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Criminal Procedure

BY RUTHEFORD B CAMPBELL, JR.*

INTRODUCTION

The Kentucky Court of Appeals has had an especially active year in the criminal procedure area. Since the nature of this article does not permit extended commentary on all of the Court's decisions, discussion will be limited to the more significant cases, which deal with automobile inventory searches, waiver of constitutional rights, and plea bargaining.[1]

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[1] In addition to the decisions discussed in the text, three other cases deserve mention. In Deskins v. Commonwealth, 512 S.W.2d 520 (Ky. 1974), an indicted defendant made incriminating statements to a friend who had been wired by police with a microphone and radio transmitter. The defendant was not in custody, nor was his attorney present during the conversation. The Court held that the conversation, which was electronically recorded by the police, could be introduced into evidence, since the procedure did not violate the defendant's right to counsel. It had difficulty, however, reconciling its holding with Massiah v. United States, 377 U.S. 201 (1964), in which the defendant, who had been indicted and released from custody, was engaged in a conversation with Colson, who had permitted the police to wire the automobile where the conversation took place. The Supreme Court held:

> [T]he petitioner was denied the basic protections of that guarantee [the right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel. *Id.* at 206.

The Court of Appeals distinguished *Massiah* on the ground that the defendant, Deskins, had initiated the contacts with the wired informant "who could in no way be considered an agent of the Commonwealth." 512 S.W.2d at 526.

In the area of parole revocation procedures, the Court was faced with interpreting Morrisey v. Brewer, 408 U.S. 471 (1972), in which the Supreme Court had held that a parolee who is arrested for a parole violation must be given a preliminary hearing "at or reasonably near the place of the alleged parole violation or arrest . . . to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which could constitute a violation of parole conditions." *Id.* at 485. In Davis v. Black, 518 S.W.2d 338 (Ky. 1975), the Kentucky Court of Appeals held that the defendant's absence from this preliminary hearing would not violate *Morrisey* where the defendant parolee was in custody in another state and was returned directly from that state to the Kentucky reformatory.

In Goins v. Meade, 528 S.W.2d 680 (Ky. 1975), an indigent defendant was denied a full transcript of his trial. Specifically, he was denied a free transcript of the voir dire examination and the opening statements of counsel. Since the defendant's counsel made no specific claim of error during voir dire or opening statements, the Court of Appeals held that a transcript omitting those sections did not deprive the defendant of due process or equal protection. It said, however: "If a defendant or his counsel

I. AUTOMOBILE INVENTORY SEARCHES

Warrantless searches of automobiles have been the source of considerable litigation in the last few years. Several Supreme Court cases have defined the circumstances in which police may conduct such searches. One series of cases has established that police may conduct a warrantless search of an automobile if there is probable cause to search and if the automobile is a "fleeting target."[2] This warrantless intrusion is justified because if police take the time to obtain a search warrant, the delay would permit the removal of the vehicle as well as the removal of any evidence it contains.[3]

The "inventory search" doctrine is another theory advanced in recent years to justify warrantless automobile searches.[4] In *Cady v. Dombrowski,*[5] the leading inventory search case, a Chicago policeman who had an automobile accident in a small Wisconsin town was arrested for drunken driving. Because the police believed that Chicago policemen were required to carry guns at all times, and since no gun had been found on the defendant's person, the police searched his disabled car, which had been towed to an unguarded lot. The warrantless search disclosed evidence that incriminated the defendant. In reviewing his conviction, the Supreme Court upheld the legality of the search.

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claims the occurrence of error during the voir dire, or during opening statements, the transcript must include those events." *Id.* at 9.

[2] Cardwell v. Lewis, 417 U.S. 583 (1974); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). In the latter two cases, however, it is questionable whether the vehicles' mobility had created an emergency situation, that is, a situation in which there was insufficient time to obtain a search warrant. In *Chambers* the automobile had been impounded by the police; in *Cardwell* the arrest of the defendant occurred only after extended questioning at the police station, during which time the defendant's car was parked in a public lot near the station.

The Kentucky Court utilized the "fleeting target" theory, citing *Chambers,* in Wydman v. Commonwealth, 512 S.W.2d 507 (Ky. 1974).

[3] For an example of the emergency doctrine in a nonautomobile case *see* Schmerber v. California, 384 U.S. 757 (1966).

[4] Three Supreme Court cases that could fall under the rubric of "inventory searches" are: Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Harris v. United States, 390 U.S. 234 (1968); and Cooper v. California, 386 U.S. 58 (1967). *See* Annot., 48 A.L.R.3d 357 (1973) for citation to other cases which discuss automobile searches.

[5] 413 U.S. 433 (1973).

Although *Cady* probably presents a unique fact pattern with special dangers that are unlikely to recur, the opinion's language and interpretation of earlier automobile search cases seems to indicate that the Supreme Court is willing to permit the warrantless search of *any* automobile impounded by the police. The Court said in *Cady:*

> In *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in *Cooper* it was to guarantee the safety of the custodians. Here the justification, while different, was as immediate and constitutionally reasonable as those in *Harris* and *Cooper:* concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle.[6]

The expansive impact of this language cannot be fully appreciated until one realizes that *Harris v. United States*[7] and *Cooper v. California*[8] did not involve extraordinary circumstances. Although the Supreme Court thought that the need to safeguard Harris' property validated an inventory search, there was no evidence in that case that the automobile was especially vulnerable to robbery. The Court justified the inventory search in *Cooper* on the basis of a need to guarantee the safety of the car's custodian, despite the absence of evidence of special danger to the custodian. Thus, *Cady* seems to approve an inventory search anytime an automobile is legally impounded, for the necessity of protecting the vehicle's custodian and the arrested person's property will always be at least as intense as it was in *Harris* and *Cooper*.

The Kentucky Court of Appeals may have recently provided some solace to my liberal brethren who have been rankled by *Cady*. In *Commonwealth v. Dawson*[9] the defendant had been arrested for driving while intoxicated. In the course of inventorying the car's contents prior to towing it to police storage, the arresting officers discovered beer and liquor in the trunk. In a well-reasoned opinion by Justice Palmore, the

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[6] *Id.* at 447.
[7] 390 U.S. 234 (1968).
[8] 386 U.S. 58 (1967).
[9] Commonwealth v. Dawson, No. 74-887 (Ky., May 9, 1975).

Court addressed the question of when an arrested person's auto may be seized. It indicated that the reasonableness of the *seizure* or *impoundment* of the automobile is an important element in determining the permissibility of the subsequent inventory search. The Court also noted: "[T]he practice of impounding vehicles following arrests for mere traffic violations is utterly unnecessary and, indeed, is of questionable legality."[10] Relying heavily on an Eighth Circuit opinion,[11] the Court offered alternatives to impoundment. When the arrested owner is present and coherent,

> it is only reasonable that the owner be allowed to choose whether or not he wishes his car impounded. In cases where the owner or operator cannot make his wishes known, whether because of incapacity or absence (i.e., a parking violation), in most instances the property would be adequately safeguarded by rolling up the windows and locking the doors . . . .[12]

Alternatively, it ordinarily "should be just as easy to reach some person at his home as it is to call for a wrecker."[13]

A number of perceptive and well-reasoned judgments are evident in *Dawson*. First, the Court seems to recognize that the impounding of an automobile is a seizure that must be reasonable under the fourth amendment.[14] Absent some substantial justification, it is generally unreasonable for the police to seize an automobile solely because the driver or owner is arrested.[15]

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[10] *Id.* at 8-9.

[11] United States v. Lawson, 487 F.2d 468 (8th Cir. 1973).

[12] Commonwealth v. Dawson, No. 74-887 at 7 (Ky., May 9, 1975).

[13] *Id.* at 8.

[14] This is consistent with the Supreme Court's holding in Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[15] Several courts have considered the reasonableness of the original seizure to be relevant to the constitutionality of the subsequent search. United States v. Pannell, 256 F.2d 925 (D.C. Cir. 1969) (Since the police had no reason to impound the defendant's automobile, there was no lawful basis for an inventory search.); *In re* One 1965 Econoline, 511 P.2d 168 (Ariz. 1973) (The court held an inventory procedure reasonable where the officer had lawful possession of the vehicle and would not have been warranted in leaving it in control of its incoherent owner.); People v. Nagel, 95 Cal. Rptr. 129 (Cal. Ct. App. 1971) (The defendant was arrested for running a red light, and his car was impounded and searched. The court excluded the evidence because the police could have simply left the car in a legal parking space.); Virgil v. Superior Court, 73 Cal. Rptr. 793 (Cal. Ct. App. 1968) (An inventory search was held to be unlawful because impoundment was unjustified. The defendant had been arrested for reckless

Less intrusive alternatives should be utilized to protect an arrestee's automobile when they are available, and a failure to employ such techniques should make the subsequent inventory search unreasonable and thus unconstitutional.

This approach is sound. Regardless of one's view concerning the desirability of inventory searches, automobile seizures are difficult to justify when made without a compelling reason. This is not to say, however, that the seizure of an arrestee's automobile will be unreasonable in all circumstances. *Cooper,*[16] *Harris,*[17] and *Cady*[18] are all examples of cases in which the Supreme Court has found the initial seizure to be reasonable. In *Cooper* the impoundment of the automobile was reasonable because under state law the vehicle was subject to a forfeiture sale. In *Harris* the car was evidence in an armed-robbery case. In *Cady* the vehicle, which had been in an accident, was a nuisance along the highway and its comatose driver was unable to make arrangements to have it towed.

Absent such limited and compelling circumstances, however, the Kentucky Court of Appeals has indicated that it will not approve the seizure of an automobile simply because its owner was arrested. Furthermore, any evidence seized in the ensuing inventory search will be excluded as fruit of the illegal seizure.

II. WAIVER OF CONSTITUTIONAL RIGHTS

During the past Survey period the Court of Appeals decided three significant cases involving the waiver of one's constitutional rights. In *Short v. Commonwealth*[19] the Court held that a defendant has the right to waive a jury trial. Prior to this

driving, but there were friends in the car who could have driven it.); People v. Greenwood, 484 P.2d 1217 (Colo. 1971) (The court indicated that if the defendant had been held overnight because he was misinformed by police as to the amount of bond, then the impoundment of his automobile was unauthorized and the ensuing inventory was unlawful.); State v. Singleton, 511 P.2d 1396 (Wash. 1973) (Inventory conducted after defendant's arrest on a warrant for a minor traffic violation was unlawful since there was no reasonable cause for impoundment of the legally parked vehicle.).

[16] 386 U.S. 58 (1967).

[17] 390 U.S. 234 (1968).

[18] 413 U.S. 433 (1973).

[19] 519 S.W.2d 828 (Ky. 1975).

decision a substantial number of Kentucky cases[20] had interpreted § 7 of the Kentucky Constitution as prohibiting a defendant's waiver of his right to a jury in a felony trial.[21] Declaring that "current constitutional safeguards are so comprehensive that there remains no further necessity for the rule that an accused may not waive a jury trial,"[22] the Court decided that there "is nothing in the Kentucky Constitution which denies an accused the right to waive a jury trial."[23]

In *Wake v. Barker*[24] the Court of Appeals held that a defendant has the right "to proceed to trial without counsel being in any way associated with him."[25] It is noteworthy that 8 months after *Wake v. Baker* the Supreme Court decided *Faretta v. California,*[26] in which it held that a state cannot constitutionally deny a defendant the right to conduct his own defense, if, of course, his waiver of counsel is "knowing and intelligent."[27]

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[20] Meyer v. Commonwealth, 472 S.W.2d 479, 482 (Ky. 1971) ("The defendant may not waive jury trial where he enters a plea of not guilty."); Tackett v. Commonwealth, 320 S.W.2d 299 (Ky. 1959) (The "constitutional right [to a jury trial] cannot be waived in a felony case."); Allison v. Gray, 296 S.W.2d 735, 737 (Ky. 1956), *cert. denied,* 353 U.S. 914 (1957) (Although "the protection of the right [to trial by jury] is so secure that one accused of a felony may not waive it," there was no reversable error if sentencing was by ten jurors.); Jackson v. Commonwealth, 299 S.W. 983, 984 (Ky. 1927) (The Court reversed a felony conviction by eleven jurors, stating: "[T]his court . . . has committed itself to the doctrine . . . that defendant cannot waive his constitutional right of trial by the ancient mode of trial by jury under felony charges."); Branham v. Commonwealth, 273 S.W. 489 (Ky. 1925) (The Court refused to permit a defendant to agree to a trial by seven jurors.).

[21] The Kentucky Court of Appeals has traditionally permitted a defendant to waive his right to a jury trial in a misdemeanor case. *See, e.g.,* Phipps v. Commonwealth, 266 S.W. 651 (Ky. 1924): "A defendant in a misdemeanor trial in the Circuit Court is entitled to 12 jurors, but may agree to a lesser number or waive any number or all of the jurors and submit the law and facts to the Court."

The Court has also upheld the right of a judge to sentence a defendant following a guilty plea. Lee v. Buchanan, 264 S.W.2d 661 (Ky. 1954). Likewise, sentencing by less than 12 jurors following a guilty plea is not invalid. Allison v. Gray, 296 S.W.2d 735 (Ky. 1956), *cert. denied,* 353 U.S. 914 (1957).

[22] 519 S.W.2d at 832.

[23] *Id.* The right of a defendant in Kentucky to waive a jury trial has been the subject of two articles. Moreland, *Waiver of Jury Trial in Criminal Cases in Kentucky,* 21 KY. L.J. 1 (1932); Note, *Waiver of Trial Jury in Felony Cases in Kentucky,* 48 KY. L.J. 457 (1960).

[24] 514 S.W.2d 692 (Ky. 1974).

[25] *Id.* at 695.

[26] 422 U.S. 806 (1975).

[27] *Id.* at 835.

The third waiver case, *Britt v. Commonwealth,*[28] involved the validity of a defendant's waiver of his *Miranda* rights. Approximately 2 hours after Britt's arrest for public drunkenness it became apparent that he had been in a hit-and-run accident. Although given his *Miranda* warnings, he nevertheless admitted in subsequent questioning that he had been the driver of the hit-and-run vehicle. At the time of his admission Britt had submitted to a breathalizer test, which registered his blood-alcohol content at .22 per cent.[29] Notwithstanding Britt's apparent intoxication at the time he waived his *Miranda* rights,[30] the Court of Appeals held that the confession was admissible.

Prior to *Miranda v. Arizona,*[31] the admissibility of a confession was determined by a voluntariness standard. If the totality of the circumstances indicated that a confession was voluntarily given, the courts permitted it to be introduced into evidence.[32] In ascertaining the voluntariness of a confession the courts looked at factors such as the defendant's emotional instability[33] and youth,[34] whether he had been physically abused[35] or threatened,[36] and the length of his interrogation.[37] In *Miranda,* the Supreme Court declared that a confession is inadmissible unless the defendant has been warned, *inter alia,* of his rights to remain silent and to have counsel present at questioning.[38] It further held that these rights can be waived only if

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[28] 512 S.W.2d 496 (Ky. 1974).

[29] Under the provisions of KY. REV. STAT. § 189.520(4)(c), in effect at the time of the *Britt* case, blood alcohol of .10 percent raised a presumption that the driver was "under the influence of intoxicating beverages."

[30] The Court described the condition of Britt as follows:

> He [the arresting officer] described Britt as having been "very drunk . . . almost passed out" when arrested, but neither drunk nor sober at the time of the interview in which he admitted having been the driver of the car. Another officer described his condition at the latter time as "fairly drunk" and expressed the opinion that he "just didn't know really where he was at or what he was doing. He just seemed in a state of coma of some kind."

512 S.W.2d at 498.

[31] 384 U.S. 436 (1966).

[32] *See, e.g.,* Haynes v. Washington, 373 U.S. 503 (1963).

[33] *See* Spano v. New York, 360 U.S. 315 (1959).

[34] *See* Gallegos v. Colorado, 370 U.S. 49 (1962).

[35] *See* Brown v. Mississippi, 297 U.S. 278 (1936).

[36] *See* Payne v. Arkansas, 356 U.S. 560 (1958).

[37] *See* Turner v. Pennsylvania, 338 U.S. 62 (1949).

[38] 384 U.S. at 467-79.

the waiver is "knowing, intelligent and voluntary."[39]

Although the exact limits of this "knowing, intelligent and voluntary" standard are uncertain, it is quite clear from *Miranda* and later cases that it is more protective of the defendant than the voluntariness standard.[40] Specifically, the *Miranda* Court stated:

> In these cases we might not find the defendants' statements to have been involuntary in traditional terms . . . . The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.[41]

Additional evidence that the Supreme Court distinguishes between "voluntary" and "knowing, intelligent and voluntary" can be found in the 1973 case, *Schneckloth v. Bustamonte*.[42] In *Schneckloth* the Supreme Court held that while "voluntariness" is the criterion for assessing the validity of a consent to search, in other situations, including the *Miranda* warnings, the more rigorous "knowing, intelligent and voluntary" test applies.[43]

In the *Britt* case, however, the Kentucky Court of Appeals used language that could be interpreted as adopting voluntariness as the standard for a valid waiver of *Miranda* rights.[44] At one point the Court stated: "The heart of the problem is whether his waiver and ensuing admissions were, from a legal standpoint, 'voluntary.' "[45] Furthermore, pre-*Miranda* decisions constituted much of the authority for the decision.[46]

On the other hand, it is not clear that the Court of Appeals applied a voluntariness standard. Elsewhere in the decision the

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[39] *Id.* at 475-76.

[40] *See* 26 VAND. L. REV. 1069, 1073 (1973).

[41] 384 U.S. at 457.

[42] 421 U.S. 218 (1973).

[43] *Id.* at 241.

[44] At least one commentator has opined that the more stringent formalized waiver demanded by *Miranda* has not precipitated any additional protection for defendants. Note, *Waiver of Rights in Police Interrogation,* 36 U. CHI. L. REV. 447 (1969).

[45] Britt v. Commonwealth, 512 S.W.2d 496, 499 (Ky. 1974).

[46] The Court cited the following: Townsend v. Sain, 373 U.S. 293 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960); Peters v. Commonwealth, 403 S.W.2d 686 (1966); Annot., 69 A.L.R.2d 361 (1963).

"basic question" was characterized as "whether the confessor was in sufficient possession of his faculties to give a reliable statement . . . ."[47] The Court also noted that there was no evidence that "Britt did not understand what he was doing."[48]

In addition to the imprecision of the norm applied to the waiver of Britt's *Miranda* rights, the case is noteworthy as a reflection of the Court's attitude toward the *Miranda* decision. By holding that Britt made a valid waiver of his rights, the Court has demonstrated an attitude of grudging deference to *Miranda*.

The attitudes and biases of a decision-maker unavoidably influence the resolution of any legal issue, especially when a standard is as amorphous as "knowing, intelligent and voluntary." Within certain fairly broad limits, a court determining whether a particular waiver was knowing, intelligent, and voluntary is virtually free to decide any concrete case however it wishes.[49] What becomes important, therefore, is the court's perception of the value of the protection afforded, as contrasted with the harm which results from excluding confessions taken in violation of the *Miranda* rights. The Court of Appeals has evinced what appears to be a restrictive attitude toward the *Miranda* rights. The Court's approach may be based on a belief that the warnings are ineffective,[50] for which there is some support in empirical studies.[51] Alternatively, it may be based on the belief that the *Miranda* decision goes too far. The Court of Appeals may have determined that the cost to society of excluding relevant evidence is greater than any benefit to personal freedoms attained by strict enforcement of *Miranda* rights.

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[47] 512 S.W.2d at 500.

[48] *Id.*

[49] The Kentucky Court of Appeals has interpreted *Miranda* on a number of occasions, generally following a more conservative path in its interpretations. *See* Shadoan v. Commonwealth, 484 S.W.2d 842 (Ky. 1972); Dennis v. Commonwealth, 464 S.W.2d 253 (Ky. 1971); Cody v. Commonwealth, 449 S.W.2d 749 (Ky. 1970); Brown v. Commonwealth, 445 S.W.2d 845 (Ky. 1969); Jewell v. Commonwealth, 424 S.W.2d 394 (Ky. 1967).

[50] *See* note 45 *supra*.

[51] *See* Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968).

III. PLEA BARGAINING: JUDGE'S FAILURE TO FOLLOW PROSECUTOR'S RECOMMENDATION

Plea bargaining[52] is a fact of life in criminal law.[53] It is also a source of unfairness, defeated expectations, and playacting.[54] The failure of the sentencing authority to follow the recommendation of the prosecutor was recently treated by the Court of Appeals in *Couch v. Commonwealth*.[55] The defendant in *Couch* agreed to plead guilty to housebreaking and robbery in exchange for an agreement by the Commonwealth's attorney to recommend two 6-year concurrent sentences. The Commonwealth's attorney also agreed to recommend that the sentences run concurrently with an unrelated 2-year sentence, which the defendant was serving at the time of his trial. The defendant entered a guilty plea, and the Commonwealth's attorney made

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[52] This term is generally used to describe negotiations between the prosecution and the defense, whereby they attempt to agree, for example, to permit the defendant to plead guilty to the crime charged or a lesser charge in exchange for the recommendation of a particular sentence by the prosecution. *See* Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas,* 112 U. PA. L. REV. 865 (1964).

[53] For a discussion of the mechanics and scope of plea bargaining in New York and Philadelphia *see* White, *A Proposal for Reform of the Plea Bargaining Process,* 119 U. PA. L. REV. 439, 441-48 (1971).

Plea bargaining has been the subject of much comment, both favorable and unfavorable. *Compare* Rosett, *The Negotiated Guilty Plea,* 374 ANNALS 70, 71-73 (1967) *and* Note, *Restructuring the Plea Bargain,* 82 YALE L.J. 286, 291-95 (1972) *with* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 112-14 (1967) (Appendix A) *and* NATIONAL ADVISORY COMMISSION, THE COURTS, 44-48 (1973) (recommending that plea bargaining be eliminated by no later than 1978).

Notwithstanding this criticism the Supreme Court has endorsed plea bargaining as "an essential component of the administration of justice" which if "[p]roperly administered, it is to be encouraged." Santobello v. New York, 404 U.S. 257, 260 (1971). *See also* Brady v. United States, 397 U.S. 742 (1970) in which the Court stated:

> We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

Id. at 751.

[54] There have been a number of recommendations for alteration of existing plea bargaining procedures. *See* White, *A Proposal for Reform of the Plea Bargaining Process,* 119 U. PA. L. REV. 439, 453-65 (1971); Note, *Restructuring the Plea Bargain,* 82 YALE L.J. 286, 299-303 (1972); NATIONAL ADVISORY COMMISSION, THE COURTS 44-48 (1973) (recommending that plea bargaining be eliminated by no later than 1978).

[55] No. 74-1137 (Ky., June 6, 1975).

his recommendation, but the circuit court failed to adopt all of the prosecutor's recommendations[56] and refused to permit the defendant to withdraw his guilty plea.

The Court of Appeals held that the lower court had not abused its discretion by refusing to permit the withdrawal of the guilty plea. It indicated, however, that in certain instances such a refusal would amount to an abuse of discretion. The Court framed the issue as follows:

> The question then becomes whether the refusal of the court to be bound by the agreement and recommendation of the Commonwealth's attorney was such as to make the guilty plea involuntary and the action of the court in refusing to permit its withdrawal an abuse of discretion.[57]

The Court went on to say that the plea would be deemed involuntary if the defendant were misled at the time of its entry. Since the record revealed that Couch and his attorney had been fully informed that the trial judge would not be bound by the prosecutor's recommendation, the Court held that there was no abuse of discretion.

Couch is consistent with prior Kentucky cases. The Court of Appeals has refused on a number of occasions to overturn a conviction based on a guilty plea when the sentencing authority failed to follow the prosecutor's recommendation.[58] The Court of Appeals has indicated, however, that its sense of fairness was strained by at least two of these cases.[59] In both of

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[56] The judge refused to permit the 2-year sentence, which the defendant was presently serving, to be served concurrently with the sentence for robbery and housebreaking. *Id.* at 2.

[57] *Id.* at 7.

[58] Wood v. Commonwealth, 469 S.W.2d 765 (Ky. 1971) (The Court by way of dictum stated that the judge was not bound to follow the recommendation of the prosecution.); Ruggles v. Commonwealth, 335 S.W.2d 344 (Ky. 1960) (jury refused to follow recommendation); Layne v. Commonwealth, 239 S.W.2d 939 (Ky. 1951); Hobbs v. Commonwealth, 214 S.W.2d 274 (Ky. 1948) (jury refused to follow the sentencing recommendation of prosecution); Hayes v. Commonwealth, 203 S.W.2d 1 (Ky. 1947); Jackson v. Commonwealth, 196 S.W.2d 865 (Ky. 1946).

[59] In Hayes v. Commonwealth, 203 S.W.2d 1 (Ky. 1947), the Court of Appeals refused to overturn a sentence by a jury in excess of the recommendation of the prosecution, but stated that the trial judge would have been "justified" in granting a new trial to the defendant. In a similar case, Hobbs v. Commonwealth, 214 S.W.2d 274 (Ky. 1948), the Court said that the trial court "should" have granted a new trial. In both instances, however, the Court of Appeals refused to grant a new trial.

those cases the Court characterized the result as a possible "miscarriage of justice which might well be righted through executive clemency."[60]

This author agrees that a miscarriage of justice results when a defendant is given a sentence that is harsher than the one recommended by the Commonwealth's attorney.[61] A defendant who pleads guilty in return for a sentence recommendation by the prosecution expects to receive that sentence. The decision to plead will sometimes be based on a defense counsel's advice that a particular judge "usually" accepts the prosecution's recommendation. If a judge suddenly reverses his pattern and imposes a harsher sentence, the defendant is unfairly treated.[62]

The federal courts have resolved this problem with Rule 11(e) of the Federal Rules of Criminal Procedure, which permits the government's attorney and the defendant to engage in plea bargaining. If a bargain is reached it is disclosed to the judge, who may either accept or reject the bargain. If the judge rejects the agreement, however, the defendant is permitted to withdraw his guilty plea.

This author would recommend Rule 11(e) to the Court of Appeals as a just resolution of the unfairness in the *Couch* situation. It provides independence and flexibility for the trial judge, while insuring that the defendant is treated fairly. It will guard against possible miscarriages of justice in situations where a defendant is forced to bargain without knowing what sentence he will receive.

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[60] Hayes v. Commonwealth, 203 S.W.2d 1, 2 (Ky. 1947); Hobbs v. Commonwealth, 214 S.W.2d 274, 276 (Ky. 1948) (citing *Hayes*).

[61] One author has stated: "In the rare instance when the judge decides to supersede the prosecutor by imposing a harsher sentence than the prosectuor recommended, the defendent will understandably feel victimized by factors beyond his control." Note, *Restructuring the Plea Bargain,* 82 YALE L.J. 286, 297 (1972).

[62] The Kentucky Court has held that the failure of the prosecutor to abide by his agreement will be grounds for reversal. Wood v. Commonwealth, 469 S.W.2d 765 (Ky. 1971); Mounts v. Commonwealth, 12 S.W. 311 (Ky. 1889). In Santobello v. New York, 404 U.S. 257 (1971), the Supreme Court held that a defendant, who had pleaded guilty after the prosecutor had agreed to make no sentence recommendation, was entitled to relief when a new prosecutor recommended to the sentencing judge that the defendant be given the maximum sentence.