

THE ROAD WARRIOR

by Ed Kuwatch* 707 459 3999
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COMBATING PUNISHMENT FOR REFUSING TO PLEAD GUILTY - THE RIGHT TO A JURY TRIAL

Both the due process and jury trial rights guaranteed by the U.S. and California Constitutions prohibit punishing a defendant for asserting his or her right to a trial, instead of pleading guilty.¹ Despite the constitution though, a growing number of judges do threaten greater penalties later for not pleading guilty early. This tactic often works with less experienced attorneys and with attorneys not familiar with the relevant law.

In *In re Lewallen* (1979) 23 C3d 274, 152 CR 528, the California Supreme Court considered the limits that a court may go to in coercing guilty pleas in return for leniency in sentencing, saying:

It is well settled that to punish a person for exercising a constitutional right is “a due process violation of the most basic sort.” (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363 [54 L.Ed.2d 604, 610, 98 S.Ct. 663, 668].) The constitutional right to trial by jury in criminal prosecutions is fundamental to our system of justice (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *People v. Superior Court* (1967) 67 Cal.2d 929, 932 [64 Cal.Rptr. 327, 434 P.2d 623, 25 A.L.R.3d 1143]); thus, we have stated that “only the most compelling reasons can justify any interference, however slight, with an accused's prerogative to personally decide whether to stand trial or to waive his rights by pleading guilty.” (*People v. Hill* (1974) 12 Cal.3d 731, 768 [117 Cal.Rptr. 393, 528 P.2d 1].) [4a] “A court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.” (*People v. Superior Court (Felmann)* (1976) 59 Cal.App.3d 270, 276 [130 Cal.Rptr. 548].)

As one might expect, judges' skills at getting around these lofty ideals vary considerably. After *Lewallen* only the most brain dead would so bluntly state, as the judge in that case did:

‘I think I want to emphasize there's no reason in having the District Attorney attempt to negotiate matters if after the defendant refuses a negotiation he gets the same sentence as if he had accepted the negotiation. It is just a waste of everybody's time, and what's he got to lose. And as far as I'm concerned, if a defendant wants a jury trial and he's convicted, he's not going to be penalized with that, but on the other hand he's not going to have the consideration he would have had if there was a plea.’”

¹ The author wishes to express his thanks to San Jose attorney Randy Moore (408 298 2000) for his help in researching this article, and for his general expertise in handling judicial misconduct issues.

Fortunately for the defense bar, it seems the vast majority of judges threatening punishment for not pleading guilty are indeed brain dead and just as blunt as the judge in *Lewallen* was, expressing a feigned interest in not penalizing the defendant for insisting on a trial, then qualifying that with a but-there's-got-to-be-some-penalty attitude.

However, *Lewallen* makes it clear that any sort of expression of that sort is sufficient to show the forbidden nature of the extra punishment. In fact, the *Lewallen* opinion pointedly relied for its holding not on the considerably clear quote above, but on a less clearly improper single sentence uttered by the judge, which a comment the opinion describes thusly:

“... in response to defense counsel's suggestion that placing defendant on informal probation would suffice, the trial judge responded, “You mean whether or not there's a disposition or not after a jury trial?”

The actual heart of the opinion, it's primary quotable quote is:

The trial judge's rhetorical query at sentencing -- “You mean whether or not there's a disposition or not after a jury trial?” -- clearly reveals that he gave consideration to petitioner's election to plead not guilty in imposing sentence. That a defendant pleads not guilty is completely irrelevant at sentencing; if a judge bases a sentence, or any aspect thereof, on the fact that such a plea is entered, error has been committed and the sentence cannot stand.

For mental midgets like the judge in *Lewallen* all you need to do is make a good record, supported by sufficient evidence of the usual sentence for similar offenses and defendants, cite *Lewallen* and your appeal or habeas corpus writ should be successful. In fact, you may even be able to convince the judge to impose the “standard disposition” simply by educating the court about *Lewallen*.

For the more sophisticated though, you'll need a better approach. Here's some guidance:

Once the defendant makes an initial showing of an improper motive by the judge in exercising his or her sentencing discretion after trial, the prosecution has the burden of showing the sentence was not based upon any improper motive (*In re Bower* (1985) 38 C3d 865, 215 CR 267).

Making the initial showing requires more than simply proving a more severe sentence than is normally given (*People v. Szeto* (1981) 29 C3d 20, 171 CR 652 - “The mere fact, if it be a fact, that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights.”; *People v. Sequeria* (1981) 126 CA3d 1, 179 CR 249 - Quotes *Szeto*; *People v. Angus* (1980) 114 CA3d 973, 171 CR 5 - “In this action there is no indication that the court set out to penalize appellant for asking for a hearing, beyond the naked fact that the trial judge apparently did offer three years before the hearing and impose four years afterward. The trial judge tendered an explanation for the difference and denied any intent to punish appellant for exercising his constitutional right. (*People v. Vickers*, supra, 8 Cal.3d 451, 458.)”).

It seems that the only way in which a person can be sentenced to a greater punishment after rejecting an initial plea bargain offer is where the judge learns facts relevant to sentencing considerations after the offer has been made which included an indicated sentence from the judge (*People v. Levinson* (1993) 15 CA4th **Supp.** 15 - “The trial court in this case was presented with evidence at trial adverse to appellant which indicated that the increased fine was suitable.”; *People*

v. Brown (1986) 177 CA3d 577, 223 CR 5 - “Fn 16 Factors developed during evidence at trial, for example, may warrant an increase of punishment from that promised in a proffered pretrial plea arrangement. (*In re Lewallen* (1979) 23 Cal.3d 274 [152 Cal.Rptr. 528, 590 P.2d 383, 100 A.L.R.3d 823]; *In re Perez* (1978) 84 Cal.App.3d 168 [148 Cal.Rptr. 302].)”; *Broadman v. Commission on Judicial Performance* (1998) 18 C4th 1079, 77 CR2d 408 - “(See *In re Lewallen* (1979) 23 Cal.3d 274, 281 [152 Cal.Rptr. 528, 590 P.2d 383, 100 A.L.R.3d 823] [trial court may not increase sentence in criminal case because the defendant refused a plea bargain but may consider information that came to court's attention during or after trial].) Lack of remorse is a relevant consideration in judicial discipline (see, e.g., *Gonzalez v. Commission on Judicial Performance*, supra, 33 Cal.3d 359, 377), in attorney discipline (see, e.g., *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 197 [242 Cal.Rptr. 196, 745 P.2d 917]), and in criminal sentencing (see, e.g., Cal. Rules of Court, rules 414(b)(7), 423(b)(3)).”.

The usual scam by the more sophisticated judge bases the illegal harsher sentence on a claim that the defendant committed “perjury” at trial. It’s not that simple. Any justification for an increase in punishment which is based upon a claim that the defendant’s testimony was perjured requires some relation between the claimed perjury and the defendant’s prospects for rehabilitation (*In re Perez* (1978) 84 CA3d 168, 148 CR 302 - “When there has been no charge of perjury or conviction for that crime, due process would be denied if additional punishment were inflicted for that crime.” . . . ¶ “The United States Supreme Court has recently resolved the apparent conflict between holdings of the various federal courts, and has reaffirmed against a due process challenge the authority of a sentencing judge to take into account a defendant's false testimony in evaluating the defendant's personality and prospects for rehabilitation. (*United States v. Grayson* (1978) 438 U.S. 41, 54-55 [57 L.Ed.2d 582, 592-593, 98 S.Ct. 2610].)”).

Practice Tip: Like most judges, those handling misdemeanors are extremely puffed up with their own importance. On top of that, the meanest of these judges are often those that have been stuck for eternity handling traffic tickets and misdemeanors, because their colleagues recognize their intellectual limitations. Combine a huge ego with incompetence, and you have a person who replaces hard knowledge with bluster and intimidation. A good lawyer armed with a solid background in the law, and a willingness to challenge this type of judge can often prevail over even the worst of them. But most importantly, in dealing with judges like this remember that they are bullies, and bullies respect bullying.

At the pretrial conference, be sure the judge and prosecutor are aware of all disclosable facts of the case that might influence the sentencing decision, including any negative information that might come out at trial. Then use the form which follows this practice tip to put the prosecution’s pretrial offer on the record, along with the judge’s indicated sentence.

Whenever the trial judge then makes a pre-trial threat to punish the defendant for not pleading guilty, also put those facts on the record immediately, along with a quick review of the relevant law.

If the judge still persists in punishing the defendant for not pleading guilty, file a challenge for cause pursuant to C.C.P. §§ 170.1 et seq. C.C.P. §170.3(c)(1) requires a such a challenge “at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.” (*People v. Scott* (1997) 15 C4th 1188, 65 CR 240.) Where a continuance is necessary in order to draft, file and serve the required pleadings, the statutory procedure seems to contemplate just that (see, *id.*, *Hollingsworth v. Superior Court* (1987) 191 CA3d 22, 236 CR 193; and *Urias v. Harris Farms Inc.* (1991) 234 CA3d 415, 285 CR 659).

FORM: DEFENDANT'S REJECTION OF PROSECUTION'S PLEA BARGAIN OFFER AND COURT'S INDICATION OF INTENDED SENTENCE.

MUNICIPAL COURT FOR THE KANGAROO JUDICIAL DISTRICT
COUNTY OF COW, STATE OF CALIFORNIA

The People of the
State of California,

Case No. 32139

Plaintiff,

vs.

DEFENDANT'S REJECTION OF
PROSECUTION'S PLEA BARGAIN
OFFER AND COURT'S INDICATION
OF INTENDED SENTENCE.

JOSEPH G. NIZEGUY,

Defendant _____/

Defendant herein hereby notifies the court and the prosecution herein that defendant rejects the offered plea bargain, the terms of which are:

- (1) The offer of the prosecution to [*dismiss count 2, alleging a violation of Veh. C. §23152, subdivision(b), in return for defendant's guilty plea to count 1, which alleges a violation of Veh. C. §23152, subdivision (a)*]; and,
- (2) The indicated sentence of the court, based upon a full disclosure of all relevant facts of the case, of [*three years unsupervised probation on the condition that defendant serve two days in the county jail, to be actually served by participating for two days in the Sheriff's Work Alternative Program (SWAP), a fine of \$1600.00, including penalties and assessments, a 30-hour, 3-month, first offender DUI Program, a 90-day license restriction limited to driving to, from and in connection with work or school only, and the standard terms and conditions set forth in Veh. C. §23600, subdivision (b), paragraphs (2) through (4).*].

Dated: [July 19, 2000]

[Ed Kuwatch, Attorney at Law]

For more information:

Ryan v. Commission on Judicial Performance(1988) 45 C3d 518,247 CR 378 - Judge removed from office for, among other things, a clear expression of intent to punish more severely solely for not pleading guilty. The opinion said, "The misconduct in this matter is especially serious because it indicates that the judge was willing to fabricate justifications for a challenged ruling. This is misconduct of the worst kind, evidencing moral turpitude and dishonesty."

People v. Justice (1985) 168 CA3d **Supp.** 1 -"The Whittier court policy at issue permits the trial court to impose a harsher sentence because the defendant exercised his right to plead "not

guilty” and proceed to trial. This practice violates the right to trial by jury. (Ibid *People v. Superior Court (Feldmann)* (1976) 59 Cal.App.3d 270, 276 [130 Cal.Rptr. 548]; *People v. Morales* (1967) 252 Cal.App.2d 537, 544-547 [60 Cal.Rptr. 671].) . . . ¶ “We find equally offensive any efforts to facilitate court processes by offering offenders a bonus for an early plea and a penalty for a “not guilty” plea.”

Bordenkircher v. Hayes (1978) 434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663 - Clerk’s Syllabus: “The Due Process Clause of the Fourteenth Amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged.”