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Recent Trends in the Criminal Law

der the fourteenth amendment[52] was not "specially set up or claimed" under 28 U.S.C. § 1257,[53] which gave the Supreme Court review over state courts in specified circumstances. Justice Rehnquist concluded, in dissent, that the constitutional issue was not before the state high court, thus, blocking Supreme Court jurisdiction on state procedural grounds.

[52] 410 U.S. at 313. One of Chambers' grounds for appeal was:

> The trial of the Defendant was not in accord with fundamental fairness guaranteed by the Fourteenth Amendment of the Constitution of the United States. . . .

[53] *Id.* Final judgements or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

28 U.S.C. § 1257 (1948).

Indeed, the *Chambers* Court was hesitant to come to terms with the voucher rule and the rule excluding declarations against penal interests as hearsay, individually. Perhaps this hesitancy was due to a reluctance to "constitutionalize the intricacies of the common law of evidence."[54] The Court held that the voucher rule and the rule making declarations against penal interest inadmissible as hearsay, taken together under the circumstances of this case, rendered Chambers' trial unfair, denying him due process. The Court also used critical language in discussing these two evidentiary rules. Perhaps the holding and the language used against these evidentiary rules in *Chambers* indicates the beginning of a trend that one day may lead to a renunciation of these two evidentiary rules whose rationale, and indeed function, belong to a bygone age.

[54] *See* note 45 *supra*.

RECENT TRENDS IN THE CRIMINAL LAW

Guilty Pleas

Guilty pleas continue to present a miscellany of problems to federal and state appellate courts. Considering the consequences of a guilty plea, the Ninth Circuit in *Mann v. Smith*[1] reviewed a California case in which the defendant pleaded guilty to possession of marijuana only after his motion to suppress the evidence had been denied. Following *Tollett v. Henderson*[2] and *McMann v. Richardson*,[3] the court held that a defendant who pleads guilty to state charges has no right to challenge his conviction by federal habeas corpus on any grounds except improvidency of the plea through absence, or incompetent advice, of a lawyer. In response to Mann's fourth amendment argument, the court held: "There can be no federal collateral attack based upon an alleged violation of constitutional rights occurring prior to the guilty plea." [4]

The dissent argued that *Tollett* and *McMann* do not preclude giving effect to special state statutes which preserve the right to appeal certain issues despite the guilty plea. The dissent pointed out that in a pre-*Tollett* case[5] the Second Circuit did give effect to such statutes.

[1] 13 BNA CR. L. REP. 2425 (9th Cir. July 6, 1973).
[2] 411 U.S. 258 (1973).
[3] 397 U.S. 759 (1970).
[4] 13 BNA CR. L. REP. at 2426.
[5] Rogers v. Warden, 381 F.2d 209 (2d Cir. 1967).

In *Boykin v. Alabama*[6] the Supreme Court discussed the constitutional rights which are waived by a guilty plea. Applying *Boykin*, recent court decisions such as *McChesney v. Henderson*[7] and *Merrill v. State*[8] indicate that the judge need not expressly enunciate these rights to the defendant. Nor need the defendant expressly waive these rights at the time of his guilty plea. Nonetheless, the record must indicate that the accused's plea was intelligently and voluntarily made, with knowledge of the consequences. The Fifth[9] and Tenth[10] Circuits have held that misinformation about sentencing does not necessarily invalidate a guilty plea. In contrast, the Third Circuit in *United States v. Jasper*[11] recently allowed a bank robbery defendant to withdraw his guilty plea because he was given misinformation about the maximum sentence, was told incorrectly that the sentence could be pyramided, and was apparently never advised of just what the government would have to prove to establish his guilt on each of the separate

[6] 395 U.S. 238 (1969).
[7] 482 F.2d 1101 (5th Cir. 1973).
[8] 206 N.W.2d 828 (S.D. 1973).
[9] United States v. Woodall, 438 F.2d 1317 (5th Cir. 1970).
[10] Murray v. United States, 419 F.2d 1076 (10th Cir. 1969).
[11] 481 F.2d 976 (3rd Cir. 1973).

counts. This context was not consistent with a knowing and voluntary guilty plea.

In *People v. Martin*[12] the California supreme court dealt with the consequences of the defendant's agreement to have the issue of his guilt determined on the basis of his preliminary hearing transcript. Such a submission has been equated with a guilty plea for some purposes—for protecting the defendant's rights to adequate warning of what he is waiving. But in *Martin* the court held that a submission on the transcript does not preclude appeal based on insufficiency of the evidence. Unlike a guilty plea, the submission does not warrant the finding of an implied admission of the existence of each element of a charged crime. The submission is no more than waiver of jury trial—an attempt to save the court's time in hopes of a lenient sentence.

In determining whether a defendant was competent to plead guilty, at least two state courts recently used the standard of competency to stand trial. In *People v. Harrington*,[13] a Michigan appellate court said that the circumstances of the guilty plea and of the hearing which determined competency to stand trial did "not as a matter of law preclude the possibility of a voluntary plea."[14] And the Massachusetts Supreme Judicial Court explicitly stated in *Commonwealth v. Morrow*[15] that the same standard used to determine competency to stand trial "should be applied to the acceptance of a guilty plea."[16]

In contrast, the Ninth Circuit in *Sielig v. Eyman*[17] held that a defendant who is competent to stand trial may nevertheless be incompetent to understand the rights he waives in a guilty plea. In this case, psychiatrists had examined the defendant to determine whether he could stand trial. The court extended *Westbrook v. Arizona*[18] to hold that when a question of mental capacity lurks in the background, the trial court must make an inquiry and a *finding* on the criminal defendant's competency to plead guilty. Furthermore, the reviewing court cannot use the "objective" waiver test; that is, the court cannot simply examine the record as it could in the typical case of the presumably competent defendant.

There are implications in *Sielig* that the standard is higher for waiving a constitutional right (*e.g.*, self-incrimination) than for being judged competent to stand trial. The court adopted this standard:

> A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea.[19]

In remanding to the state court, the Ninth Circuit said that the records submitted by the medical experts (regarding competency to stand trial) a month before the guilty plea might be sufficient to support a finding of competency to plead guilty.

Plea Bargaining

A plea bargain does not render a guilty plea involuntary, but the agreement must be upheld by the parties to the agreement. Several federal and state appellate courts have recently spoken to the problem of breaking or bungling the promises made during plea bargaining.

A Michigan appellate court held that when a judge actively participated in the plea bargaining process, his failure to honor the agreement was reviewable.[20] In this case the defendant had overheard one end of the telephone conversation in which his lawyer, the judge and an assistant prosecuting attorney apparently agreed on a five year minimum sentence. When the judge imposed a ten year minimum, the defendant asked for a vacation of the plea or, alternatively, that he be sentenced according to the original bargain. The appellate court ordered resentencing.

In *Troupe v. Rowe*,[21] a plea-bargaining prosecutor was limited by the bargain and by the sentence, even through the judge was more lenient than the prosecutor requested. The state, after sentencing, prevailed on the judge to reopen the matter, reject the guilty plea (made pursuant to a plea bargain), and proceed to trial (which resulted in a harsher sentence). The reviewing court held that the original sentencing was complete, that the "rehearing" was not just a "resumption" of the earlier trial,

[12] __ Cal. 3d __, 511 P.2d 1161, 108 Cal. Rptr. 809 (1973).
[13] 45 Mich. App. 549, 206 N.W.2d 748 (1973).
[14] *Id.* at 550, 206 N.W.2d at 749.
[15] 296 N.E.2d 468 (Mass. 1973).
[16] 296 N.E.2d at 468.
[17] 478 F.2d 211 (9th Cir. 1973).
[18] 384 U.S. 150 (1966) (held that competency to stand trial—assist counsel—did not suffice as competency to waive a right to counsel at trial).
[19] 478 F.2d at 215. The court adopts this standard from Judge Hufstedler's dissent in Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir. 1970).
[20] People v. Stevens, 45 Mich. App. 689, 206 N.W.2d 757 (1973).
[21] 283 So. 2d 857 (Fla. 1973).

and that the new state's attorney should not have been allowed to reopen the case after a recess. The court granted petitioner's mandamus to void the harsher sentence. Increase in sentence here constituted double jeopardy.

The prosecutor in *Correale v. United States*[22] was in good faith but bungled the execution of a plea bargain. He recommended a sentence which was illegal and which could not fulfill the bargain, *i.e.*, could not effectively run concurrently with a state sentence which the defendant was already serving. When the prosecutor realized he had miscalculated the years, he made belated and cryptic suggestions to the judge, who did not realize that this new recommendation was different from the former one. On review, the First Circuit said:

> While we do not go so far as to say that minor and harmless slips by prosecutors will void a plea bargain, we hold that, at a minimum, a prosecutor may not, in exchange for a guilty plea, promise and/or make a recommendation of an illegal sentence.[23]

The court fashioned an equitable remedy similar to specific performance of the original plea bargain. Since the defendant had already served more than the recommended time, the court vacated the sentence, remanded for immediate resentencing, specified the years, suspended the execution of the sentence, and specified the years of probation.

Prosecutors must also uphold certain informal promises to defendants. For example, in *People v. Brunner*,[24] the state covertly promised not to prosecute one of Charles Manson's girl friends if she would testify in the trials of the more reprehensible offenders. Her contradictory confessions, recantations and sur-recantations were impeached at trial; nevertheless, the defendants were convicted. Noting that perjury indictments were pending, the California supreme court dismissed the murder case against her. She had upheld her part of the bargain, and the state was estopped from arguing non-compliance.

> While it is indisputable that the People can bargain only for testimony and not for results, the issue here is not the validity of the bargain but the extent of a party's performance under the bargain. Performance can be measured, at least in part, by results. Since the People got their hoped-for results through the use of Brunner's testimony, we conclude, albeit somewhat pragmatically, that enough of the bargain was kept to make it operative.[25]

The court also held that the immunity-from-prosecution bargain was valid even though it was not made pursuant to statutory procedure. The court hints that it might have been more sympathetic to the prosecutor if he had followed the statute which provided that the terms of a promise of immunity should appear clearly on the record and be supported by a court order.

Airport Searches

Recent United States circuit court decisions on the legality of airport searches focus on several key issues: (1) whether the search is a private, administrative or police search; (2) assuming the fourth amendment is relevant, what test of reasonableness should be used for warrantless airport searches; (3) whether the hijack menace itself can justify otherwise illegal searches; (4) whether the test should vary according to the time and place and according to whether the search is of the person or the luggage; (5) what facts suffice to meet a given test: merely being a prospective passenger, fitting the statistical hijack profile, activating the magnetometer, failing to produce adequate identification or acting "suspiciously"; (6) whether consent is a necessary accompaniment, an unnecessary frill or sufficient independent ground for the search; (7) what constitutes consent-in-fact—merely being in the boarding area amidst posters and announcements of an imminent search, being aware (or perhaps even individually warned) of the right not to consent (and hence, not to fly); (8) whether the consent is voluntary; (9) whether one can "voluntarily" consent when the choices are so limited, whether one is denied his constitutional right to travel by being forced to choose between being searched and not boarding the plane at all.

Since the decisions seem to turn on the particular fact situation, each case will be discussed separately. The legality of routine search of *all* luggage was the issue in *United States v. Anderson*.[26] The defendant appealed his conviction for carrying a concealed weapon, which had been discovered in a briefcase during a security check at the loading gate.

First, the Ninth Circuit determined that the extensive government involvement (Federal Aviation Administration regulations, use of Customs

[22] 479 F.2d 944 (1st Cir. 1973).
[23] *Id.* at 947.
[24] 13 BNA CR. L. REP. 2372 (Cal. June 26, 1973).
[25] *Id.* at ___, ___ P.2d at ___, ___ Cal. Rptr. at ___.
[26] 13 BNA CR. L. REP. 2373 (9th Cir. June 29, 1973).

Service agents and federal marshals, etc.) rendered the searches subject to fourth amendment limitations.[27] Thus it was irrelevant that this particular search was conducted by a private airline employee rather than a public official. The search still had to meet a fourth amendment test.[28]

In determining which test to use, the court rejected the government's argument that the search was legal because the passenger had no reasonable expectation of privacy with respect to his luggage.[29] To countenance this argument would be to say that the government could avoid the fourth amendment by notifying the public that all telephone lines are tapped. The court said that airport searches "are not outside the Fourth Amendment simply because they are being conducted at all airports." [30] The routine nature of airport searches does not mean that all passengers have waived the reasonable expectation of privacy.

The court also rejected the stop-and-frisk standards from *Terry v. Ohio*[31] and *Adams v. Williams*[32] since they were concerned with justification for individual searches. In contrast, the airport search here was indiscriminate—not directed against the defendant as an individual. The airline employee had no individualized basis for the search at all; he certainly had no "articulable facts" on which to suspect this passenger of possible criminal activity.

The court finally decided that airport searches are "administrative" [33] searches made pursuant to a general regulatory scheme. The test for administrative searches is the fourth amendment's standard of reasonableness. This means that the screening of all passengers may be sufficient in scope to detect the presence of weapons or explosives but

> must be limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it. It follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft.[34]

He must consent. Furthermore, if the person elects not to board, then any search would be a criminal investigation subject to warrant and probable cause requirements.

The court reversed and remanded for a determination of whether the defendant had consented to the search. Since the search occurred in 1971 before the screening process was so well publicized, there is the possibility that no consent-in-fact will be found. However, the court hints that in 1973, the publicity, posters and notices probably would notify the passenger of his alternatives and would render his attempt to board as a consent—and a voluntary one which would pass muster under *Schneckloth v. Bustamonte*.[35]

The court believes that its decision is completely consistent with the defendant's right to travel. He may submit to the search as a condition to boarding, or he may turn around and leave. If he chooses to proceed to the screening area, he has relinquished his option to leave or, alternatively, he has submitted to the search. Either way, it is essentially a "consent" granting the government a license to do what would otherwise be barred by the fourth amendment.

In *United States v. Ruiz-Estrella*,[36] the Second Circuit considered the legality of searching a passenger simply because he fit the hijack profile. The passenger involved had neither passed through the magnetometer nor done anything at all suspicious. On the basis of the ticket agent's identifying the passenger as fitting the Federal Aviation Administration hijack profile, a federal sky marshal took him behind closed doors, asked him for identification (in which there were some minor discrepancies), and then either asked or told the defendant to submit to a baggage search. The court held that the shotgun found in the shopping bag should have been suppressed from evidence as the fruit of an illegal search.

The government conceded that the seizure was not predicated on fourth amendment probable cause. Disagreeing with the other arguments posed by the prosecution, the court said:

(1) The *Terry v. Ohio*[37] rationale was inapplicable

[27] In contrast, the Eighth Circuit is split over whether searches by airline agents are private (invulnerable to fourth amendment attack when conducted by the airline for its own purpose and without instigation or participation by government officers) or government (controlled by the fourth amendment). United States v. Wilkerson, 478 F.2d 813 (8th Cir. 1973).

[28] *But see* State v. Fellows, — Ariz. —, 511 P.2d 636 (1973) for a state court holding that a 1971 search by airline employee (who then informed officers) was not governmental and hence was not proscribed by the fourth or fourteenth amendment.

[29] The government had cited Katz v. United States, 389 U.S. 347, 361 (1967).

[30] 13 BNA CR. L. REP. at 2396.

[31] 392 U.S. 1 (1968).

[32] 407 U.S. 143 (1972

[33] People v. Kluga, 108 Cal. Rptr. 160 (Ct. App. 1973) deems as "administrative" the United States marshal's search of passengers with high magnetometer readings. But this decision does not stress the necessity for consent.

[34] 13 BNA CR. L. REP. at 2396.

[35] 412 U.S. 218 (1973).

[36] 481 F.2d 723 (2d Cir. 1973).

[37] 392 U.S. 1 (1968).

here. The court has used the *Terry* less-than-probable-cause test in *Bell v. United States*[38] where the suspect met the profile and also activated the magnetometer, produced no identification and admitted to a criminal history. These circumstances, which sufficed to justify a limited pat-down frisk in *Bell*, did not obtain in this case. Also, the court refused to accept the trial court's reasoning that the passenger *would* have set off the magnetometer *if* he had passed through it.

(2) Chief Judge Friendly's theory[39] that the hijacking danger could itself justify a limited airport search was not applicable here, since the theory was conditioned on the passenger's awareness that he could avoid search by avoiding the flight. No one made Ruiz-Estrella aware of any such option. (The court broadly implied that posters will never suffice to create the presumption of awareness on the part of the passenger.)

(3) The search could not be based on defendant's consent unless the consent was voluntarily given. The court reviewed the recent Supreme Court discussion of voluntary consent to a search. In *Schneckloth v. Bustamonte*[40] the Court declined to hold that the suspect must be made specifically aware of his right to refuse to consent. Rather, the Court emphasized that the prosecutor has the burden of proving the consent was freely and voluntarily given, that the question of voluntariness must be resolved through examination of the "totality of all the surrounding circumstances," [41] that voluntariness can be shown without a demonstration that the defendant knew of his right to refuse, but that the prosecutor's burden cannot be met merely by showing acquiescence to a claim of lawful authority.[42] *Bustamonte* found voluntariness more easily when the interrogation and search did not take place in some inherently coercive environment like a remote station house. Distinguishing *Bustamonte* on the facts, the court in *Ruiz-Estrella* felt that the closed side room at the airport provided a traditional custodial situation. The court said that the defendant was merely acquiescing to apparently lawful authority, not voluntarily consenting.

It would appear that courts can avoid a *Bustamonte* finding of voluntariness by finding some coercive element in the circumstances or in the mind of the defendant. Also, courts can fail even to reach the *Bustamonte* question of voluntariness by refusing to find consent-in-fact. For example, the court could decide that passing by posters and announcements is not tantamount to consent.[43]

The Eighth Circuit in *United States v. Kroll*[44] found no grounds for the search and no consent to it. The passenger fit the hijack profile, and the metal hinges on his briefcase activated the magnetometer. He tried to keep the file section of his briefcase closed, and he shifted the position of the case as the federal marshal approached. On appeal, the court upheld the trial judge's finding that the gestures concurrent with the examination of the briefcase did not supply a sufficient evidentiary justification for believing that the defendant was transporting explosives or weapons.

The court avoided dealing with the question of whether the hijack menace in itself justified a general search of carry-on luggage.[45] But the court did find it unreasonable to search a 9″ × 4″ envelope with a ¼″ × 2″ bulge—too small to be an explosive or weapon. Besides, the federal marshal did not clear the area of other persons before he asked the defendant to open the envelope. Thus the marshal's objective behavior indicated that he was searching for contraband, not for nitroglycerine as he professed. The Eighth Circuit affirmed the district court's suppression from evidence of the amphetamines found in the envelope.

Regarding the government's argument that the passenger consented simply by passing the notices posted on the way to the boarding area, the court said:

> Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consent [*sic*] to the search when to do otherwise would have meant foregoing the constitutional right to travel.[46]

[38] 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972).
[39] *Id.*, (Friendly, C. J., concurring).
[40] 412 U.S. 218 (1973).
[41] *Id.* at 227.
[42] *Id.* at 233.
[43] *See* United States v. Ruiz-Estrella, 481 F.2d 723, 728 (2d Cir. 1973); United States v. Kroll, 481 F.2d 884 (8th Cir. 1973); United States v. Rivera, 13 BNA CR. L. REP. 2234 (E.D.N.Y. May 22, 1973) for indications that posters may not suffice for consent, much less for voluntary consent.
[44] 481 F.2d 884 (8th Cir. 1973).
[45] *See* United States v. Legato, 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., concurring) for a statement that exigencies do not make an airport into an enclave immune from fourth amendment restrictions.
[46] 481 F.2d at 886. The court does not mention Schneckloth v. Bustamonte, 412 U.S. 218 (1973), which was announced one month earlier. Rather, the court cites United States v. Meulener, 351 F. Supp. 1284, 1288 (C.D. Cal. 1972) which in turn cited United States v. Lopez, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971) for recognizing that the government cannot "condition the

United States v. Legato[47] dealt with a search of a passenger who had left the airport when he heard an announcement of a general baggage search. There had been an anonymous tip about a bomb in an orange shopping bag. There was suspicious behavior by the defendants when the FBI agent approached: one man was holding a ticket issued to an assumed name, and the other denied having sat with his companion—even denied knowing him. At trial, the defendants challenged the admissibility of the heroin discovered in the shopping bag.

The Fifth Circuit refused to subject the tip to the *Aguilar-Spinelli*[48] tests of informer reliability. The court said those tests were appropriate for probable cause for arrest or warrant but not for cases (like this one) following *Terry*. The court used the *Terry-Adams* stop-and-frisk standard to justify the pat-down although this man had left the terminal and was apparently no longer intending to board the flight. To justify the further search of the shopping bag, the court cited its own decision in *United States v. Moreno*,[49] which extended *Terry* to recognize that public danger made the airport into a "critical zone where special fourth amendment considerations apply." [50] (Apparently the bomb danger also extends to any location chosen by the passenger who exercises his option of not boarding the plane.)

To meet a possible objection that the *Terry* rationale can support a pat-down but not a baggage search, the court offered alternate grounds, *viz.* consent. The defendants had been given *Miranda* warnings, and there was no evidence of coercion. Since the search was not conducted near the boarding area, there was no discussion of whether passing the posters amounted to consent. Nor was there a reference to *Bustamonte* considerations of voluntariness.

The Fifth Circuit continued to approve airport searches in *United States v. Skipwith*.[51] Analogizing the boarding area to the area near a foreign border, the court held that "those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country, are subject to a search based on mere or unsupported suspicion." [52]

The defendant in this case met the Federal Aviation Administration profile, stated that he had no identification and used a false name on a ticket. A United States marshal ordered him to empty his pockets, purportedly to determine whether a bulge was in fact a gun. The court affirmed the conviction for possession of cocaine, saying that the discovery of the cocaine was not a "windfall" but the "product of valid police work." [53]

Both the dissent and majority agreed in rejecting the rule in *United States v. Meulener*[54] that a passenger can freely withdraw from the boarding area once he has entered it. They feel that such a rule would increase the danger of hijacking by reducing the risk, *i.e.*, whenever a search was announced, the potential hijacker could just walk out of one boarding area and perhaps into another.

In dissent, visiting Judge Aldrich argued that special safeguards should guarantee that the loose standards for airport searches not be abused. The inspectors should not be encouraged to use the airport circumstances as a pretext to look for contraband such as illegal drugs. Judge Aldrich argued for an exception to the general exclusionary rule: "viable use . . . should not be made of proceeds towards which the search was not, and could not have been independently directed." [55]

exercise of the constitutional right to travel on the voluntary relinquishment of Fourth Amendment rights," 351 F. Supp. at 1288. The *Kroll* court overlooks the fact that United States v. Meulener went on to say that the fourth amendment can be satisfied if the passenger is advised "that he has to submit to a search if he wants to board the plane but that he can decline to be searched if he chooses not to board the aircraft." 351 F. Supp. at 1290.

[47] 480 F.2d 408 (5th Cir. 1973).

[48] Spinelli v. United States, 393 U.S. 410 (1968); Aguilar v. Texas, 378 U.S. 108 (1964).

[49] 475 F.2d 44 (5th Cir. 1973).

[50] *Id.* at 51.

[51] 482 F.2d 1272 (5th Cir. 1973).

[52] *Id.* at 1276.

[53] *Id.* at 1278.

[54] 351 F. Supp. 1284 (C.D. Cal. 1972).

[55] United States v. Skipwith, 482 F.2d 1272, 1280 (5th Cir. 1973) (Aldrich, J., dissenting).

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