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J. Troy Smith Jr.

governed by individual and varying philosophies of crime control rather than by an orderly and consistent approach for the judiciary as a whole."[56] Thus, in North Carolina a trial judge remains free to follow such maxims as the one cited by the supreme court in 1925, "The deterrence theory is the kingdom of the criminal law."[57] But, quite aside from differences in active philosophies, the more frightening, though hopefully more rare, possibility exists for arbitrary and emotional judgments or simple mistake.[58] This is not to suggest that all discretion should be taken from the trial judge but rather that the objective should be "to provide a technique whereby discretion shall be allowed ample creative scope and yet be subject to some degree of discipline."[59] Without such discipline trial judges are left in a lonely position indeed and respect for the law on the part of those who come under its scrutiny suffers.

MARTIN N. ERWIN

Criminal Law—Nolle Prosequi With Leave—Possibility of Abuse

On February 24, 1964, an Orange County grand jury indicted Peter Klopfer for a trespass that had occurred on January 3, 1964. The defendant entered a plea of not guilty during a special criminal session of Orange County Superior Court in March, 1964. The jury was unable to agree on a verdict, and a mistrial was declared. The defendant was ordered to return for retrial during the same session, but the case was not reached at this time. Approximately one year later the solicitor indicated to the defendant's attorney that he intended to have a *nolle prosequi*[1] with leave entered. At

[56] Bennett, *The Sentence—Its Relation to Crime and Rehabilitation,* 1960 U. ILL. L.F. 500.

[57] State v. Swindell, 189 N.C. 151, 155, 126 S.E. 417, 418 (1925).

[58] In *Stubbs* it should be noted that the trial judge obviously intended to fix the sentence on the lower end of the permitted scale. In view of the fact that the old statute allowed a fifty-five year range of discretion, almost any factor could have caused him to add two years to the minimum. It is at least open to speculation that under the new statute the sentence would have been fixed at the lower end of the new scale, yet under the existing system the judicary must leave the correction of its mistakes to other branches of government.

[59] Second Circuit Court of Appeals Judicial Conference, *Appellate Review of Sentences,* 32 F.R.D. 249, 273 (1962).

[1] *Nolle prosequi* will hereinafter be abbreviated as *nol. pros.*

the April, 1965, session, the defendant in open court opposed the entry of a *nol. pros.* with leave to the trespass charge. The court indicated its approval of a *nol. pros.* with leave, but the solicitor then asked that the case be retained in its trial docket status. The case was not listed on the trial calendar for the August, 1965, session, and the defendant filed a motion to ascertain its status. The case was considered during the August, 1965, session, and the solicitor's motion for entry of a *nol. pros.* with leave was allowed over the defendant's objection. The defendant appealed, contending that the entry of a *nol. pros.* with leave under the circumstances of the case deprived him of the right to a speedy trial secured to him by the constitutions of North Carolina and the United States. The North Carolina Supreme Court held that the solicitor and the trial judge followed customary procedure in entering the *nol. pros.* with leave and that their discretion was not reviewable under the facts disclosed by the record.[2]

It is well settled in North Carolina that the entry of a *nol. pros.* is not an acquittal and does not bar a subsequent prosecution of the defendant for the same offense.[3]

> A *nol. pros.* in criminal proceedings is nothing but a declaration on the part of the prosecuting officer that he will not at that time prosecute the suit further. Its effect is to put the defendant without day; that is, he is discharged and permitted to leave the court without entering into a recognizance to appear at any other time . . . but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he may be tried upon it.[4]

The solicitor or prosecuting officer normally decides when a *nol. pros.* will be entered. The solicitor has a discretionary power with respect to a *nol. pros.*, and he is responsible for its proper exercise.[5] The court will not usually interfere with the decisions of the solicitor unless his power is used oppressively.[6] However, since the

[2] State v. Klopfer, 266 N.C. 349, 145 S.E.2d 909, *cert. granted*, —— U.S. —— (1966).

[3] See, *e.g.*, State v. Smith, 170 N.C. 742, 87 S.E. 98 (1915); State v. McNeill, 10 N.C. 183 (1824).

[4] State v. Thornton, 35 N.C. 256, 257-58 (1852). See Wilkinson v. Wilkinson, 159 N.C. 265, 266, 74 S.E. 740, 741 (1912).

[5] State v. Thompson, 10 N.C. 613 (1825).

[6] *Ibid.*

solicitor acts under the control of the court,[7] the entry of a *nol. pros.* is always subject to final approval and assent of the court.[8]

Where a *nol. pros.* has been entered, neither the solicitor nor the clerk can order an arrest order issued without permission of the court.[9] This restraint is placed on the power of the solicitor to issue new process in order to prevent any abuse or oppression.[10] However, this restriction can be circumvented by the judge's discretionary entry of leave with the *nol. pros.*: leave may be given by the court at the time the *nol. pros.* is entered empowering the solicitor to issue another *capias* when and if he deems it proper to do so[11] without further permission of the court. A *nol. pros.* with leave authorizes the clerk to issue a new arrest order at the request of the solicitor.[12]

There are basically three legitimate uses for the *nol. pros.* or the *nol. pros.* with leave in North Carolina.

(1) There is a statutorily prescribed use of a *nol. pros.* with leave in all criminal actions where an indictment has been pending for two terms of criminal court, the defendant has not been apprehended, and a *nol. pros.* has not been entered.[13]

(2) The solicitor may enter a *nol. pros.* with or without leave against one or more multiple defendants in a case in order to obtain testimony against co-defendants.[14]

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[7] State v. Conly, 130 N.C. 683, 684, 41 S.E. 534, 540 (1902); State v. Moody, 69 N.C. 529, 531 (1873).

[8] N.C. Att'y Gen. Ruling, Letter of Oct. 7, 1953.

[9] State v. Smith, 129 N.C. 546, 547, 40 S.E. 1 (1901); State v. Thornton, 35 N.C. 256, 258 (1852).

[10] Wilkinson v. Wilkinson, 159 N.C. 265, 267, 74 S.E. 740, 741 (1912); State v. Thornton, 35 N.C. 256, 258 (1852).

[11] State v. Smith, 129 N.C. 546, 547, 40 S.E. 1 (1901).

[12] *Id.* at 547, 40 S.E. at 1. N.C. Att'y Gen. Ruling, Letter of Feb. 18, 1947.

[13] N.C. GEN. STAT. § 15-175 (1965):

> A nolle prosequi "with leave" shall be entered in all criminal actions in which the indictment has been pending for two terms of court and the defendant has not been apprehended and in which a nolle prosequi has not been entered, unless the judge for good cause shown shall order otherwise. The clerk of the superior court shall issue a capias for the arrest of any defendant named in any criminal action in which a nolle prosequi has been entered when he has reasonable ground for believing that such defendant may be arrested or upon the application of the solicitor of the district. . . .

[14] See, *e.g.*, State v. Bullard, 253 N.C. 809, 810, 117 S.E.2d 722, 723 (1961) (defendant's objection to solicitor's entering a *nol. pros.* against another defendant in order to obtain testimony against objecting defendant overruled); State v. Ammons, 204 N.C. 753, 758, 169 S.E. 631, 633 (1933)

(3) A *nol. pros.* with or without leave may be entered by the solicitor if he finds available evidence insufficient to support a conviction.[15]

The North Carolina court has said that if the trial judge thinks it proper to grant leave at the time the *nol. pros.* is entered, it does not see why he may not do so.[16] However, the court clearly implies that the use of the *nol. pros.* with leave should be limited to cases where it is "necessary to so use it as to bring offenders to trial and justice."[17]

Since the entry of a *nol. pros.* does not terminate the prosecution on the indictment, the court has held that the two-year statute of limitations for misdemeanors is tolled.[18] Thus it does not matter when the trial takes place provided the bill of indictment was seasonably returned.[19]

The defendant in *State v. Klopfer* contended that the entry of the *nol. pros.* with leave was an arbitrary refusal by the state to prosecute the charge pending against him and, as such, deprived him of his right to a speedy trial.[20]

(entry of *nol. pros.* with leave in the presence of the jury as to some defendants not prejudicial to the remaining defendants).

[15] State v. Furmage, 250 N.C. 616, 622, 109 S.E.2d 563, 568 (1959) (discretionary power solicitor may exercise prior to prosecution).

[16] State v. Smith, 129 N.C. 546, 548, 40 S.E. 1 (1901).

[17] *Id.* at 547-48, 40 S.E. at 1. The defendant in *Klopfer* was not at large, nor was the state attempting to elicit testimony against any co-defendants. The only apparent legitimate basis for entering the *nol. pros.* with leave was a lack of sufficient evidence to convict the defendant. However, there was no indication that all possible evidence concerning the alleged offense was not at hand during the eighteen months between indictment and the entry of the *nol. pros.* with leave. The defendant did not deny his act, but contended that any trespass conviction in this case would be contrary to recent decisions of the United States Supreme Court. See note 20 *infra*. At least one state court has held that the court should refuse to allow a *nol. pros.* to be entered where the defendant is entitled to an acquittal. State v. Deso, 110 Vt. 1, 1 A.2d 710 (1938).

[18] State v. Williams, 151 N.C. 660, 661, 65 S.E. 908, 909 (1909).

[19] *Id.* at 661, 65 S.E. at 909; N.C. Att'y Gen. Ruling, Letter of Nov. 6, 1941.

[20] 266 N.C. 349, 350, 145 S.E.2d 909, 910 (1966). The motion in *Klopfer* objected to the entry of a *nol. pros.* with leave and asked that the case be permanently concluded. The motion contended

> that the continued pendency of said charge against the defendant is causing substantial and recurring problems in regard to the defendant's scheduling lecture and conference trips outside the State of North Carolina and trips outside the United States in connection with research projects of the defendant, said defendant being a Professor of Zoology at Duke University and said research projects

Article I, section 35 of the Constitution of North Carolina provides:

> All courts shall be open; and every person for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or *delay*.[21]

The North Carolina court has asserted that the right of a person accused of a crime to a speedy trial is a right guaranteed to all people basing their system of jurisprudence on the principles of common law.[22] In *State v. Patton*[23] the court said that the right to a speedy trial has been guaranteed since the Magna Carta and is embodied in the sixth amendment and in the North Carolina Constitution. The right to a speedy trial is expressly designed to prohibit arbitrary and oppressive delays that might be caused by the prosecution.[24] In *State v. Lowry*[25] the North Carolina court found federal protection of the right to a speedy trial unnecessary since the "fundamental law" of North Carolina fully secures to a defendant the right to a speedy trial. The determination of whether a speedy trial is afforded has to be determined in the light of the circumstances of each case, and the court has discretion in deciding what is a fair and reasonable time.[26]

The Supreme Court of the United States has not held expressly that the sixth amendment right to a speedy trial is made mandatory in state proceedings. However, the court has held that most of the other sixth amendment rights are binding on the states through the fourteenth amendment,[27] and at least one lower federal court has

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including projects for the Defense Department of the United States Government . . . .

The defendant's motion asserted that prosecution of the trespass offense was barred by the decisions of the United States Supreme Court in Blow v. North Carolina, 379 U.S. 684 (1965), and Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

[21] Emphasis added. This section applies to both criminal and civil actions. See, *e.g.*, State v. Pope, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962); State v. Godwin, 216 N.C. 49, 59, 3 S.E.2d 347, 352 (1939). See N.C. CONST. art. I, § 17.

[22] State v. Webb, 155 N.C. 426, 429, 70 S.E. 1064, 1065 (1911).

[23] 260 N.C. 359, 363, 132 S.E.2d 891, 894 (1963), *cert. denied*, 376 U.S. 956 (1964).

[24] *Id.* at 364, 132 S.E.2d at 894.

[25] 263 N.C. 536, 542, 139 S.E.2d 870, 874 (1965).

[26] *Ibid.* See N.C. GEN. STAT. § 15-10 (1965), requiring speedy trial or discharge on commitment for *felony*.

[27] See, *e.g.*, Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of

held that the federal guarantee of a speedy trial applies to the states.[28]

There is something of a practical conflict between the right of a defendant to a speedy trial and the use of a *nol. pros.* with or without leave, and it is obvious from the nature of the *nol. pros.* with leave[29] that it presents possibilities of abuse if granted indiscriminately by the court. This is especally so where it is employed on the grounds of lack of sufficient evidence for conviction.[30] A flaw in the scheme of criminal procedure that has the *potential* of denying a defendant the right to a speedy trial is pointed out by the situation in *Klopfer*. It would seem to be a practical and realistic solution to the problems of both the state and the defendant to require the solicitor, when his application for permission to enter a *nol. pros.* with leave is challenged by the defendant, to show just cause for such an entry that has the effect of indefinitely suspending the prosecution and tolling the statute of limitations.[31] The time required for this simple, and doubtless infrequently needed, procedure would be negligible, but the effect would be to insure the protection of a defendant's right to a speedy trial while leaving the legitimate usefulness of the *nol. pros.* with leave unimpaired.[32]

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prosecuting witness); Escobedo v. Illinois, 378 U.S. 478 (1964) (counsel prior to trial); Douglas v. California, 372 U.S. 353 (1963) (counsel at appellate level); Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel at trial).

[28] Suit v. Ellis, 282 F.2d 145 (5th Cir. 1962). *Contra,* Phillips v. Nash, 311 F.2d 513 (7th Cir. 1962); Maryland v. Kurek, 233 F. Supp. 431 (D. Md. 1964).

[29] See notes 11 and 12 *supra.* The *nol. pros.* without leave does not present the potentiality of misuse that is present where leave is granted without a showing of good cause.

> To prevent abuse, the power of the solicitor to issue new process upon the same bill is checked and restrained by the fact that a *capias,* after a *nol. pros.* does not issue, as a matter of course, upon the mere will and pleasure of the officer, but only upon permission of the court, which will always see that its process is not abused to the oppression of the citizen. . . .

Wilkinson v. Wilkinson, 159 N.C. 265, 267, 74 S.E. 740, 741 (1912).

[30] This situation opens the door to potential harassment of the defendant by the prosecution. In cases where a *nol. pros.* without leave is entered this possibility is practically precluded.

[31] See notes 3, 18 & 19 *supra.*

[32] In order for a *defendant* to obtain a continuance to have additional time to prepare for trial, the reasons for such delay must be fully established. The court has indicated that it is desirable, if not necessary, that an application for a continuance be supported by an affidavit showing sufficient grounds for the continuance. See State v. Gibson, 229 N.C. 497, 501, 50 S.E.2d 520, 523 (1948); State v. Banks, 204 N.C. 233, 237, 167 S.E.

The question of whether a speedy trial has been afforded a defendant is a determination that must be made on a case-by-case basis,[33] but it is important to provide a safeguard in advance where practicably possible so that this issue will not arise.

J. TROY SMITH, JR.

Damages—Contractual Limitation of Liability

If a purchaser of real estate is required to put up a good faith deposit before the sale is confirmed, he may provide in the sales contract that if he fails to purchase the property, the deposit shall be forfeited to the seller as liquidated damages. If the purchaser does default, what damages will the seller be able to obtain if the property is later sold at such a low price that the difference between the original and second sale prices is greater than the amount of deposit that the buyer forfeited? A court has the following alternatives:[1]

(1) To treat the stipulated sum retained as liquidated damages and limit the plaintiff's (seller's) recovery to that amount regardless of whether the actual damages suffered were more or less. Designating the sum liquidated damages primarily benefits the plaintiff (seller) by entitling him to his pre-estimation of his probable damages upon a showing of the breach without the necessity of proving actual damages and incidentally benefits the defendant (buyer) by setting his minimum and maximum liability.

(2) To treat the stipulated sum retained as a penalty and allow the plaintiff (seller) to recover his provable actual damages sustained because of the breach. Designating the sum a penalty primarily benefits the defendant (buyer) by placing upon the plaintiff (seller) the additional burden of establishing his actual damages, which are almost always lower, and incidentally benefits the plaintiff (seller) by removing the maximum limit to liability of the defendant (buyer).

851, 852 (1933); N.C. GEN. STAT. §§ 1-176, -177 (1953), -175 (Supp. 1965). The requisite of good cause that a defendant must show to obtain a continuance apparently is not required in actual practice of a solicitor when he seeks a *nol. pros.* with leave.

[33] See note 26 *supra.*

[1] For a general discussion of these alternatives, see 5 WILLISTON, CONTRACTS §§ 781A, 790 (3d ed. 1961).