

RECENT DEVELOPMENTS

CRIMINAL LAW: INELIGIBILITY FOR PAROLE IS NOT AMONG THE "CONSEQUENCES" OF A GUILTY PLEA FOR PURPOSES OF FEDERAL RULE 11

INELIGIBILITY for parole is not a "consequence" of which a defendant must be aware before his guilty plea can be accepted, the Court of Appeals for the Fifth Circuit has held in *Trujillo v. United States*.¹ After being advised that probation could not be granted and that conviction carried a mandatory minimum five-year sentence, appellant pleaded guilty to a charge of unlawfully selling marijuana. The district court, without informing him that parole would be unavailable, accepted Trujillo's plea and sentenced him to ten years imprisonment.² His section 2255 motion to vacate the sentence³ was denied and he appealed, asserting that the unavailability of parole was a consequence of his plea of which he should have been informed. The Fifth Circuit, acknowledging that rule 11 of the Federal Rules of Criminal Procedure prohibits the acceptance of a guilty plea without prior determination by the judge that the accused fully appreciates the "consequences of the plea," affirmed, holding that congressional refusal to make parole available to marijuana offenders⁴ is not a "consequence" envisioned by the rule.⁵

Trujillo represents the first appellate consideration of rule 11 "consequences" since the 1966 amendment of the rule. The Advisory Committee's Note to former rule 11, promulgated in 1945, indicates that it was intended as a restatement of then existing law and practice;⁶ *i.e.*, a court was prohibited from accepting a guilty plea without first determining that it was made voluntarily with an "understanding of the nature of the charge."⁷ Rule 11 was subsequently interpreted to include the additional requirement that a

¹ 377 F.2d 266 (5th Cir. 1967).

² *Id.* at 268.

³ Act of June 25, 1948, § 2255, 28 U.S.C. § 2255 (1964).

⁴ See INT. REV. CODE OF 1954, § 7237.

⁵ 377 F.2d at 269.

⁶ Advisory Committee's Note to Rule 11, reprinted in 8 J. MOORE, FEDERAL PRACTICE ¶ 11.01[2] (2d ed. 1965) [hereinafter cited as MOORE].

⁷ Fed. R. Crim. P. 11, 327 U.S. 842 (1945).

defendant understand the "consequences of his plea," an accession which the recent amendment to the rule sought to codify.⁸ The Committee pointed out that the rule was necessary to insure fair and adequate procedures at the important pleading stage, since a large majority of criminal defendants plead guilty, and comparatively few cases continue to trial.⁹ No attempt was made to define "consequences," however, leaving the term to be construed in the light of pre-amendment precedent.¹⁰ At the minimum, a trial court will ordinarily instruct a defendant on the "range of allowable punishments" following conviction,¹¹ that acceptance of a guilty plea is equivalent to conviction,¹² and that all non-jurisdictional defenses are thereby waived.¹³ What other factors rule 11 comprehends remains unsettled.

Whether factors affecting the potential length of actual detention are to be considered "consequences" within the ambit of rule 11 has evoked disagreement among the federal courts. In accepting a plea of guilty from a youthful offender, for example, the courts are divided on whether it is necessary to inform the defendant of the possibility that he may be sentenced under the Federal Youth Corrections Act which provides for detention of potentially longer duration than the maximum adult punishment for an equivalent offense.¹⁴ In another context, the threat of extended confinement has been held to entitle a defendant to warning that a prosecutor will enter evidence of recidivism only when a plea of not guilty is tendered.¹⁵

⁸ FED. R. CRIM. P. 11, Advisory Committee's Note, 39 F.R.D. 69, 171 (1966), and cases cited therein.

⁹ FED. R. CRIM. P. 11, Advisory Committee's Note, 39 F.R.D. 69, 171 (1966); 8 MOORE ¶ 11.02[1] (77.2% of all federal criminal defendants pleaded guilty in 1963).

¹⁰ See 8 J. MOORE, FEDERAL PRACTICE ¶ 11.06[2] (Supp. 1966).

¹¹ Cf. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

¹² See, e.g., *United States v. Spada*, 331 F.2d 995 (2d Cir.) (per curiam), cert. denied, 379 U.S. 865 (1964); *Lockhart v. United States*, 293 F.2d 314 (8th Cir. 1961) (per curiam), cert. denied, 368 U.S. 1003 (1962); *United States v. Parker*, 292 F.2d 2 (6th Cir. 1961).

¹³ See, e.g., *Lockhart v. United States*, 293 F.2d 314 (8th Cir. 1961) (per curiam), cert. denied, 368 U.S. 1003 (1962); *United States v. Parker*, 292 F.2d 2 (6th Cir. 1961).

¹⁴ Cf. *Workman v. United States*, 337 F.2d 226 (1st Cir. 1964). Compare *Freeman v. United States*, 350 F.2d 940 (9th Cir. 1965); *Chapin v. United States*, 341 F.2d 900 (10th Cir. 1965); *Pilkington v. United States*, 315 F.2d 204 (4th Cir. 1963); *United States v. DeMario*, 246 F. Supp. 736 (E.D. Mich. 1965); *Williams v. United States*, 231 F. Supp. 382 (E.D. Ky. 1964), and *Rowe v. United States*, 227 F. Supp. 666 (W.D. Wis. 1964), with *Marvel v. United States*, 335 F.2d 101 (5th Cir. 1964); *Rawls v. United States*, 330 F.2d 777 (5th Cir. 1964); *Cunningham v. United States*, 256 F.2d 467 (5th Cir. 1958), and *Real v. United States*, 238 F. Supp. 235 (W.D. Ark. 1965).

¹⁵ *Alden v. Montana*, 234 F. Supp. 661, 670 (D. Mont. 1964).

Whether ineligibility for parole is a rule 11 "consequence" has also provoked conflict. The Court of Appeals for the Ninth Circuit, in *Munich v. United States*,¹⁶ held that one who pleaded guilty without knowledge that he would be ineligible for parole unquestionably did not plead with an understanding of the consequences of his plea.¹⁷ The opposite result was reached in the District of Columbia Circuit in *Smith v. United States*,¹⁸ on which the *Trujillo* court relied. The *Smith* court noted that *eligibility* for parole is a benefaction of legislative grace, and is not a "consequence" of which a defendant must be aware in order to tender an acceptable plea. Ineligibility for parole, therefore, must flow from a withholding of legislative grace, and could not be a "consequence" of pleading.¹⁹

Trujillo was sentenced before rule 11 was amended, and it is to its former language that the Fifth Circuit first looked. Acknowledging that the term "nature of the charge" embraces the "consequences of the plea" language incorporated in the present rule, the court found the issue to be precisely that considered in *Munich* and *Smith*.²⁰ "It is obvious," the court concluded, that to understand the nature of the charge the defendant need not be aware "of every 'but for' consequence which follows from a plea of guilty."²¹ Cases holding that a court need not inform a defendant of the loss of his passport and ability to travel abroad upon a felony conviction,²² nor of the possibility of deportation,²³ loss of voting privileges,²⁴ or undesirable discharge from the armed services²⁵ are cited by the court in support of its test.²⁶ Since ineligibility for parole is a matter of the withholding of legislative grace, the court reasoned, quoting *Smith*, it should be included in the category of "but for" consequences which need not be explained to a defendant.²⁷

¹⁶ 337 F.2d 356 (9th Cir. 1964).

¹⁷ *Id.* at 361, citing *United States v. Diggs*, 304 F.2d 929 (6th Cir. 1962) (dictum).

¹⁸ 324 F.2d 436 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 957 (1964).

¹⁹ *Id.* at 441.

²⁰ 377 F.2d at 268.

²¹ *Id.*

²² *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964) (per curiam), *cert. denied*, 380 U.S. 916 (1965).

²³ *United States v. Parrino*, 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954) (Frank, J., dissented on basis of importance of consequence).

²⁴ *United States v. Cariola*, 323 F.2d 180 (3d Cir. 1963).

²⁵ *Redwine v. Zuckert*, 317 F.2d 336 (D.C. Cir. 1963) (per curiam).

²⁶ 377 F.2d at 268-69.

²⁷ *Id.* at 269.

In approving the theoretical underpinnings of the *Smith* opinion, the Fifth Circuit failed to consider the fact that the majority relied heavily on the specific lack of prejudice to defendant Smith, who pleaded guilty knowing that he could be incarcerated for as long as forty years. Had parole been available, he still would have been required to serve a longer sentence than the one actually imposed.²⁸ Thus the actual detention fell within the range which the defendant believed possible when he entered his plea. The opposite was true in *Trujillo*, however. The defendant knew he could receive up to twenty years if convicted, but if parole were available he could serve as little as six years and eight months of the maximum sentence.²⁹ Thus, imposition of a ten-year sentence without parole was clearly prejudicial, for the defendant might serve over three years longer than he had anticipated. Further, the internal analysis of *Trujillo* reveals significant weaknesses. The court attaches undue importance to the fact that parole is causally the product of legislative enactment and not of the plea itself. "Consequence," however, admits of another interpretation: while ineligibility for parole is a consequence of legislative pronouncement, the statute's application to the particular case at this early juncture in the criminal proceedings is the direct result of the guilty plea. Were this not the proper interpretation of "consequences" in a rule 11 context, it is difficult to imagine what the term comprehends, since all the sanctions and procedures which are brought to bear following acceptance of a guilty plea have their origin in legislative enactments or established judicial precedent. Since a crucial consideration for a defendant in formulating his plea will be the specific period of his detention, any factors, irrespective of formal causality, which affect the length of incarceration should be explained. The high probability that a defendant in a marijuana case is ignorant of the suspension of the normal practice of granting parole renders the need for elucidation particularly acute. Thus, the *Trujillo* analysis of "consequences" is unacceptable both for its unjustified reliance on *Smith* and for its failure to recognize the practical dilemmas facing a defendant at the time of pleading.

²⁸ 324 F.2d at 440.

²⁹ See Act of June 25, 1948, § 4204, 18 U.S.C. § 4202 (1964).