not only be invalid but would have been declared a *nullity* by the court receiving it."[8] (Emphasis added.) The effect of a plea of guilty is defined as "a record admission of whatever is well charged in the indictment or information."[9] In other jurisdictions the courts, in uniformly requiring responsiveness, have used such language as, the "verdict is fundamentally defective,"[10] and, "a person cannot be convicted of an offense . . . not charged against him by indictment."[11]

In the instant case, the court stated that the plea of guilty when accepted and entered on the records is a *conviction* of the highest order. From this major premise the court reasoned that the state's plea to set aside and vacate judgments and sentences was in effect either a motion for a new trial, or a motion in arrest of judgment. Since Article 506 specifies that the state

5. State v. Robinson, 221 La. 19, 58 So.2d 408 (1952).

6. 213 La. 559, 567, 35 So.2d 216, 218 (1948), quoted in State v. Clayton, 236 La. 1093, 1104, 110 So.2d 111, 115 (1959).

7. 240 La. 75, 121 So.2d 244 (1960). Although this case was decided after the instant case, it indicates the consistent attitude of the court toward unresponsive verdicts.

8. 121 So.2d 244, 250 (La. 1960). In State v. Gendusa, 190 La. 422, 430, 182 So. 559, 561 (1938), the court stated: "The verdict . . . is not responsive to the indictment, and is therefore of no effect. The verdict being invalid, the sentence imposed thereunder is also invalid."

9. 22 C.J.S., *Criminal Law* § 424 (1940).

10. Wright v. State, 330 S.W.2d 618, 619 (Tex. Crim. App. 1960).

11. People v. Travis, 171 Cal. App.2d 842, 844, 341 P.2d 851, 852 (1959). In State v. La Rue, 67 N.M. 149, 151, 353 P.2d 367, 368 (1960), the court stated: "The rule that a person cannot be convicted of an offense of which he is not charged is so well settled that citation of authority is deemed unnecessary."

cannot be granted a new trial, and Article 519 prohibits a motion in arrest of judgment after sentence has been imposed, the Supreme Court concluded that the district court was without authority to entertain the state's motion which was made after sentence had been imposed. In a concurring opinion by Chief Justice Fournet it was stated that, since it had been held that the verdict of addiction is not responsive to the charge of possession and sale, the sentences were illegal. Citing Article 527, it was declared that the state's remedy to complain of such illegal sentences was by appeal, and the time allowed for an appeal having expired, the state was without right to proceed via a motion to vacate the *sentences*. In upholding the *convictions*, the opinion of the Chief Justice adopted the reasoning set forth by the main opinion of the case. In the concurring opinion of Justice Hawthorne it was stated, "As a matter of law, I think the trial judge was correct in sustaining the motion. As a matter of equity, however, I do not believe the suspended sentences in these cases should be annulled and set aside."[12] The legal basis of this opinion was not given, but the "equity" referred to was the fact that there had been an agreement between the state and defendant, and that the state was urging its own error in seeking abrogation of that agreement.[13]

In view of the fact that the tenor of the Code of Criminal Procedure indicates that the judgments *and* sentences in the instant case should be declared null, and the attitude of the court toward cases involving similar problems, and dispositions by courts of other jurisdictions, it is submitted that a sufficient basis in law existed for the result reached by the trial court. The ultimate result of the holding of the Supreme Court is that the state's remedy was lost due to the lapse of procedural delays applicable to a device (appeal) not employed per se by the state but made applicable to the state's motion by an analogy by the court. This analysis was answered in the dissenting opinions.

12. State v. Braud, 238 La. 811, 822, 116 So.2d 676, 680 (1959).

13. The penalty for a conviction of possession and sale of narcotics is considerably more severe than is the penalty for conviction of being an addict. The penalty for the former offense in one situation provides for the death penalty, and expressly prohibits parole, probation, or suspension of sentence in all other situations, whereas in the latter, the sentence in one situation provides for the possibility of a suspended sentence, which was in fact what occurred in the instant case. In the concurring opinion of Justice Hawthorne reference was expressly made to this vast difference in punishment, and it was pointed out that should the judgments and sentences be set aside, the defendant could be compelled to stand trial for the offense with the more severe punishment. Perhaps this fact bore considerable weight toward the result reached in the instant case. See LA. R.S. 40:981 (1950), as amended by La. Acts 1956, No. 84, § 1.

Justice McCaleb took the position that the judgments and sentences were null and stated that the majority should not have equated the state's motion with the motion for new trial or the motion in arrest of judgment, as the purpose of the state's motion was to have the null judgments set aside. If an unresponsive verdict is treated as a nullity, then the lapse of procedural delays should not cause such nullities to achieve validity. This latter position was taken in the dissenting opinion of Justice Hamlin. Finally, four of the Justices felt that at least the *sentences* were invalid.[14] Article 527 would appear to indicate that no invalid sentence should be allowed to stand. In view of the result of the case, perhaps the fact that there was an agreement between the state and the defendant, and, by virtue of its own error, the state sought abrogation was of greater significance and consequence than is indicated by the single reference to these facts made in a concurring opinion.[15]

Bernard E. Boudreaux, Jr.

ELECTIONS — SECRECY OF THE BALLOT

Plaintiff alleged that secrecy of the ballot was violated at two precincts having 895 of the 20,061 legal votes cast during the 1960 Democratic Primary Election for the office of Judge of the Twenty-first Judicial District. If the vote in these two contested precincts were set aside, petitioner would have had a majority of one vote. In both precincts the voting machines were located in buildings near stairways leading to the second floors. The booths were constructed with open tops permitting someone on the stairway to see into the booth, but the testimony was somewhat contradictory concerning the extent the interior could be seen. At both precincts persons were seen on the stairway at various times during the election. Plaintiff sought to have spe-

14. Chief Justice Fournet stated that the sentences were invalid but that the state's remedy had prescribed. Justice Hawthorne stated that as a matter of law the sentences should be set aside, but held otherwise as a matter of equity. Justices McCaleb and Hamlin dissented as to the result of the case.

15. See in *Work of the Louisiana Supreme Court for the 1959-1960 Term — Criminal Law and Procedure*, 21 LOUISIANA LAW REVIEW 366, 375 (1961), a discussion of the possibility of the state being estopped from alleging invalidity of judgments and sentences because of its own error. On the matter of the binding effect of agreements between prosecuting attorneys and defendants, see State v. Lopez, 19 Mo. 254 (1853); State v. Ward, 112 W.Va. 552, 165 S.E. 803 (1932); Annot., 85 A.L.R. 1177 (1932); 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 140 (1957); 5 *id.* § 2210.