No. 22541 - State of West Virginia v. Bruce Allen Lilly
No. 22542 - State of West Virginia v. Cecil Wayne Lilly

Cleckley, Justice, concurring:

I agree entirely with another of Judge Fox's fine and scholarly opinions. I write only to applaud the trial court, the litigants, the prosecuting attorney, and defense counsel below for their use of Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure.[1] Realizing that the only meritorious issue in the case was the Fourth Amendment claim, the participants below agreed to allow the defendants to enter conditional guilty pleas[2] which

[1]For the text of Rule 11(a)(2), see infra.

[2]Conditional pleas are frequently confused with "Alford" pleas, named after the decision in North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970); but, as the court in note 1 of State v. Hodge, 118 N.M. 410, ___, 882 P.2d 1, 3 (1994), noted, the purpose and effect of the two are different:

> "In Alford, the United States Supreme Court held that courts do not violate due process when they accept guilty pleas from defendants who continue to protest their innocence . . . so long as the court is satisfied that there is a factual basis for the plea independent of the defendant's statements. . . . An Alford plea, however, does not in itself reserve any issue for appeal.
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> "A conditional guilty plea, on the other hand, conditions the plea on reservation of one or more specific issues for appellate review. An Alford plea could be conditioned on review of a specific issue, as it was in the

preserved the defendants' right to appeal the constitutional claim. By invoking Rule 11(a)(2), the parties not only eliminated the need for a protracted trial, but paid the ultimate respect to limited judicial resources and judicial economy. To be specific, the appropriate use of a conditional guilty plea by a criminal defendant serves the interests of justice by, inter alia, safeguarding the defendant's right to appeal and promoting judicial economy. See State v. Forshey, 182 W. Va. 87, 93, 386 S.E.2d 15, 21 (1989) (forcing party to go through an unnecessary trial is a "'pointless and wasteful exercise'") (Miller, J., dissenting). (Citation omitted).

As a general rule, an unconditional plea of guilty or nolo contendere, intelligently and voluntarily made, operates as a waiver of all nonjurisdictional defects and bars the later assertion of constitutional challenges to pretrial proceedings. Tollett v. Henderson, 411 U.S. 258, 93 S. Ct. 1602, 36 L.Ed.2d 235 (1973); Losh v. McKenzie, 166 W. Va. 762, 277 S.E.2d 606 (1981); State v. Sims, 162 W. Va. 212, 248 S.E.2d 834 (1978); 1 C. Wright, Federal Practice

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> case involved here . . . ; but it is a conditional guilty plea only if it comports with the requirements for such a plea. Otherwise, appellate review of Alford pleas is conducted under the same standards as are applicable to review of unconditional

guilty pleas." (Citations omitted).

& Procedure § 175 (1982). Although a defendant may still challenge the sufficiency of the indictment or other defects bearing directly upon the State's authority to compel the defendant to answer to charges in court, claims of nonjurisdictional defects in the proceedings, such as unlawfully obtained evidence and illegal detention, generally will not survive the plea. An exception to this general rule is a plea conditioned upon the right to appeal certain pretrial rulings. "Where specific rulings are decisive of the case, so that a trial serves merely to preserve those pretrial issues for appeal, the conditional plea obviates the need for a trial thus conserving judicial resources." State v. Morin, 71 Haw. 159, 162, 785 P.2d 1316, 1319 (1990).

In West Virginia, conditional pleas are authorized by Rule 11(a)(2) of the Rules of Criminal Procedure:

> "Conditional Pleas. With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea."

Prior to our adoption of Rule 11(a)(2), and to a disappointingly large extent today, a criminal defendant who loses one or more

pretrial motions will often go through a lengthy trial merely to preserve the pretrial issues for later appellate review. In most cases, this results in a waste of prosecutorial and judicial resources, not to mention adding to the already congested trial dockets of circuit courts. Rule 11(a)(2) was adopted solely to avoid this unfortunate and unnecessary consequence. See also Lefkowitz v. Newsome, 420 U.S. 283, 293, 95 S. Ct. 886, 891, 43 L.Ed.2d 196, 204 (1975) (describing use of conditional guilty plea in New York as "commendable efforts to relieve the problem of congested criminal trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution").

[3]Obviously, there are still some remaining objections to the procedure for conditional guilty pleas. Four of the most often heard objections are: (1) the procedure encourages appellate litigation; (2) it does not advance the interests of finality in the disposition of criminal cases; (3) it precludes the effectiveness of meaningful appellate review because of the absence of a full trial record; and (4) it compels decisions on many issues that would ordinarily not be addressed by an appellate court. Most of the these problems are not applicable in West Virginia because there is no automatic right to appeal. More importantly, when these considerations are balanced against the obvious gains in judicial efficiency that are realized when a full trial is avoided, as well as the opportunity afforded to defendants to enter a plea without foregoing substantial constitutional claims, the need for Rule 11(a)(2) appears compelling. In cases where a defendant chooses to go to trial in order to preserve his right of appeal, not only is finality not achieved, but a successful appeal may result in two trials and two appeals.

Although a conditional guilty plea can only be used in limited circumstances, as done in the case sub judice, it spares the taxpayers and the court the expense of a potentially time consuming trial. Rule 11(a)(2) not only preserves resources, but serves the ends of justice by permitting a defendant to preserve specific errors. In my judgment, Rule 11(a)(2) is one of our most important criminal rules and, when it is properly invoked, everyone benefits, including the public.

The procedure for following Rule 11(a)(2) should remain simple. A defendant preserves the alleged error by invoking a ruling by the trial court on a pretrial motion to suppress evidence or to dismiss. The defendant may then plead guilty or nolo contendere and reserve appellate review of an adverse determination of a pretrial motion by entering a conditional plea, in writing, specifying the issue or issues reserved for appeal. Entry of the

[4]See United States v. Doherty, 17 F.3d 1056, 1058 (7th Cir. 1994) (quoting United States v. Yasak, 884 F.2d 996, 999 (7th Cir. 1989), noting that conditional pleas are "'allowed only when the appellate court's decision will completely dispose of the case'"); United States v. Markling, 7 F.3d 1309, 1313 (7th Cir. 1993), (quoting United States v. Wong Ching Hing, 867 F.2d 754, 758 (2nd Cir. 1989), quoting Advisory Committee Note to 1983 Amendment of Fed. R. Crim. P. 11 for the proposition that the issue reserved on a conditional guilty plea must "'"dispose of the case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence"'").

conditional plea is contingent upon approval of the trial court and the consent of the prosecution. Significantly, neither the prosecution nor the circuit court is required to agree to a conditional guilty plea and both are "free to reject a conditional plea for any reason or no reason at all." United States v. Bell, 966 F.2d 914, 916 (5th Cir. 1992). As discussed in note 4, supra, before accepting a conditional plea, the circuit court and the prosecution should assure that pretrial issues reserved for appeal are case dispositive and are capable of being reviewed by this Court without a full trial.

It is important for the defendant to understand that Rule 11(a)(2) does not guarantee that his or her petition for appeal will be granted by this Court. If this Court does not grant the petition for appeal, the conviction becomes final and the guilty plea may not later be withdrawn for this reason. If the case is accepted for appellate review, our initial task is to determine whether a defendant entered a valid conditional plea. In deciding this initial issue, we, as an appellate court, should not always require rigid adherence to all the requirements of Rule 11(a)(2). See W.Va.R.Crim.P. 11(h) ("[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded"). On appeal, we can pardon the informalities of a

conditional guilty plea "so long as the record demonstrates that the spirit of Rule 11(a)(2) has been fulfilled--that the defendant expressed an intention to preserve a particular pretrial issue for appeal and that neither the government nor the district court opposed such a plea." Bell, 966 F.2d at 916. See also United States v. Fernandez, 887 F.2d 564, 566 n.1 (5th Cir. 1989) (holding conditional guilty plea valid despite lack of written reservation of right to appeal and judge's approval of conditional plea).

On the other hand, "[t]he conditional plea is susceptible to abuse . . . unless its use is carefully limited to significant issues the determination of which on appeal is likely to be dispositive of the case." State v. Madera, 198 Conn. 92, 101, 503 A.2d 136, 141 (1985). Therefore, as an appellate court, we will review with caution the entire record to determine whether the litigants or the court below offered satisfactory justification as to why the procedure under Rule 11(a)(2) was deemed appropriate. In Madera, 198 Conn. at 101-02, 503 A.2d at 141, the court further stated:

> "The inherent power of the trial court to reject such a plea where it is clearly inappropriate affords some protection against misuse of the statutory procedure, but the court is not in a position to evaluate such prosecutorial concerns as the significance of a particular ruling to the ultimate disposition of a case

> or the problems entailed by delaying a trial for the period necessary to obtain appellate relief. The prosecutor is ordinarily much more familiar with the evidence to be presented that may not be affected by the ruling and also with the effect of delay incident to an appeal upon the availability of witnesses. Even where the prosecutor looks favorably on the conditional plea . . . the parties, as well as the trial court, must be sure that the issues reserved can properly be reviewed on the record available."

In the case sub judice, the record made by the trial court was exemplary and this Court did not hesitate to approve the conditional plea procedure. I conclude by again applauding the participants below and particularly the trial court for making this system of criminal justice work as it should.