St. John's Law Review

Volume 46
Number 3 *Volume 46, March 1972, Number 3*

Article 19

Criminal Procedure--Rule 11 (Bye v. United States)

St. John's Law Review

process of law. It would seem that an importer will be successful in asserting non-exclusive jurisdiction of the customs court over foreign goods only in cases involving statutes such as trademarks or patent infringement or criminal sanction, that is, statutes which are not part of the customs laws.

CRIMINAL PROCEDURE — RULE 11

Rule 11 of the Federal Rules of Criminal Procedure concerns pleas by criminal defendants and the basis on which they should be accepted. It states, *inter alia*, that

> [t]he court may refuse to accept a plea of guilty, and shall not accept such plea . . . without first addressing the defendant personally or determining that the plea is made voluntarily with understanding of the . . . consequences of the plea.[24]

The majority of courts subscribe to a reading which brings ineligibility for parole within the meaning of Rule 11;[25] *i.e.*, ineligibility for parole is a consequence of a plea of which a defendant must be informed.[26]

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[24] FED. R. CRIM. P. 11. The phrase "understanding of the . . . consequences of the plea" was added by a 1966 Amendment, effective July 1, 1966 "to state what clearly is the law." FED. R. CRIM. P. 11, Notes of Advisory Committee on Criminal Rules. Rule 11 sets no standard by which to determine what is a legitimate "consequence" of which defendant must be informed. However, since the statute was amended to incorporate judicial decision in 1966 it might be assumed that judicial decision can define the term.

[25] *See* Harris v. United States, 426 F.2d 99 (6th Cir. 1970); Jenkins v. United States, 420 F.2d 433 (10th Cir. 1970); Durant v. United States, 410 F.2d 689 (1st Cir. 1969); Berry v. United States, 412 F.2d 189 (3d Cir. 1969); Munich v. United States, 337 F.2d 356 (9th Cir. 1964). *But see* Trujillo v. United States, 377 F.2d 266 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967). This decision was subsequently limited to its specific facts. Spradley v. United States, 421 F.2d 1043 (5th Cir. 1970).

[26] Berry v. United States, 412 F.2d 189 (3d Cir. 1969) has been cited as the leading case. 8 J. MOORE, FEDERAL PRACTICE 11.03[3] n.26 (Supp. 1970).

> [N]ot every result of a plea is a "consequence" . . . . United States v. Cariola, 323 F.2d 180 (3 Cir. 1963) . . . .
>
> [S]ome . . . suggest that the ineligibility for parole should be similarly categorized . . . .
>
> In any normal sentencing procedure in the federal courts, a sentence prescribing a number of years of imprisonment generally means that the defendant may expect to serve approximately one-third of this term with good conduct. Probation and parole are concepts which our society has come to accept as natural incidents of rehabilitation during imprisonment.
>
> This is not true where, as here, because of a Congressional directive tucked away in a relatively obscure section of the Internal Revenue Code, a narcotics offender is faced with the unconditional loss of probation and parole. This loss becomes an inseparable ingredient of the punishment imposed. Its effect is so powerful that it translates the term imposed by the sentencing judge into a mandate of actual imprisonment for a period of time three times as long as that ordinarily expected.
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> The mandate of Rule 11, before and after the 1966 amendment, is designed to insure that the pleader is made aware of the outer limits of punishment. At the very least, this means that he must be apprised of the period of required incarceration. Except for capital punishment, no other consequence can be as significant to an accused as the period of possible confinement. When one enters

Bye v. United States[27] now states the same rule for this circuit.[28]

Proceeding on a motion for post conviction relief,[29] defendant Bye alleged that he was unaware of his ineligibility for parole at the time he entered his plea. He had pleaded guilty to two violations of the narcotics laws,[30] and was subsequently sentenced to a total of fifteen years.[31] Parole, which is usually available to one who serves one third of his sentence,[32] was not available to Bye as a narcotics offender[33] — a fact not announced when his plea was entered[34] and one of which he alleged he was unaware until he received his "commitment card."[35] Bye further challenged that, had he been aware of this at the time of the pleading, he would not have so entered his plea.[36]

The circuit court accepted Bye's allegations of failure by the district court to comply with Rule 11.[37] Primarily relying on *Berry v. United*

a plea of guilty he should be told what is the worst to expect. At the plea he is entitled to no less—at sentence he should expect no more.

Berry v. United States, 412 F.2d 189, 192 (3rd Cir. 1969) (citations omitted).

27 435 F.2d 177 (2d Cir. 1970).

28 More specifically, the court held that a person accused of a narcotics offense who pleads guilty to that offense, without knowledge that he will be ineligible for parole from the sentence he receives, does not enter his guilty plea voluntarily with an understanding of the consequences of the plea. 435 F.2d at 178.

29 The motion was brought under 28 U.S.C. § 2255 (1970) in the District Court for the Southern District of New York. This section provides for habeas corpus proceeding by way of a motion to set aside sentence. Being no part of the original criminal proceeding, this is an independent civil proceeding. Heflin v. United States, 358 U.S. 415 (1959). For an excellent summation of section 2255 procedure see 8 J. MOORE, FEDERAL PRACTICE ¶ 11.04 [2] (2d ed. 1969). See also FED. R. CRIM. P. 32(d).

The district court had based its decision on United States v. Caruso, 280 F. Supp. 371 (S.D.N.Y. 1967), *aff'd sub nom.* United States v. Mauro, 399 F.2d 158 (2d Cir. 1968), *cert. denied*, 394 U.S. 904 (1969). The court in *Mauro*, made a finding not inconsistent with that of the court in Bye v. United States, 435 F.2d 177 (2d Cir. 1970).

30 Act of June 14, 1930, ch. 488, § 3, 46 Stat. 585, *as amended*, Pub. L. No. 91-513, III, § 1101 prohibits the importation of narcotic drugs; Act of July 18, 1956, ch. 629, tit. I, § 105, 70 Stat. 570, *as amended*, Pub. L. No. 91-513, tit. III, § 1101 sets penalties for bringing drugs into the United States contrary to law. See Drug Control Act, Pub. L. No. 91-513, tit. III, § 1002.

31 Bye was sentenced to 7½ consecutive years on each of two counts. He had been informed of a possible 20 years on each count. 435 F.2d at 178.

32 18 U.S.C. § 4202 (1970).

33 Act of Aug. 16, 1954, ch. 736, 68A Stat. 860, formerly 26 U.S.C. § 7237(d). Section 7237 has been repealed. Act of Oct. 27, 1970, Pub. L. No. 91-513, 111, §1101(b)(4)(A) 84 Stat. 1292.

34 Sentencing without trial, the minimum and maximum sentences on each count, the possibility of concurrence, and admission of facts charged were all specific aspects of which Bye was informed by the district court would constitute "consequences" of his plea. Bye v. United States, 435 F.2d 177, 178 n.1. (2d Cir. 1970).

35 A card issues to each prisoner stating the terms of his incarceration. 435 F.2d at 181.

36 Bye alleged a belief in a possible defense of entrapment as an alternative to his plea. 435 F.2d at 178.

37 The government must bear the burden of proving that a plea was voluntarily entered with an understanding of the consequences, when the accused was not informed by the court of his ineligibility for parole. Durant v. United States, 410 F.2d 689, 693

States,[38] the court found error in not informing him of his ineligibility for parole, and placed the onus on the government of proving the guilty plea to have been voluntary with an understanding of the consequences.[39] Argument by the government that sentence was well within what Bye could have expected even with parole,[40] and that his claim of being unaware of the "consequences" was "incredible"[41] were both dismissed on the weight of *Berry*.[42]

Obviously, underestimation, by a multiple of three, of time to be served is a significant "consequence" within the meaning of Rule 11, regardless of what might be the expectation of a defendant. The attitude of the government appears to have been to prosecute solely for the sake of prosecution itself. But, the court has aligned itself with the majority rule[43] and refused to allow Bye's ignorance of a relatively obscure section of the Internal Revenue Code[44] deprive him of just treatment.[45]

APPELLATE REVIEW — ABUSE OF DISCRETION

On the night of April 20, 1969 Timothy J. Hart, then 18 years old and an honor student in his freshman year at Syracuse University on a full scholarship, was killed in an automobile accident while riding as a passenger in the auto of appellant, Charles N. Forchelli. The action was

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(1st Cir. 1969); Munich v. United States, 337 F.2d 356, 360-61 (9th Cir. 1964). The court did not find its holding in United States v. Caruso, 280 F. Supp. 371 (S.D.N.Y. 1967), *aff'd sub nom.* United States v. Mauro, 399 F.2d 158 (2d Cir. 1968), *cert. denied*, 394 U.S. 904 (1969), to be inconsistent. In *Mauro*, the record fully rebutted all allegations of unawareness. 280 F. Supp. at 375.

38 412 F.2d 189, 191 (3d Cir. 1969). *See* note 26 *supra*. *Contra*, Smith v. United States, 324 F.2d 436, 440 (D.C. Cir. 1963).

39 The general view among the circuits was that failure to inform defendant of such consequences could constitute harmless error, if it could be established the defendant was aware of the consequences of his plea at the hearing on motion for post conviction relief. 41 TEMP. L.Q. 491, 496 n.26 (1968). However, the Supreme Court, in Mc Carthy v. United States, 394 U.S. 459 (1969), stated that failure to comply with Rule 11 was prejudicial per se. 394 U.S. at 468-72. *See Heiden v. United States*, 353 F.2d 53 (9th Cir. 1965).

40 435 F.2d at 180. The government pointed out that Bye had been informed of a 20 year maximum sentence on each count which, had he received such, and had parole been available, would have made him eligible for parole in 13⅓ years. Since he had received only 15 years total and could conceivably be released afted 10 years with full credit for good time, the government felt "that there was no justification in allowing Bye an opportunity for a shorter incarceration period.

41 The court found it more credible to have a person expect the usual treatment of parole. 345 F.2d at 181, citing, 41 TEMP. L.Q. 491, 496 (1968).

42 Berry v. United States, 412 F.2d 189, 192 (3d Cir. 1969).

43 Cases cited note 25 *supra*.

44 *See* note 33 *supra*. Formerly INT. REV. CODE of 1954, § 7237(d).

45 One might make the argument that Bye should not be entitled to use of his expectation of parole to promote his case for vacating sentence. The government does so argue, and yet attempts to use his expectation of sentence to their advantage. However, such argument tends to obviate the theory of our peno-correctional system, *i.e.*, meaningful rehabilitation.