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***Boykin v. Alabama* and Use of Invalid Guilty Pleas**

[Note: Legal principles related to voluntariness of guilty pleas apply equally to no contest pleas]

I. Constitutional Requirements in Accepting Guilty Pleas

[See LaFave, Israel, and King, *Criminal Procedure*, § 21.4(e) (1999) for an extensive discussion of constitutional issues in accepting guilty pleas]

A. United States Supreme Court cases

In *Boykin v. Alabama*, 395 U.S. 238 (1969) the defendant, represented by counsel, pled guilty to five armed robberies, and a jury sentenced him to death. The record showed that the judge, when accepting the guilty plea, did not ask any questions of the defendant and the defendant did not address the judge. The United States Supreme Court ruled that it was “error, plain on the face of the record, for the trial judge to accept [the defendant’s] guilty plea without an affirmative showing that it was intelligent and voluntary.” The Court noted that several federal constitutional rights are waived when a defendant enters a guilty plea and a court cannot presume a waiver of these rights [privilege against compelled self-incrimination, right to trial by jury, right to confront one’s accusers] from a silent record. However, despite the Court’s statement about the waiver of these specific constitutional rights, a guilty plea may be constitutionally valid even when these three rights are not specifically waived. *State v. Dammons*, 128 N.C. App. 16 (1997). See also e.g., *Wilkins v. Erickson*, 505 F.2d 761 (9th Cir. 1974), *United States v. Stewart*, 977 F.2d 81 (3d Cir. 1992), *United States v. Wagner*, 996 F.2d 906 (7th Cir. 1993), and LaFave & Israel, *Criminal Procedure*, § 20.4(e)]. And although ordinarily the trial judge conducts the inquiry of the defendant to determine that the guilty plea is being entered voluntarily, the Court stated in *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), and *North Carolina v. Alford*, 400 U.S. 25, n. 3 (1970) that a defense attorney’s advising the defendant of the consequences of the plea and the rights waived by the plea was sufficient record evidence to satisfy *Boykin* requirements. See also *Marshall v. Lonberger*, 459 U.S. 422 (1983). Due process also requires that the defendant must be aware of the nature of the charges when pleading guilty. *Henderson v. Morgan*, 426 U.S. 637 (1976); *Marshall v. Lonberger*, cited above.

B. North Carolina cases

State v. Ford, 281 N.C. 62 (1972) (court upheld no contest plea under *Boykin* but stated judge should have explained nature and consequences of plea in open court).

State v. Harris, 14 N.C. App. 268 (1972) (plea of guilty was vacated because record did not show that defendant’s guilty plea had been freely and voluntarily made with full understanding of nature of charge against him, the constitutional rights being waived, and the likely consequences of plea; valid guilty plea may not be presumed from silent record).

State v. Alford, 274 N.C. 125 (1968) (when guilty plea was set aside because defendant did not knowingly and understandingly enter plea, testimony about the plea was improper for

any purpose, and therefore it was error when prosecutor used it to impeach defendant at trial).

C. Application to misdemeanors in district court

Most courts have ruled that federal constitutional requirements for taking guilty pleas apply to misdemeanors as well as felonies. [In fact, some North Carolina cases—including *State v. Harris*, 14 N.C. App. 268 (1972)—involved misdemeanor guilty pleas in superior court in which *Boykin* was applied.] See *Mills v. Municipal Court*, 515 P.2d 273 (Cal. 1973); *Hunt v. State*, 487 N.E.2d 1330 (Ind. Ct. App. 1986); *Woods v. Commonwealth*, 793 S.W.2d 809 (Ky. 1990); *State v. Warren*, 407 N.W.2d 482 (Minn. Ct. App. 1987); *State v. Tweedy*, 309 N.W.2d 94 (Neb. 1981); *Fox v. Kelso*, 911 F.2d 563 (11th Cir. 1990); *State v. Jones*, 404 So.2d 1192 (La. 1981); *United States ex rel. Grundset v. Franzen*, 675 F.2d 870 (7th Cir. 1982).

But see *Clemmons v. City of Muscle Shoals*, 565 So.2d 683 (Ala. Crim. App. 1990) (*Boykin* does not apply to defendant who will not be sentenced to actual imprisonment for petty offense); *United States v. Nash*, 703 F. Supp 507 (W.D. La. 1989), *affirmed* 886 F.2d 1312 (5th Cir. 1989); *People v. Yost*, 445 N.W.2d 95 (Mich. 1989) (*Boykin* does not apply to misdemeanor pleas).

It would appear that the federal constitutional requirements of *Boykin* apply to guilty pleas to misdemeanors in district court (although I have not found a case directly discussing the application of *Boykin* to guilty pleas to misdemeanors in the lower court of a trial de novo system). However, it also would appear that there is flexibility in taking guilty pleas in district court so that the process need not precisely follow the mandatory statutory provisions set out for superior court guilty pleas in Article 58 of Chapter 15A. See, e.g., *Mills v. Municipal Court*, 515 P.2d 273 (Cal. 1973) (judge may collectively advise defendants of rights with supplementation by written waiver form that defendants read and sign); *State v. Kirchoff*, 452 N.W.2d 801 (Iowa 1990) (informing defendant of rights by written form is not impermissible); *Commonwealth v. Crawford*, 789 S.W.2d 779 (Ky. 1990) (written forms signed by defendant and attorney, respectively, and judge's question to defendant whether he understood form were sufficient).

II. North Carolina Statutory Requirements in Accepting Guilty Pleas

Article 58 of Chapter 15A applies only to taking guilty pleas in superior court.

Note the availability of a form to take a guilty and no contest plea in district court: AOC-CR-322 [Defendant's Plea Of (Guilty) (No Contest) In District Court].

III. Challenging Use of Conviction Based on Allegation that Guilty Plea Was Made Involuntarily.

A. United States Supreme Court cases

In a series of decisions involving the use of convictions obtained in violation of the right to counsel, the United States Supreme Court ruled that a conviction obtained in violation of a defendant's right to counsel cannot be used in a later criminal proceeding to support guilt or enhance punishment, including using the invalid conviction to impeach the defendant. *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1972); *Loper v. Beto*, 405 U.S. 473 (1972).

Although the United States Supreme Court has not specifically ruled that a *Boykin* violation would prohibit the later use of that guilty plea in the same manner as a right-to-counsel violation, it would likely so rule. See *Parke v. Raley*, 506 U.S. 20 (1992) and *Marshall v. Lonberger*, 459 U.S. 422 (1983) (defendant was seeking to assert *Boykin* violation to prevent use of a conviction in a later prosecution, but that issue was not presented in the case). However, as discussed below, collateral attack is not permitted under *Custis v. United States*, 511 U.S. 485 (1994). A defendant must directly challenge the original conviction by seeking to set it aside in a motion for appropriate relief.

B. North Carolina cases

State v. Alford, 274 N.C. 125 (1968) (when guilty plea was set aside because the defendant did not knowingly and understandingly enter plea, testimony about plea is improper for any purpose, and therefore it was error when the prosecutor used it to impeach defendant at trial).

State v. Neeley, 307 N.C. 247 (1982) (when a defendant's suspended sentence is activated, defendant may raise claim that he or she was unconstitutionally denied the right to counsel at original trial and therefore cannot be sentenced to imprisonment; court ruled that record in this case is completely silent about whether defendant waived his right to counsel when he pled guilty to nonsupport of child).

State v. Hargrove, 104 N.C. App. 194, 408 S.E.2d 757 (1991) (defendant failed to prove that he had not waived his right to counsel for two convictions used for impeachment—defendant had executed written waiver of right to counsel; defendant also failed to prove that he was not indigent for two other convictions used for sentencing purposes, based on facts in the case).

State v. Smith, 96 N.C. App. 235 (1989) (court places burden of proof on defendant who moved to suppress, on *Boykin* grounds, the use of prior convictions to impeach the defendant at trial and to aggravate his sentence).

State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992) (court ruled that the trial judge properly used prior convictions in sentencing by rejecting defendant's challenge that guilty pleas were not voluntarily and knowingly made. The state offered court judgments reflecting that defendant, represented by counsel, "freely, voluntarily, and understandingly pled guilty" to offenses. The court noted that a defendant has the burden of proving the invalidity of convictions in such cases. The defendant had testified in this case that he had "no recollection of being advised of his rights by the judge before entering guilty pleas.")

State v. Hester, 111 N.C. App. 110 (1993) [defendant moved to suppress the use of three district court convictions in sentencing under the Fair Sentencing Act, based on *Boykin* grounds. At the suppression hearing, the defendant offered into evidence the district court files of his prior convictions, which demonstrated that he had pled guilty while being represented by an attorney. Defendant did not present any additional evidence, and the state did not present evidence. Relying on *State v. Smith*, 96 N.C. App. 235 (1989), the court ruled that defendant failed to meet his burden of proof. The court noted that "[n]othing in the record affirmatively indicates the requisite waivers of rights were not obtained before defendant pled guilty in the earlier cases . . . Defendant presented no testimony on this issue, and his assertion to the court below that the resultant convictions

were invalid, without more, is insufficient. While waiver may not be ‘presumed’ from a silent record . . . neither may lack of waiver be inferred, particularly in favor of a party with the burden of proving it.”]

State v. Stafford, 114 N.C. App. 101 (1994). The defendant, charged with felony habitual impaired driving, moved to suppress prior convictions that the state sought to use in the state’s case-in-chief. The defendant alleged that his guilty pleas had been entered in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969). The court ruled that a defendant may not collaterally attack a guilty plea based on *Boykin* grounds.

State v. Muscia, 115 N.C. App. 498 (1994). The court ruled, relying on *State v. Stafford*, 114 N.C. App. 101 (1994), that the defendant was properly denied collateral attack of a prior DWI conviction used in sentencing for a DWI offense.

State v. Bass, 133 N.C. App. 646 (1999). The defendant filed a motion for appropriate relief alleging that his guilty plea entered in district court on October 28, 1991, should be set aside because the judge accepted his plea without informing him, as required by *Boykin v. Alabama*, 395 U.S. 238 (1969), of the constitutional rights he waived by pleading guilty. The evidence showed that the defendant had pleaded guilty to DWI, and the judgment showed a finding by the judge that the defendant had “appeared in open court and freely, voluntarily, and understandingly pled guilty.” The defendant testified that he could not remember the judge’s informing him of his *Boykin* rights, but he also could not remember anything the judge had told him on the day he had pleaded guilty. Three attorneys testified that they could not recall that in 1991 the particular district court judge who had accepted the defendant’s guilty plea informed defendants of their *Boykin* rights. However, none of the attorneys testified that they were present in court when the defendant pleaded guilty. The court noted that in *Parke v. Raley*, 506 U.S. 20 (1992), that the United States Supreme Court ruled that the “presumption of regularity” applies to cases when a final judgment has been entered, and that the defendant must overcome this presumption when no transcript is available. The court upheld the ruling of the judge conducting the hearing on the motion for appropriate relief that the defendant had failed to satisfy burden of proving that his guilty plea should be set aside.

C. Lower federal court and state court cases

Lower federal court and state court cases uniformly have ruled that *Boykin* violations prevent later use of convictions based on guilty pleas in the same manner as right-to-counsel violations. See, e.g., *People v. Meyers*, 617 P.2d 808 (Colo. 1980).

D. Is collateral attack permitted? No.

Custis v. United States, 511 U.S. 485 (1994). The Court ruled that although a defendant has a federal constitutional right to collaterally attack a prior conviction because it was obtained in violation of an indigent’s constitutional right to counsel, a defendant has no federal constitutional right to collaterally attack a prior conviction on other grounds, such as (1) the guilty plea was obtained without proper advice about waiver of rights as required by *Boykin v. Alabama*, 395 U.S. 238 (1969), or (2) the defendant’s lawyer provided ineffective assistance of counsel under the Sixth Amendment. The Court ruled that a trial judge at a federal sentencing hearing had properly barred the defendant from attacking—under the grounds specified in (1) and (2) above—prior state convictions offered by the government to enhance a federal sentence.

The Court stated that the defendant could attack his state convictions in state court or through federal habeas review. If he was successful, he then could apply for reopening of any federal sentence enhanced by the state convictions (although the Court stated that it expresses no opinion on the appropriate disposition of such an application).

The North Carolina Court of Appeals in *State v. Stafford*, 114 N.C. App. 101 (1994) ruled that a defendant may not collaterally attack prior DWI convictions on *Boykin* grounds when the convictions are offered to prove the offense of habitual impaired driving. The *Stafford* ruling is consistent with the *Custis* ruling, and it would also bar a defendant from collaterally attacking a prior conviction on *Boykin* grounds when the state seeks to use the conviction at sentencing or to impeach the defendant with that conviction. See also *State v. Muscia*, 115 N.C. App. 498 (1994) (court ruled, relying on *Stafford*, that the defendant was properly denied collateral attack of a prior DWI conviction used in sentencing for a DWI offense). A defendant's remedy would be to directly attack the prior conviction (if it occurred in a North Carolina state court) by a motion for appropriate relief under G.S. 15A-1415 in the court where the conviction occurred.

For right-to-counsel violations, G.S. 15A-980 allows a defendant to collaterally attack a prior conviction that the state seeks to use for impeachment or sentencing purposes. Thus, North Carolina statutory law is consistent with federal constitutional law as described in *Custis*. [Note: To the extent the court's ruling in *State v. Creason*, 123 N.C. App. 495 (1996), bars a collateral attack on a prior conviction based on an alleged violation of the right to counsel, it is in direct conflict with the provisions of G.S. 15A-980 and federal constitutional law.]

E. Who has the burden of proof? The defendant.

In *Parke v. Raley*, 506 U.S. 20 (1992), the defendant was being sentenced as a persistent felony offender, and the state offered judgments of two prior convictions for which the defendant had pled guilty, for which a presumption of legality attaches. Under Kentucky law, a defendant who moves to suppress evidence of guilty pleas under *Boykin* has the burden of producing evidence of *Boykin* error. If the defendant does so, then the state has the burden of proving that the judgments were entered without violating the defendant's rights. The Court ruled that Kentucky's procedures are constitutional, and it also determined—based on the facts of this case—that the defendant failed to produce evidence of *Boykin* error (there was no guilty plea transcript for the one contested conviction).

Although the Court did not rule on the constitutionality of assigning the burden of proof to the defendant to show *Boykin* error, it is highly likely that the Court would uphold such a procedure. Federal and North Carolina case law assigns the burden of proof to the defendant; see, e.g., *State v. Pickard*, discussed below, and *United States v. Stewart*, 977 F.2d 81 (3d Cir. 1992); *United States v. Mulloy*, 3 F.3d 1337 (9th Cir. 1993).

With right-to-counsel violations, the North Carolina Supreme Court in *State v. Thompson*, 309 N.C. 421 (1983), placed the burden of production on the defendant and the ultimate burden of proof on the state. However, G.S. 15A-980, effective after that decision, places the burden of proof on the defendant. It is highly likely the North Carolina Supreme Court would also place the burden of proof on the defendant in proving a *Boykin* error; see *State v. Ross*, 329 N.C. 108, at 123 (1991), citing *State v. Smith*, 96 N.C. App. 235 (1989) (placing burden of proof on defendant who moved to suppress, on *Boykin* grounds, the use of prior convictions to impeach the defendant at trial and to aggravate his sentence). See also *State v. Jordan*, 174 N.C. App. 479 (2005) (placing burden on defendant to prove that

a prior conviction was obtained in violation of right to counsel did not violate *Boykin* requirement of affirmative showing of a knowing and voluntary guilty plea).

The North Carolina Court of Appeals has placed the burden of proof on the defendant. In *State v. Pickard*, 107 N.C. App. 94 (1992), in which the court ruled that the trial judge properly used prior convictions in sentencing by rejecting defendant's challenge that guilty pleas were not voluntarily and knowingly made. The state offered court judgments reflecting that defendant, represented by counsel, "freely, voluntarily, and understandingly pled guilty" to offenses. The court noted that a defendant has the burden of proving the invalidity of convictions in such cases. The defendant had testified in this case that he had "no recollection of being advised of his rights by the judge before entering guilty pleas." In *State v. Hester*, 111 N.C. App. 110 (1993), the defendant moved to suppress the use of three district court convictions in sentencing under the Fair Sentencing Act, based on *Boykin v. Alabama*, 395 U.S. 238 (1969) error. At the suppression hearing, the defendant offered into evidence the district court files of his prior convictions, which demonstrated that he had pled guilty while being represented by an attorney. Defendant did not present any additional evidence, and the state did not present evidence. Relying on *State v. Smith*, 96 N.C. App. 235 (1989), the court ruled that defendant failed to meet his burden of proof. Court notes that "[n]othing in the record affirmatively indicates the requisite waivers of rights were not obtained before defendant pled guilty in the earlier cases . . . Defendant presented no testimony on this issue, and his assertion to the court below that the resultant convictions were invalid, without more, is insufficient. While waiver may not be 'presumed' from a silent record . . . neither may lack of waiver be inferred, particularly in favor of a party with the burden of proving it." See also *State v. Bass*, *State v. Bass*, 133 N.C. App. 646 (1999) (defendant failed to satisfy burden of proof in seeking to set aside conviction on *Boykin* grounds). See also *United States v. Hamell*, 3 F.3d 1187 (8th Cir. 1993) (defendant does not satisfy burden of proof by merely showing a silent or ambiguous record of guilty plea).

F. What evidence may be presented?

Evidence that may be presented includes: (1) transcript of plea and proceedings [but transcript is not necessary to show compliance with *Boykin*, see *United States ex rel. Grundset v. Franzen*, 675 F.2d 870 (7th Cir. 1982)]; (2) testimony of witnesses to the guilty plea [including defendant's attorney, *United States v. Hamell*, 3 F.3d 1187 (8th Cir. 1993)]; (3) any documents in the case [note, e.g., AOC-CR-310 (DWI judgment form states that defendant "freely, voluntarily, and understandingly pled guilty to.");]; and (4) habit and custom of judges and attorneys in complying with *Boykin*, see *United States v. Dickens*, 879 F.2d 410 (8th Cir. 1989); *United States v. Hamell*, 3 F.3d 1187 (8th Cir. 1993).

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The attorney-client privilege normally would bar the state from calling attorneys as witnesses to testify about conversations with defendants about the guilty plea. But see *United States v. Glass*, 761 F.2d 479 (8th Cir. 1985) (attorney's testimony that he discussed elements of crime with defendant did not violate attorney-client privilege); *State v. Chervenell*, 662 P.2d 836 (Wash. 1983) (attorney-client privilege does not bar attorney's testimony that the attorney advised defendant of the defendant's right against self-incrimination) See also *State v. Hartley*, 784 P.2d 550 (Wash. Ct. App. 1990); *United States v. Hamell*, 3 F.3d 1187 (8th Cir. 1993).