Rule 402. Pleas of Guilty or Stipulations Sufficient to Convict

In hearings on pleas of guilty, or in any case in which the defense offers to stipulate that the evidence is sufficient to convict, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty or a stipulation that the evidence is sufficient to convict without first, by addressing the defendant personally in open court, informing him or her of and determining that he or she understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he or she pleads guilty there will not be a trial of any kind, so that by pleading guilty he or she waives the right to a trial by jury and the right to be confronted with the witnesses against him or her; or that by stipulating the evidence is sufficient to convict, he or she waives the right to a trial by jury and the right to be confronted with any witnesses against him or her who have not testified.

(b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

(c) Determining Factual Basis for Plea. The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea.

(d) Plea Discussions and Agreements. When there is a plea discussion or plea agreement, the following provisions, in addition to the preceding paragraph of this rule, shall apply:

(1) The trial judge shall not initiate plea discussions. Upon request by the defendant and with the agreement of the prosecutor, the trial judge may participate in plea discussions. Prior to participating in the plea discussions, the trial judge shall admonish the defendant and inquire as to the defendant's understanding of the following:

That the defendant's attorney has requested that the trial judge participate in the conference to determine whether or not the charge(s) which is/are pending against the defendant can be resolved by a plea of guilty;

That during the course of the conference the prosecutor will be present and advise the judge of the facts of the case as contained in the police reports or conversations with witnesses, that the defendant's attorney will also be present and will advise the judge of any information the defendant may have concerning the circumstances which led to the defendant's arrest in the case.

That without the conference, the judge would not learn about this information unless the case proceeded to trial.

That the judge will also learn whether the defendant has a prior criminal history, his or her driving record, whether the defendant has any alcohol or drug problem, the defendant's work history, family situation, and other things which would bear on what, if any punishment should be imposed upon the defendant as a result of his or her plea of guilty to one or more of these charges.

That these are things that the judge would not learn about unless the case went to trial and the defendant was found guilty.

That at the end of the conference, the judge may make a recommendation as to what an appropriate sentence would be.

That the defendant or the prosecutor is free to accept or reject the judge's recommendation. However, if the defendant rejects the judge's recommendation and he or she wishes to have a trial on the charges, the defendant may not obtain another judge solely on the basis that the judge participated in the conference and is aware of the facts and circumstances surrounding the incident as well as the defendant's background. This means that the defendant will be waiving his or her right to request a substitution of judge based upon the judge's knowledge of the case.

That knowing all of these things the defendant still wishes that the judge participate in this conference.

(2) If a tentative plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that a specified sentence will be imposed or that other charges before the court will be dismissed, the trial judge may permit, upon request of the parties, the disclosure to him or her of the tentative agreement and the reasons therefor in advance of the tender of the plea. At the same time he the trial judge may also receive, with the consent of the defendant, evidence in aggravation or mitigation. The judge may then indicate to the parties whether he or she will concur in the proposed disposition; and if he the judge has not yet received evidence in aggravation or mitigation, he or she may indicate that his or her concurrence is conditional on that evidence being consistent with the representations made to him. If he the judge has indicated his or her concurrence or conditional concurrence, he the judge shall so state in open court at the time the agreement is stated as required by paragraph (b) of this rule. If the defendant thereupon pleads guilty, but the trial judge later withdraws his or her concurrence or conditional concurrence, he the judge shall so advise the parties and then call upon the defendant either to affirm or to withdraw his or her plea of guilty. If the defendant thereupon withdraws his or her plea, the trial judge shall recuse himself or herself.

(3) If the parties have not sought or the trial judge has declined to give his or her concurrence or conditional concurrence to a plea agreement, he the judge shall inform the defendant in open court at the time the agreement is stated as required by paragraph (b) of this rule that the court is not bound by the plea agreement, and that if the defendant persists in his or her plea the disposition may be different from that contemplated by the plea agreement.

(e) Transcript. In cases in which the defendant is charged with a crime punishable by

imprisonment in the penitentiary, the proceedings required by this rule to be in open court shall be taken verbatim, and upon order of the trial court transcribed, filed, and made a part of the common law record.

(f) Plea Discussions, Plea Agreements, Pleas of Guilty Inadmissible Under Certain Circumstances. If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding.

Adopted June 26, 1970, effective September 1, 1970; amended effective September 17, 1970; amended January 5, 1981, effective February 1, 1981; amended May 20, 1997, effective July 1, 1997; amended April 26, 2012, eff. July 1, 2012.

M.R. 3140

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

Filed June 29, 2012.

JUSTICE BURKE, concurring in part and dissenting in part:

The court's amendments to Supreme Court Rule 402, effective July 1, 2012, formally authorize a judge to participate in plea discussions upon the request of a defendant and following proper admonishments. While I am in agreement with this change as a general matter, I am concerned that the amendments do not include an explicit allowance for a defendant's participation in the plea conference.

The Rule 402 conference is intended to be an open negotiating process, where all relevant information regarding the defendant will be discussed. The majority of these conferences, however, will involve a public defender, who simply cannot possess the level of personal information known to the individual defendant. The defendant will always have relevant information to bring to the conference and should be able to do so.

The admonishments contained in the amendments should include a statement that the defendant has the right to be present and to speak during the plea conference. Because this provision is not included in the amendments, I respectfully dissent.

JUSTICE FREEMAN joins in this partial concurrence and partial dissent.

Committee Comments

(Revised May 1997)

The procedure on pleas of guilty was previously dealt with briefly in former Rule 401, paragraph (b). More extended and specific treatment of this subject is now required for at least two reasons. For one, the Supreme Court of the United States has recently held that it is a violation of due process to accept a guilty plea in State criminal proceedings without an affirmative showing, placed on the record, that the defendant voluntarily and understandingly entered his plea of guilty. (*Boykin v. Alabama* (1969), 395 U.S. 238.) For another, increased attention has recently been given to the long-standing practice of pleading guilty as a consequence of a prior agreement between the prosecution and defense concerning the disposition of the case; it is generally conceded that "plea discussions" and "plea agreements" are often appropriate, but that such procedures should not be concealed behind an in-court ceremony at which the defendant sometimes seems to think that he is expected to state falsely that no promises were made to him. (See American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (Approved Draft 1968); Enker, *Perspectives on Plea Bargaining*, in The President's Commission on Law Enforcement and Administration of Justice, Task Force Report (1967): The Courts.) Two major objectives of new Rule 402 are: (1) to insure compliance with the *Boykin* requirements; and (2) to give visibility to the plea-agreement process and thus provide the reviewing court with a record containing an accurate and complete account of all relevant circumstances surrounding the guilty plea. See *United States v. Jackson* (7th Cir. 1968), 390 F.2d 130.

Paragraph (a) sets forth the admonitions which must be given to the defendant to insure that his guilty plea is intelligently and understandingly made, as required by *Boykin*. Subparagraph (1) requires that the defendant be informed of the nature of the charge, as now also required by section 113-1 of the Code of Criminal Procedure of 1963. Subparagraph (2) requires that the defendant also be informed of the minimum and maximum sentences prescribed by law; this deviation from section 113-4(c) of the Code, which only expressly requires explanation of the "maximum penalty provided by law," is based upon the assumption that notice of both the minimum and maximum will give the defendant a more realistic picture of what might happen to him. (See ABA Standards Relating to Pleas of Guilty 28 (Approved Draft 1968).) Subparagraphs (3) and (4) cover the requirements enumerated in *Boykin*, namely, that the record on a guilty plea affirmatively show a waiver of "three important federal rights": the privilege against self-incrimination; the right to trial by jury; and the right to confront one's accusers.

The 1997 amendment was added to require that admonitions be given in cases in which the defense offers to stipulate to the sufficiency of the evidence to convict. See *People v. Horton*, 143 Ill. 2d 11 (1991).

Paragraph (b) requires a determination that the guilty plea is voluntary by inquiry of the defendant as to whether any force or threats or promises were made to him. This is now accepted practice, see, *e.g., People v. Darrah* (1965), 33 Ill. 2d 175, 210 N.E.2d 478, although not expressly required by Code section 113-4. In contrast to current practice, paragraph (b) also requires that if the tendered plea is the result of a plea agreement, then the agreement must be stated in open court. It is important to give visibility to the plea-agreement process in this way, as otherwise the

defendant may feel required to state falsely that no promises were made and the plea may later be subject to collateral attack.

Paragraph (c) requires that the court determine there is a factual basis for the plea. Such inquiry is not uncommon in current practice, but heretofore has not been specifically required by law. The language of paragraph (c) is based upon the recent revision of Rule 11 of the Federal Rules of Criminal Procedure, and, as is true under the Federal rule, no particular kind of inquiry is specified; the court may satisfy itself by inquiry of the defendant or the attorney for the government, by examination of the presentence report, or by any other means which seem best for the kind of case involved. For a statement of the value of such a procedure, see ABA Standards Relating to Pleas of Guilty 30-34 (Approved Draft 1968).

Underlying paragraph (d), concerning plea discussions and plea agreements, is the notion that it is sometimes permissible for a defendant to plead guilty pursuant to a prior agreement that the prosecution will obtain, seek, or not oppose a certain disposition. For one assessment of various reasons upon which such practices may be legitimately based, see ABA Standards Relating to Pleas of Guilty 36-52 (Approved Draft 1968).

Subparagraph (1) of paragraph (d) prohibits the trial judge from initiating plea discussions.

Under subparagraph (d)(2), the judge, if he considers it appropriate, may be advised, in advance of the plea, of the tentative plea agreement and indicate his conditional concurrence or (if, with consent of the defendant, he then receives evidence in aggravation or mitigation) concurrence. Such concurrence or conditional concurrence is to be stated for the record when the plea is received, but if the judge later determines before sentencing that a more severe disposition is called for he must so advise the defendant and give him an opportunity to withdraw the plea. If the defendant does withdraw his plea under these circumstances, it would be inappropriate for the same judge to be involved in the trial of the case, so he is required to recuse himself. If, however, the defendant elects not to withdraw his plea, the judge is not required to recuse himself. Under subparagraph (3), where there is a plea agreement but no concurrence or conditional concurrence by the judge (either because the parties have not sought it or the judge has declined to give it), the judge is required to advise the defendant that he is not bound by the agreement stated in court at the time of the plea. This caution will remove any possibility of an inference by the defendant that the judge's awareness of the agreement indicates concurrence in it. See *People v. Baldridge* (1960), 19 Ill. 2d 616, 169 N.E.2d 353.

Paragraph (e) is derived from former Rule 401. It was amended in 1981 to leave within the court's discretion the question of whether the proceedings shall be transcribed. The requirement that they shall be taken verbatim remains.

Paragraph (f) adopts the prevailing view that once a guilty plea has been annulled by withdrawal or other means, it should not be subsequently admissible against the defendant in criminal proceedings. (See *People v. Haycraft* (1966), 76 Ill. App. 2d 149, 221 N.E.2d 317.) It follows that a plea discussion which has not resulted in a still-effective guilty plea should likewise be inadmissible, for otherwise defendants could engage in plea discussions only at their peril.