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Criminal Procedure - Criminal Law - Plea of Guilty to a Charge Not Included in Information

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RECENT CASES

CRIMINAL PROCEDURE — CRIMINAL LAW — PLEA OF GUILTY TO A CHARGE NOT INCLUDED IN INFORMATION. — Defendant was charged in two informations with possession and sale of marijuana. In an agreement with the assistant district attorney, defendant was to plead guilty to the offense of addiction on both informations which resulted in merely a five year suspended sentence upon condition he remain in a hospital until cured. Subsequently, the district judge discovered that the defendant had not been charged with the offense of addiction. The district attorney then filed a motion to vacate the judgments and sentences, which was granted by the district judge. The defendant objected and petitioned for writs of prohibition, certiorari, and mandamus. The Supreme Court of Louisiana in restoring the judgments and the sentences, *held*, two justices dissenting, that when a plea of guilty is accepted and entered upon the record, it is a conviction of the highest order, which has the same effect in subsequent proceedings against the accused as a verdict of guilty, and that the district judge was without authority to entertain the motion by the district attorney to set aside the judgments and sentences. *State v. Braud*, 116 So.2d 676 (La. 1959).

A valid indictment or information must charge an offense,[1] and the evidence must establish the allegations in the indictment to sustain a sentence,[2] otherwise the sentence is void.[3] In the instant case, the dissenting opinion pointed out that a plea of guilty must be responsive to the indictment or information, and that no one can plead guilty to a crime for which he is not charged.[4]

It is a general rule that a person cannot be convicted of an entirely different offense from that charged or to one which is not included within the terms of the indictment or information.[5] When the indictment or information does not charge the accused with any crime, a judgment and sentence based upon a plea of guilty, would be void and therefore subject to collateral attack.[6] In *Territory v. Miller*,[7] the defendant was charged with murder and plead

1. N.D. Rev. Code § 29-1110. Aderhold v. Schilitz, 73 F.2d 381 (5th Cir. 1943) (where the defendant was charged with attempt to rob and the court held this charge was insufficient to sustain conviction under statute making it an offense to assault with an intent to rob by saying, "as the indictment does not charge an offense the verdict thereon amounted to nothing, and the court was without jurisdiction to impose sentence"). *Accord*, Henry v. Henkel, 235 U. S. 219 (1914); White v. Levine, 40 F.2d 502 (10th Cir. 1930); Brown v. White, 24 F.2d 392 (8th Cir. 1928).

2. State v. Haesemeyer, 248 Iowa 167, 79 N.W.2d 755 (1956); State v. Schuling, 216 Iowa 1425, 250 N.W. 588 (1933); People v. Noblett, 244 N.Y. 355, 155 N.E. 670 (1927).

3. Hillard v. State, 87 Ga. App. 769, 75 S.E.2d 173 (1953); People v. Schneider, 334 Ill. 630, 166 N.E. 529 (1929).

4. Switzer v. Golden, 224 Ark. 543, 274 S.W.2d 769 (1955) (held that one cannot plead guilty to an offense with which he has not been charged); People v. Paterno, 60 N.Y.S.2d 813 (1946); People v. Brown, 312 Ill. 63, 143 N.E. 440 (1924).

5. Hoppet v. United States, 11 U.S. (7 Cranch) 389 (1813); State v. Dobbins, 152 Iowa 632, 132 N.W. 805 (1911); State v. Karri, 51 Mont. 157, 149 Pac. 956 (1915); State v. Moon, 221 Mo. App. 592, 283 S.W. 468 (1926) (where defendant was convicted of having a still under an information charging him with the use of a still in manufacturing of liquor, the former offense being one of lower degree included in the latter). See also N.D. Rev. Code § 29-1417 (1943).

6. People v. Buffo, 318 Ill. 380, 149 N.E. 271, 272 (1925) "[T]o give the court jurisdiction of the subject-matter in a criminal case, it is essential that the accused be charged with a crime. If that is not done, a plea of guilty in manner and form as charged does not authorize the court to render a judgment of conviction for some criminal offense, and, if a judgment is so rendered, it is void and may be attacked collaterally."

7. 4 Dak. 173, 29 N.W. 7 (1886).

guilty to the charge. It was held that such a plea admitted the charge but did not admit a lesser offense. *State v. Robinson*[8] charged the defendant with possession of narcotics and when the jury returned a verdict of guilty to addiction, the Supreme Court of Louisiana said that being guilty of addiction is not responsive to the charge of possession of narcotics and therefore the verdict should be set aside. This case was decided seven years prior to the instant case.

In North Dakota a plea of guilty may be withdrawn by the defendant at any time before sentence with the approval of the court,[9] or by the court upon its own motion.[10] At the time of pleading guilty to a different offense, the information must be amended to conform to the plea; however, this too must be done before sentence has been pronounced.[11] If the information is not questioned at the trial, it will not be held insufficient unless it is obviously defective.[12] Upon entering his plea of not guilty, the accused then waives all right to quash the information[13] except as to those obvious defects which are subject to attack by motion in arrest of judgment,[14] or by writ of error.[15]

It is submitted that the dissenting judges were correct when they stated that a plea of guilty to the offense of addiction is not responsive either to a charge of possession or a sale of a narcotic. Such a plea of guilty is a nullity, and as a consequence the sentence is void.

J. F. BIEDERSTEDT.

HUSBAND AND WIFE — ACTIONS — WIFE'S RIGHT TO RECOVER FROM NEGLIGENT THIRD PARTY FOR LOSS OF HUSBAND'S CONSORTIUM. — A wife sued for damages for loss of her husband's consortium caused by negligent operation of

8. 221 La. 19, 58 So.2d 408 (1952).

9. N.D. Rev. Code § 29-1422 (1943) "The court at any time before judgment upon a plea of guilty may permit it to be withdrawn, if judgment has been entered thereon, the court may set it aside, and, in lieu thereof, may allow a plea of not guilty, or with the consent of the states attorney may allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged."

10. N.D. Rev. Code § 29-1416 (1943) "The defendant may plead guilty to an indictment or information of any offense, but the court may refuse to accept the plea and may order a plea of not guilty to enter of record."

11. N. D. Rev. Code § 29-1152 (1943) "The defendant and the states attorney are entitled, upon motion made either after verdict and before sentence is pronounced or the defendant is discharged, to have the indictment or information amended so as to state the particulars of the offense, as proved, in such a manner that the indictment or information without evidence aliunde, shall be such evidence of the offense charged and its particulars as to bar a subsequent prosecution for the same offense." See also *Ex parte* Bain, 121 U.S. 1 (1887) (which states that it is permissible to amend information to conform to the plea, usually on leave of the court, but an indictment can only be amended in form or substance with the consent of the grand jury).

12. Barnes v. United States, 197 F.2d 271 (8th Cir. 1952); Dickerson v. United States, 175 F.2d 440 (4th Cir. 1949).

13. In State v. Fradet, 58 N.D. 282, 225 N.W. 789 (1929) a plea of not guilty was entered to the charge set out in the information; the defendant orally moved to quash and set the information aside. It was held that any defect and irregularities which may have existed as grounds for quashing and setting the information aside were waived by the defendant.

14. N.D. Rev. Code § 29-1412 (1943) "If the defendant does not move to quash the indictment or information before he pleads thereto, he shall be taken to have waived all objections which are grounds for a motion to quash except those which are also grounds for a motion in arrest of judgment." State v. Simpson, 78 N.D. 571, 50 N.W.2d 661 (1951). For grounds for arrest of judgment see N.D. Rev. Code § 29-2502 (1943).

15. People v. Weber, 335 Ill. App. 215, 81 N.E.2d 5 (1948) (stated if an information charges no crime or is otherwise fatally defective, such defect can be taken advantage of on a writ of error whether the defendant pleads guilty or not guilty and regardless of whether or not the sufficiency of the information was in any way questioned in the trial court). *Accord,* People v. Wallace, 316 Ill. 120, 146 N.E. 486 (1925).