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Criminal Law—Rights of Defendant Concerning Erroneously Labeled Indictment

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since the appellant has repudiated that confession. Indeed it has been held that where the defendant is uncertain of his rights, and is faced with the power of a court, that a confession under these circumstances would be too unreliable to be admitted as evidence.²²

RIGHTS OF DEFENDANT CONCERNING ERRONEOUSLY LABELED INDICTMENT

Due process requires that an indictment inform the defendant in a criminal proceeding that he is charged with the substantial elements of a given crime.²³ In determining the sufficiency of an indictment, it is the acts alleged which constitute the crime charged, rather than the descriptive label which they are given.²⁴ An error in naming the crime in the accusatory clause of the indictment will not in itself afford grounds for granting a motion to quash the indictment.²⁵ In New York, as the result of *People v. Englese*,²⁶ if a defendant pleads guilty to such a mislabeled indictment he may be entitled, as a matter of right, to withdraw his plea and go to trial on the merits.

Ordinarily, an application for permission to withdraw a plea of guilty prior to judgment is addressed to the discretion of the trial court.²⁷ In *People v. Englese*,²⁸ the defendant pleaded guilty to an indictment erroneously labeling as a felony acts which constituted no more than a misdemeanor. Five years later, his motion to vacate the judgment was granted by the trial court.²⁹ His application for permission to withdraw the plea of guilty was denied, however, and he was resentenced *nunc pro tunc* for the misdemeanor. The Appellate Division affirmed,³⁰ but in a 4-3 decision the Court of Appeals reversed holding that once it was determined that the defendant had pleaded to a felony charge, it was an abuse of the court's discretion to deny him his fundamental right to plead anew to the indictment considered as one charging a misdemeanor.

In this decision the Court affirms its position that permission to withdraw a plea of guilty should be granted when the circumstances indicate that the plea was not freely entered — whether induced by misunderstanding of the charges,³¹ mistake of all concerned,³² or improper coercion by the court such as a promise of a lighter sentence.³³ This rule can only be applied to the instant case, however, by the dubious proposition that the defendant pleaded guilty *because* he was charged with a felony. When considered in the context of the above notice requirements for due process, it appears highly unlikely that the error in

22. *Supra* note 17.

23. *Paterno v. Lyons*, 334 U.S. 314 (1948).

24. *People v. Peckens*, 153 N.Y. 576, 47 N.E. 883 (1897).

25. *People v. Sullivan*, 4 N.Y. Crim. 193 (1885).

26. 7 N.Y.2d 83, 195 N.Y.S.2d 641 (1959).

27. N.Y. Code Crim. Proc. § 337.

28. *Supra* note 26.

29. County Court, Queens County.

30. 8 A.D.2d 744, 187 N.Y.S.2d 681 (2d Dep't 1959).

31. *People v. Gowasky*, 244 N.Y. 451, 155 N.E. 737 (1927).

32. *People v. Englese*, *supra* note 26.

33. *People v. Farina*, 2 N.Y.2d 454, 161 N.Y.S.2d 88 (1952).

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labeling the indictment so misled the defendant that he was induced to plead guilty to the acts described when he would otherwise have entered a plea of not guilty had the misdemeanor been so labeled. In branding the trial court's action in this instance an abuse of discretion, the Court has gone to unusual lengths to affirm a right, the denial of which remains doubtful.

PROOF OF FALSE REPRESENTATIONS INADMISSIBLE UNLESS ALLEGED IN INDICTMENT.

Defendant's conviction for first degree grand larceny was reversed and a new trial ordered by the Appellate Division on the ground that testimony concerning false representations made by defendant was improperly admitted in absence of an allegation in the indictment that defendant made use of any false representations.³⁴ The Court of Appeals, in *People v. Palen* unanimously affirmed this result.³⁵

In 1942, Section 1290 of the Penal Law was passed thereby abolishing "... the subtle and confusing distinctions that had previously differentiated the various types of theft."³⁶ Section 1290-a, however, required any false representations to be alleged if (and only if) the crime was "effected" thereby, that is, if the crime was one that previously would have been prosecuted as "obtaining money by false pretenses." Since this, in effect, continued the distinction between obtaining money by false pretenses and the other forms of common law larceny which the Legislature had sought to abolish, Section 1290-a was amended in 1950.³⁷ This Section now provides that if . . . defendant made use of any false or fraudulent representation or pretense in the course of accomplishing, or in aid of, or in facilitating the theft, evidence thereof may not be received at the trial unless the indictment or information alleges such a representation or pretense. Thus, the pleading requirement is extended to any theft situation, not merely those amounting to "obtaining money by false pretenses".

Testimony was introduced in the present case to show that the defendant had represented to his victim that he had a balance in his bank account of \$6,000, when in truth it was only \$2.50, and had pretended to make an arrangement with the bank whereby the complainant could leave his Veterans Administration check with the bank for "safekeeping". Although the crime did not amount to obtaining money by false pretenses at common law, the Court felt these were false representations which defendant "made use of" in accomplishing the theft. Since they were not alleged in the indictment, the Court held that Section 1290-a required a reversal of the conviction. The decision is a judicial confirmation of the plain language of the section, making clear that the applica-

34. *People v. Palen*, 7 A.D.2d 791, 181 N.Y.S.2d 9 (3d Dep't 1959).

35. 7 N.Y.2d 107, 195 N.Y.S.2d 829 (1959).

36. *People v. Karp*, 298 N.Y. 213, 216, 81 N.E.2d 817, 818 (1948).

37. See New York State Legislative Annual, 54-55 (1950); *People v. Lobel*, 298 N.Y. 243, 82 N.E.2d 145 (1948).