

FILED

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, J., dissenting:

The obliteration of the plea of *nolo contendere*, Rules 11b and 11e(6) of the *Rules of Criminal Procedure*, and Rules 410(2) and 803(22) of the *Rules of Evidence*

The majority allows Mr. Humphries’ plea of *nolo contendere* in a criminal case to be used against him in a civil case to establish his guilt or fault in the civil case. This ruling overturns 148 years of legal precedent, our *Rules of Criminal Procedure*, and our *Rules of Evidence*, all of which were established by this Court. Worse yet, it obliterates a criminal plea that served a very useful purpose.

In the past, a *nolo contendere* plea meant “I do not wish to contest the charges against me.” It was not a plea of guilty and could not be used against the defendant in a subsequent civil action. As we once said in Syllabus Point 2 of *Schad v. McNinch*, 103 W.Va. 44, 136 S.E. 865 (1927):

A plea of *nolo contendere*, when accepted by the court, is, in its effect upon the case, equivalent to a plea of guilty. It is an implied confession of guilt only, and cannot be used against the defendant as an admission in any civil suit for the same act. The judgment of conviction follows upon such plea, as well as upon a plea of guilty. But there is a difference between the two pleas in that the defendant cannot plead *nolo contendere* without leave of the court. If such plea is tendered, the court may accept or decline it in its discretion.

The modern purpose of the plea is “to avoid exacting an admission which could be used as an admission in other potential litigation.” *United States v. Jones*, 119 F.Supp. 288 (S.D. Cal. 1954). *See also*, “Plea of Nolo Contendere or Non Vult Contendere,” 89 A.L.R. 2d 540 (1963).

Because a *nolo contendere* plea was tantamount to a conviction and was not an admission of factual guilt, it could not be plead in a criminal case without the consent of the court. Rule 11(b), *Rules of Criminal Procedure*. *See also*, 22 C.J.S., Criminal Law § 519; *United States v. Poellnitz*, 372 F.3d 562, 566 (3rd Cir. 2004) (“While a *nolo* plea is indisputably tantamount to a conviction, it is not necessarily tantamount to an admission of factual guilt.”)

Our Court embraced this logic when it adopted West Virginia’s *Rules of Criminal Procedure* and *Rules of Evidence*. The *Rules of Criminal Procedure* and *Rules of Evidence* make it clear that pleas of *nolo contendere* are not admissions of guilt, and are later inadmissible as proof that a defendant was in any way guilty. Rules 11(b) and (e)(6) of the *Rules of Criminal Procedure* provide, in part:

(b) *Nolo Contendere*. – A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice. . . .

(6) Inadmissibility of pleas, plea discussions, and related statements. — Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: . . .

(B) A plea of *nolo contendere*.

Rules 410 of the *Rules of Evidence* makes evidence of a *nolo* plea inadmissible, and says:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions. . . .

(2) A plea of *nolo contendere*. . . .

Similarly, Rule 803 (22) indicates that a *nolo* plea is inadmissible:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

(22) Judgment of previous conviction. — Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime . . .

Our Court adopted these rules of procedure and evidence — but now, contrary to these well-established rules, holds that a *nolo contendere* plea in a criminal case can be considered in a legal malpractice case. The majority opinion absolutely bars Mr. Humphries from any possibility of proving in his civil case that he was innocent of the criminal charges, and was sent to prison because of the carelessness and ineffective assistance of his lawyer.

I disagree with the majority, and respectfully dissent.