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Motor Vehicles—Nolo Contendere—Suspension of Driver's License Based Solely on the Record of Sentence on Such Plea Held Invalid

The question whether the record of a plea of *nolo contendere*[1] entered in a drunken driving case will support a suspension of the operator's license by the Commissioner of Motor Vehicles pursuant to provisions of G. S. 20-16[2] was recently presented to the Supreme Court for the first time. In holding the Commissioner's action, taken solely upon the record of the licensee's plea of *nolo contendere,* to be without authority of law, the Court said that, the suspension proceedings before the Commissioner being separate from the proceedings in which the plea was entered, the record was neither sufficient evidence of the offense nor the equivalent of an admission that an offense had been committed.[3]

The plea of *nolo contendere* is of ancient origin[4] and has been recognized by our Supreme Court since 1837.[5] It authorizes judgment as upon a verdict or plea of guilty,[6] but leaves the defendant free to assert his innocence in all other proceedings, both civil[7] and criminal,[8] the judgment and sentence upon the plea not being the equivalent of conviction or confession in open court.[9] Other jurisdictions, confronted with analogous situations, have relaxed this strict rule[10] and have drawn two distinctions not expressly considered by the North Carolina Court: (1) The issue involved in a proceeding of this nature is not the guilt or innocence of the licensee *but rather whether or not he has been con-*

[1] Lat. I do not wish to contest (the action). 2 BOUVIER'S LAW DICTIONARY 2354 (1914). For an excellent survey of the topic, see 30 N. C. L. REV. 407 (1952).

[2] The statute gives the Commissioner "authority to suspend the license of any operator . . . upon a showing by its records or other satisfactory evidence that the licensee . . . has committed an offense for which mandatory revocation of license is required upon conviction." N. C. GEN. STAT. § 20-16 (1953). Driving under the influence of intoxicating liquor is such an offense.

[3] Winesett v. Scheidt, 239 N. C. 190, 79 S. E. 2d 501 (1954).

[4] LAMBARD, EIRENARCHA: OR OF *The Office of the Justices of the Peace* 511 (4th rev. 1599). This manual cites entries, relative to the plea, entered in 1407 and 1409.

[5] The earliest reported case appears to be State v. Oxendine, 19 N. C. 435 (1837).

[6] State v. Cooper, 238 N. C. 241, 77 S. E. 2d 695 (1953); State v. Beasley, 226 N. C. 579, 39 S. E. 2d 607 (1946).

[7] *In re* Stiers, 204 N. C. 48, 167 S. E. 382 (1933).

[8] State v. Thomas, 236 N. C. 196, 72 S. E. 2d 525 (1952).

[9] State v. Oxendine, 19 N. C. 435 (1837). Also Winesett v. Scheidt, 239 N. C. 190, 79 S. E. 2d 501 (1954); State v. Thomas, 236 N. C. 196, 72 S. E. 2d 525; *in re* Stiers, 204 N. C. 48, 167 S. E. 382 (1933).

[10] Louisiana State Bar Association v. Steiner, 204 La. 1073, 16 So. 2d 843 (1944); Louisiana State Bar Association v. Connolly, 201 La. 342, 9 So. 2d 582 (1942); Wilson v. Burke, 356 Mo. 613, 202 S. W. 2d 876 (1946); Neibling *et al.* v. Terry, 352 Mo. 396, 177 S. W. 2d 502 (1944); Kravis v. Hock, 136 N. J. L. 161, 54 A. 2d 778 (1947); Kravis v. Hock, 135 N. J. L. 259, 51 A. 2d 441 (Sup. Ct. 1947); Schireson v. State Board of Medical Examiners, 129 N. J. L. 203, 28 A. 2d 879 (Sup. Ct. 1942); State v. Estes, 130 Tex. S. Ct. Rep. 425, 109 S. W. 2d 167 (1939).

victed;[11] (2) where there is a statute which looks to conviction as a basis for revoking or suspending a license without specifying how the conviction shall be had, sentence upon the plea of *nolo contendere* may be considered the equivalent of a conviction.[12]

The decision in the principal case is based upon an earlier North Carolina decision.[13] In that case, defendant, an attorney at law, had pleaded *nolo contendere* to an indictment for embezzlement. Under the statute then in force,[14] disbarment proceedings predicated upon conviction for a felony were instituted. The Court held that the fact that he had pleaded *nolo contendere* could not be used against him in such proceeding because the plea does not amount to a conviction in open court. The principal case might have been distinguished on the ground that the statute in the *Stiers* case, *supra,* required a conviction "in open court" while G. S. 20-16 has no such requirement. However, no cases are found supporting such a distinction.

The concurring opinion in the principal case suggests that the Commissioner proceed to revoke the operator's license under G. S. 20-17, which directs that the Commissioner "forthwith revoke the license of any operator . . . upon receiving a record of such operator's . . . conviction" for drunken driving. This result is subject to the same objection, for the Commissioner would yet be revoking the license of a person who has not been "convicted" within the meaning ascribed to the word by the Court. One might even look askance at the clerk of court for having sent the record in the first place, since the applicable statute, G. S. 20-24(a), stipulates that the clerk forward to the Department of Motor Vehicles all driver's licenses held by the person *convicted,* "together with a record of such conviction." Assuming, as did the Judge in the concurring opinion, that this revocation would not be reviewable under G. S. 20-25,[15] still the problem is not hurdled, for the licensee might seek a writ of mandamus to force the return of his license,[16] or seek a writ of certiorari to review the action taken.[17]

Two other possibilities present themselves. First, the trial court might make surrender of the license a condition, agreed to by the li-

[11] Kravis v. Hock, 136 N. J. L. 161, 165, 54 A. 2d 778, 781 (1947). Schireson v. State Board of Medical Examiners, 129 N. J. L. 203, 208, 28 A. 2d 879, 881 (Sup. Ct. 1942).

[12] Neibling *et al.* v. Terry, 352 Mo. 396, 398, 177 S. W. 2d 502, 504 (1944).

[13] *In re* Stiers, 204 N. C. 48, 167 S. E. 382 (1933).

[14] N. C. CONSOL. STAT. 205 (1924) as amended by N. C. Pub. Laws 1929, c 64.

[15] "Any person denied a license or whose license has been cancelled, suspended, or revoked by the Department, except where such cancellation is mandatory under the provisions of this article, shall have a right to file a petition within thirty (30) days thereafter for a hearing in the matter in the superior court." N. C. GEN. STAT. § 20-25 (1953).

[16] Hinnekens v. Magee, 135 N. J. L. 537, 53 A. 2d 356 (Sup. Ct. 1947).

[17] *In re* Wright, 228 N. C. 584, 46 S. E. 2d 696 (1948); Hinnekens v. Magee, 135 N. J. L. 537, 53 A. 2d 356 (Sup. Ct. 1947).

censee, upon which sentence could be suspended. This course, however, poses an objection. Suppose that the licensee were subsquently found guilty of operating a motor vehicle without a license. This would be sufficient to result in execution of the suspended sentence. But suppose instead that he had entered the plea of *nolo contendere* to the second offense. In that event, our Court has held that the suspended sentence received in the first case may not be executed on the strength of the plea entered in the second, for proof of the violation must be made independent of the plea and independent of evidence or admission that such a plea was made.[18] Second, it is suggested that, the plea being one which may be entered not as a matter of right but only by leave of court, neither the court nor the prosecuting attorney need accept the proffered plea. While these suggestions have their advantages if strictly applied, neither solves but only seeks to avoid the basic problem presented.

In two states, Massachusetts and Pennsylvania,[19] the problem has been solved by statutory enactments. The Pennsylvania statutes are particularly clear in effect. The section corresponding to G. S. 20-16 provides that:

> The secretary may suspend the operating privileges of any person . . . upon receiving a record of proceedings . . . in which such person pleaded guilty, entered a plea of *nolo contendere,* or was found guilty by judge or jury, or whenever the secretary finds upon sufficient evidence [that certain enumerated offenses have been committed.][20]

The section that corresponds to G. S. 20-17 states:

> Upon receiving a certified record, from the clerk of court, of proceedings in which a person pleaded guilty, entered a plea of *nolo contendere,* or was found guilty by a judge or jury, of any of the crimes enumerated in this section, the secretary shall forthwith revoke . . . the operating privilege of any such person.[21]

While recognizing that the decision in the principal case is legally sound and is inevitable in view of the *Stiers* precedent, it is submitted that the great necessity for safety on our highways makes it desirable, even imperative, to revise the applicable statutes, bringing them into substantial agreement with the Pennsylvania statutes quoted above.

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[18] State v. Thomas, 236 N. C. 196, 72 S. E. 2d 525 (1952).

[19] The Massachusetts statute applies only to mandatory revocation. MASS. ANN. LAWS C. 90, § 24 (1946). The Pennsylvania Statutes, on the other hand, apply both to mandatory and discretionary revocation. PURDON'S PENNA. STAT. ANNO. C. 75, §§ 191, 192 (1953).

[20] PURDON'S PENNA. STAT. ANNO. C. 75, § 192 (1953).

[21] PURDON'S PENNA. STAT. ANNO. C. 75, § 191 (1953).