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### Criminal Procedure—Effect upon Appeal of Plea of Guilty in Recorders Court

Defendant was charged in a recorders court with assault with a deadly weapon. He was without counsel and pleaded guilty. Upon appeal to the Superior Court, from a judgment of two years' imprisonment, counsel for D sought to withdraw the plea of guilty entered below. This motion was refused. On appeal questioning this ruling it was *held*: That the motion to withdraw the plea of guilty was addressed to the sound discretion of the Superior Court judge and could not as a matter of right be withdrawn.<sup>1</sup> Three judges dissented and were of the opinion that the statute controlling appeals from the particular recorders court involved entitled the D to enter an original plea of not guilty. The majority purports to follow *State v. Warren*,<sup>2</sup> which was a criminal case originating in a justice of the peace court. There the plaintiff pleaded guilty to the use of profane language in an area prohibited by statute. He was fined fifty dollars and appealed to the Superior Court. The report of the case fails to show what his plea was in the Superior Court; however, it is stated that the record shows that D was found guilty by a jury. This would be inconsistent with a plea of guilty. The Superior Court granted D's motion to arrest judgment on the grounds that the statute under which he was convicted was unconstitutional, and D's plea of guilty precluded him from raising other questions. The dissent points out that the *Warren* case did not directly raise the question here presented, and that the original record in that case reveals that there was also a verdict by the jury in the Superior Court.

Assuming that the cases raise the same question, the *Warren* case would seem to be authority, since the statute regulating appeals from the particular recorders court here involved<sup>3</sup> and that regulating appeals from a justice of the peace in criminal cases are similar.<sup>4</sup> This comparison is accepted by the dissent.

Although the case is fundamentally one of statutory construction, it involves the effect of a plea of guilty. Just what is the effect of such a plea? A plea of guilty is a formal confession of guilt before the court in which the defendant is arraigned, and differs from a volun-

<sup>1</sup> *State v. Crandall*, 225 N. C. 148, 33 S. E. (2d) 861 (1945).

<sup>2</sup> 113 N. C. 683, 18 S. E. 498 (1893).

<sup>3</sup> N. C. PUB. LOCAL LAWS (1911) c. 74 §7(e): ". . . and any person convicted in said court shall have the right to appeal to the Superior Court of Beaufort County and upon such appeal the trial in the Superior Court shall be de novo on papers certified from said recorders court."

<sup>4</sup> N. C. GEN. STAT. (1943) §15-17: "The accused may appeal from the sentence of the justice to the Superior Court of the county. . . . In all such cases of appeal, the trial shall be anew, without prejudice from the former proceedings."

tary confession in that the latter is merely evidence of guilt.<sup>5</sup> Such a plea, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order.<sup>6</sup> The courts agree that once the plea is accepted it is equivalent to a conviction in that the court may give judgment thereon. It is when a plea of guilty is entered in an inferior court, and the defendant is brought before a higher court upon appeal, with the upper court looking back on the plea, that differences in a guilty plea and a conviction have been noted.

In this state a conviction in an inferior court cannot be used as evidence of guilt when the defendant is tried anew upon appeal to the Superior Court.<sup>7</sup> On the other hand, when a defendant pleads guilty in an inferior court the plea is admissible as evidence of defendant's guilt on trial *de novo* in the Superior Court.<sup>8</sup> Again, a defendant appealing from a conviction upon a plea of not guilty in an inferior court must plead anew in the Superior Court,<sup>9</sup> while under the doctrine of the principal case, if a defendant pleads guilty in an inferior court and appeals, he comes into the Superior Court with that plea.

Courts of other states have made further distinctions. A statute requiring twenty-four hours delay between a conviction and sentence does not apply to a plea of guilty.<sup>10</sup> Where a physician or an attorney pleads guilty to a crime involving moral turpitude, and in a separate action to revoke his license, under a statute providing that same may be done upon "conviction," the statute was held not to apply to a plea of guilty before final judgment was entered thereon.<sup>11</sup> To the same effect, where a statute provided a heavier penalty for persons previously "convicted," and defendant had pleaded guilty on three previous occasions and sentence had been suspended, it was held that he had not been thrice convicted within the meaning of the statute.<sup>12</sup>

It is due to a guilty plea's conclusiveness, together with its collateral and subsequent effect, that it is often stated that it should be accepted with caution.<sup>13</sup> The caution should be exercised in proportion to the gravity of the offense.<sup>14</sup> At least three states require by statute that

<sup>5</sup> *State v. Branner*, 149 N. C. 559, 63 S. E. 169 (1908).

<sup>6</sup> *Marks v. People*, 204 Ill. 248, 68 N. E. 436 (1903).

<sup>7</sup> *State v. John Moore*, 209 N. C. 44, 182 S. E. 692 (1935).

<sup>8</sup> *State v. Libby*, 209 N. C. 363, 183 S. E. 414 (1936); *State v. Ingram*, 204 N. C. 557, 168 S. E. 837 (1933).

<sup>9</sup> *State v. Lueders*, 214 N. C. 558, 200 S. E. 22 (1938).

<sup>10</sup> *State ex rel. Chicola v. Gen. Mgr. La. State Penitentiary*, 188 La. 694, 177 So. 804 (1937).

<sup>11</sup> *State Medical Board v. Rodgers*, 190 Ark. 266, 79 S. W. (2d) 83 (1935); *ex parte Tanner*, 40 Ore. 31, 88 P. 301 (1907).

<sup>12</sup> *People ex rel. Marckley v. Lawes*, 254 N. Y. 249, 172 N. E. 487 (1930).

<sup>13</sup> 4 BL. COMM. 329; Note (1931) 79 U. OF PA. L. REV. 484 (deals with withdrawals of pleas of guilty, but cites numerous authorities for the proposition stated).

<sup>14</sup> BISHOP, CRIMINAL PROCEDURE, vol. 1, §795.

the trial judge admonish the defendant before accepting his plea of guilty,<sup>15</sup> and it has been held apart from any statutory provisions, that the trial judge should give admonition to the effect of the guilty plea before it is accepted and sentence given thereon.<sup>16</sup> Other jurisdictions leave to the discretion of the trial judge whether to accept or refuse such a plea from the defendant, and in the absence of explanatory evidence will presume that D understood the significance of his plea.<sup>17</sup>

Since the effect of a plea of guilty gives its greatest difficulty when a court is exercising a retrospective view of the plea, the problem becomes in part one of the relationship between the inferior courts and the Superior Court. The constitution allows the legislature to provide methods other than jury trials for petty misdemeanors, with the right to appeal.<sup>18</sup> Thus it is held that recorders courts are constitutional, and a defendant's right to a jury trial is not denied when he is allowed a jury trial in the Superior Court.<sup>19</sup> Assuming that the right to a jury trial is preserved by the constitutional right to an appeal, when and under what circumstances may the right be waived? It may be waived in the Superior Court by a plea of guilty entered there.<sup>20</sup> The defendant in a misdemeanor case may consent to a verdict of less than twelve, and by not objecting to the entry in the record that it was a verdict of a jury may estop himself to deny that he has had a jury trial.<sup>21</sup> He may likewise waive the right by consenting to a judgment of an inferior court or by not appealing, although the statutory time limit for the appeal has not run.<sup>22</sup> Has a defendant who pleads guilty in an inferior court waived this right? The dissent thinks not where the statute defining the scope of the appeal from the inferior court provides that ". . . upon such appeal the trial in the Superior Court shall be *de novo*." The majority might have given a short answer to the whole question by simply holding that the right to a trial *de novo*, by the express terms of the statute, applied where a defendant was *convicted* in the recorders court and had no application

<sup>15</sup> ILL. ANN. STAT. (Smith-Hurd, 1934), c. 38, §732; COLO. STAT. ANN. (Michie, 1935), c. 48, §482; TEXAS ANN. CODE CRIM. PROC. (Vernon, 1938), art. 501. Cf. MICH. STAT. ANN. (Henderson, 1936), §28-1058.

<sup>16</sup> *Mislik v. State*, 184 Ind. 72, 110 N. E. 551 (1915); *Lowe v. State*, 111 Md. 1, 73 A. 637, 24 L. R. A. (N.S.) 439, 18 Ann. Cas. 744 (1909); *Hordzog v. State*, 47 Okla. 244, 293 P. 1107 (1930).

<sup>17</sup> *State v. Ingram*, 204 N. C. 557, 168 S. E. 837 (1933); *State v. Hill*, 81 W. Va. 676, 95 S. E. 21, 6 A. L. R. 687 (1918).

<sup>18</sup> N. C. CONST. ART. 1, §13.

<sup>19</sup> *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394 (1922); *State v. Shine*, 149 N. C. 480, 62 S. E. 1080 (1908).

<sup>20</sup> *State v. Branner*, *supra* note 5.

<sup>21</sup> *State v. Robert Wheeler*, 185 N. C. 670, 116 S. E. 413 (1923).

<sup>22</sup> *State v. Lockey*, 191 N. C. 571, 132 S. E. 570 (1926); *State v. Pasley*, 180 N. C. 695, 104 S. E. 533 (1920).

where the defendant pleaded guilty.<sup>23</sup> It is evident that the court did not intend to make any distinction between "conviction," as used in the statute and a plea of guilty, for the decision purports to follow a case where the appeal was from a justice of the peace. There the relative statute provides that the defendant may appeal from the sentence and upon such appeal the trial shall be anew, without prejudice from the former proceedings.<sup>24</sup> These latter provisions merely spell out the right to a trial *de novo*.

Where the statute provides for a trial *de novo*, just what do such provisions mean? Generally *de novo* means anew, but it is not so broad in misdemeanor cases as to prevent a trial in the Superior Court on the original warrants.<sup>25</sup> Neither are the warrants so binding as to prevent amendments,<sup>26</sup> but they cannot be so amended as to charge a new or a different offense.<sup>27</sup> The Superior Court when considering a case *de novo* may increase the punishment given below.<sup>28</sup>

When it comes to the effect of a plea of guilty entered below upon the statutory provisions for an appeal and a trial *de novo* the courts seem to have taken three views: (1) The right to appeal is non-existent after such a plea is entered or is waived thereby. (2) The right to appeal is not affected, but the guilty plea is retained in the new trial. (3) The right to appeal is not affected and the defendant may plead anew in the appellate trial.

The courts taking the first view are in keeping with the general rule as stated by law encyclopedias that in a criminal case a party cannot have a judgment properly entered on a plea of guilty reviewed by appeal or error proceedings.<sup>29</sup> Statutory or constitutional provisions for an unrestricted appeal from the inferior court does not alter the result. These courts treat the guilty plea as a waiver of the existing right.<sup>30</sup> Although these courts speak as if there is no right of appeal after such plea is entered, some merely decide that the appeal should be dismissed.<sup>31</sup> Courts of this view make exceptions when the

<sup>23</sup> Cf. *People v. Brown*, 87 Cal. 261, 286 P. 859 (1930). (Statute provided: "If any person convicted of any criminal offense before any justice of the peace, shall wish to appeal to the county court he or she shall . . . etc." Held: Statute did not give right to an appeal when defendant pleaded guilty before the justice.)

<sup>24</sup> *Supra* note 4.

<sup>25</sup> *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

<sup>26</sup> *State v. Hunt*, 197 N. C. 707, 150 S. E. 353 (1929); *State v. Johnson*, 188 N. C. 591, 125 S. E. 183 (1924); *State v. Millis*, 181 N. C. 530, 106 S. E. 677 (1921).

<sup>27</sup> *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934).

<sup>28</sup> *State v. Stafford*, 113 N. C. 635, 18 S. E. 256 (1893).

<sup>29</sup> 2 AM. JUR. 987; 2 R. C. L., Appeal and Error, §41.

<sup>30</sup> *State v. Eckert*, 123 Wash. 403, 212 P. 551 (1923); *State v. Putnam*, 121 Wash. 438, 209 P. 679 (1922).

<sup>31</sup> *Stokes v. State*, 122 Ark. 56, 182 S. W. 521 (1916); *Dudney v. State*, 136 Ark. 453, 206 S. W. 898 (1918); *Philpot v. State*, 65 N. H. 250, 20 A. 955 (1890).

case on appeal is one that the court thinks is meritorious.<sup>32</sup> The weight of authority is against this view and will allow an appeal from a court not of record where the statute provides for an unrestricted appeal.<sup>33</sup>

The courts taking the second view treat the plea of guilty and its entry upon the record as the defendant's plea upon appeal, the effect being to limit the appellate court's consideration to those things not admitted by the plea of guilty. Perhaps the leading case for this position is *Commonwealth v. Mahoney*,<sup>34</sup> where Grey, C. J. said, "If he pleads guilty on his first arraignment, and the plea is received by the court and recorded, it is an admission of all the facts well charged in the indictment or complaint and a waiver of his right to a jury trial thereon." The difference between the first two views is that the first makes the plea a waiver of the right to appeal while the second makes it a waiver of the right to a jury trial.<sup>35</sup> Courts adopting this position make the same rule applicable to a plea of not guilty entered below.<sup>36</sup>

The courts adopting the third view say the stated rule that a judgment by confession cannot be reviewed on appeal is wholly inapplicable to statutory appeals that are made triable *de novo*.<sup>37</sup> This view was taken by the Texas court in *Ex parte Jones*.<sup>38</sup> There defendant had pleaded guilty before a justice of the peace and appealed to the county court. When the case was called in the county court the defendant wanted to plead not guilty, but was denied the right to do so. The Texas constitution provides that in all appeals from justice courts there shall be a trial *de novo*. Upon appeal questioning this ruling by the county court the Supreme Court said, "Without reviewing the statutes and constitutions of those states whose courts have held contrary to the view we entertain, we deem it only necessary to say, the language of our constitution and statutes as above quoted are so plain as to almost demand apology for an argument or any other citation. A trial *de novo* literally is a trial from the beginning, as if no former trial had been had." The same question was before the Florida court

<sup>32</sup> *Fletcher v. State*, 12 Ark. 169 (1850); *Nicley v. Butcher*, 81 W. Va. 247, 94 S. E. 147 (1917).

<sup>33</sup> *State v. Stevens*, 3 Harr. (Del.) 479, 139 A. 78 (1927); *Yeager v. State*, 197 Ind. 401, 131 N. E. 42 (1921); *State v. Hedges*, 67 Kan. 176, 72 P. 528 (1903); *State v. Funderburk*, 130 S. C. 352, 126 S. E. 140 (1925); *Weaver v. Kimball*, 59 Utah 72, 202 P. 9 (1921); *Duckerson v. Commonwealth*, 162 Va. 787, 173 S. E. 543 (1934).

<sup>34</sup> 115 Mass. 151 (1874).

<sup>35</sup> *State v. Down*, 41 Idaho 199, 239 P. 279 (1925); *Doench v. State*, 89 Ind. 52, 165 N. E. 777 (1929).

<sup>36</sup> *Cline v. State*, 25 Ind. 331, 58 N. E. 210 (1900); *Commonwealth v. Blake*, 94 Mass. 188 (1865).

<sup>37</sup> *Jenkins v. State*, 173 Miss. 546, 54 So. 158 (1911).

<sup>38</sup> 128 Tex. Cr. App. 380, 81 S. W. (2d) 706 (1935).

in *State v. Frederick*.<sup>39</sup> The Florida constitution provides: "Appeal from justice of the peace courts in criminal cases may be tried *de novo* under such regulation as the legislature may prescribe." Pursuant to this provision the legislature provided that the circuit court should try all cases on appeal from justice of the peace courts *de novo* as though the proceeding had been originally begun in the circuit court. The defendant pleaded guilty of assault and battery before a justice, was given four months in jail, and appealed to the circuit court, where his appeal was dismissed. Considering a petition for a writ of mandamus directing the circuit court judge to reinstate the case the Supreme Court said, "The right to appeal and demand a trial *de novo* in the circuit court from a justice of the peace court conviction is entirely regulated by statute. The statute imposes no limitation on the right to appeal such as to confine the right only to those who have pleaded not guilty. . . . Justice of the peace courts in Florida are not courts of record. On the contrary they proceed with utmost informality. For the latter reason such courts are best made to serve the purpose of justice through according to the accused an unconditional trial *de novo* in the circuit court under proper forms of accusations and before a judge and jury of the highest degree of capability." The Virginia court, when confronted with the question in *Dickerson v. Commonwealth*,<sup>40</sup> reversed a former opinion in keeping with the first view and adopted the third stated view. The circuit court had dismissed defendant's appeal from a justice of the peace where he had pleaded guilty. The Supreme Court when considering this ruling held that the statutes there neither expressly nor by implication limit the right to appeal to persons convicted upon a plea of not guilty. The case was remanded to the circuit court for a trial *de novo* with the right to the accused to withdraw his plea of guilty. Courts adopting this view are of the opinion that the former proceedings must be disregarded and find this to be the legislative intent in providing for unrestricted appeals and *de novo* trials.<sup>41</sup>

It is submitted that in the principal case if the statute is construed to mean the same as statutes governing like situations from justice of the peace courts the dissent is supported by the greater and better authority.

CYRUS F. LEE.

<sup>39</sup> 124 Fla. 290, 168 So. 252 (1936).

<sup>40</sup> *Supra* note 33.

<sup>41</sup> *People v. Richmond*, 57 Mich. 399, 24 N. W. 124 (1885).