

SALEM ALEX PALO Y TOYUR, PETITIONER, VS. HON. FRANCIS J. MILITANTE, PRESIDING JUDGE, REGIONAL TRIAL COURT OF CEBU, 7TH JUDICIAL REGION, BRANCH XII, RESPONDENT.

G.R. NO. 76100. April 18, 1990

Ponente: REGALADO, J.

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REGALADO, J.:

The petition at bar seeks to nullify the following: (a) Judgment of conviction, dated June 11, 1986, sentencing petitioner to suffer imprisonment of six (6) years and one (1) day and to pay a fine of P6,000.00 and the costs of suit; (b) Order of respondent judge, dated August 25, 1986, denying petitioner's application for probation; and (c) Order of respondent judge, dated September 19, 1986, denying petitioner's omnibus motion for reconsideration. The facts which gave rise to the foregoing judicial issuances follow.

On May 10, 1986, agents of the Narcotics Command in Cebu City apprehended petitioner who was in possession of three (3) sticks of marijuana cigarettes. He was subsequently charged with violation of the second paragraph of Section 8, Article II of Republic Act No. 6425, otherwise known as the Dangerous Drugs Act of 1972, as amended.

During the plea bargaining on June 11, 1986, petitioner, through his counsel de oficio, manifested his desire to plead guilty to the offense charged provided that he be meted a sentence that would qualify him to apply for probation. The prosecution did not manifest any objection. Thus, upon being duly arraigned on the same date, petitioner, also assisted by his counsel de oficio, pleaded guilty.

After respondent judge clarified to petitioner the consequences of his plea, a judgment of conviction was promulgated sentencing petitioner to suffer imprisonment of six (6) years and one (1) day and to pay a fine of P6,000.00, together with the costs of suit.[1]

Immediately thereafter, petitioner, through counsel, manifested that he was applying for probation and prayed that his bond be allowed to continue until his probation may have been granted. Respondent judge granted the prayer and issued an order, dated June 11, 1986, allowing petitioner to remain on provisional liberty under the same bond.[2]

On June 13, 1986, respondent judge, acting on petitioner's application for probation, ordered the Probation Officer of the City of Cebu to conduct a post-sentence investigation on the petitioner.[3]

However, on August 25, 1986, respondent judge issued an order *motu proprio* denying the application for probation and ordering petitioner to serve his sentence. It was explained in the order that petitioner was not entitled to probation in view of a memorandum circular coming from the Probation Administration, dated July 15, 1986, which states, *inter alia*, that persons sentenced to serve a maximum term of imprisonment of more than six (6) years are not entitled to probation.[4]

In view of this development, petitioner was re--arrested and committed to jail on September 5, 1986.

On September 15, 1986, petitioner, through his counsel de parte, filed an omnibus motion for reconsideration and for the withdrawal of an improvident plea of guilty.[5] The comments of the prosecution indicated no objection to said motion.[6]

After hearing the omnibus motion for reconsideration on September 19, 1986, respondent judge denied the same,[7] hence the present special civil action for the extraordinary writ of certiorari. In a resolution dated October 27, 1986, the Court, through the First Division, issued a temporary restraining order enjoining respondent judge from enforcing his order of August 25, 1986.

The following issues are raised by petitioner for resolution, viz:

1. Whether or not respondent judge gravely abused his discretion in denying petitioner's omnibus motion for reconsideration;
2. Whether or not petitioner may still withdraw his improvident plea of guilty; and
3. Whether or not Batas Pambansa Bilang 76 was repealed by Presidential Decree No. 1990 so as to disqualify petitioner from the benefits of probation.[8]

To bolster his recourse, petitioner insists that his plea of guilty was improvident because he was not properly apprised of the consequences of his plea and that the only conceivable consequence he had in his mind at the time he pleaded guilty to the charge was that he would be extended the benefits of probation instead of going to jail after his conviction. He advances the view that his motion to withdraw his improvident plea of guilty was timely because the filing of an application for probation suspends the running of the period for perfecting an appeal or to withdraw an improvident plea of guilty. He further argues that Batas Pambansa Blg. 76, which qualifies accused persons sentenced to six (6) years and one (1) day imprisonment to the benefits of probation, has not been repealed expressly or impliedly by Presidential Decree No. 1990.

The petition is devoid of merit; certiorari will not lie.

Section 7, Rule 120 of the 1985 Rules on Criminal Procedure is explicit that a judgment in a criminal case becomes final when the accused has applied for probation. This is totally in accord with Section 4 of Presidential Decree No. 968, otherwise known as the Probation Law of 1976, as amended, which in part provides that the filing of an application for probation is deemed a waiver of the right to appeal. In other words, the judgment ipso facto attains finality, although it is not yet executory pending resolution of the application for probation.

Thus, the judgment in the lower court having become final, the respondent judge is not vested with any discretion to allow the alleged improvident plea of guilty to be withdrawn and be substituted by a plea of not guilty.[9]

Again, even on the assumption that the judgment was not yet final, the factual circumstances do not render or categorize as improvident the plea of guilty entered by petitioner.

As observed by respondent judge who filed his memorandum in propria persona, "(u)pon arraignment, the petitioner understood the allegations in the information and he knew very well the import of his plea. He was a third year college student so that it cannot be said that he did not understand the information read to him. He admitted he had in his possession three (3) sticks of marijuana cigarettes without any authority nor license to possess them." [10]

These facts are also recited in the assailed judgment of conviction, dated June 11, 1986, with the following ramification, to wit: "Asked by the Court why he had in his possession these three sticks of marijuana cigarettes, the accused answered that he wanted to try smoking them. He was further asked whether he realized that by his plea of guilty he would be sentenced accordingly by this Court and again the accused answered in the

affirmative.”[11]

The fact that he was merely assured by the prosecution that he could apply for probation if he pleaded guilty is no guarantee that his application for probation would consequently be approved by the court. He was made to understand the consequences of his plea. Every accused must realize that he cannot attach a string or condition to his plea of guilty and, in fact, the records of the case below reflect his unconditional plea. The withdrawal of such plea is not a matter of strict right to the accused but of sound discretion to the trial court, and the appellate court will not interfere with such discretion in the absence of abuse thereof.

As further explained by respondent judge, "there was no assurance made by the respondent that the petitioner would be granted probation. There was only an assurance that petitioner could apply for probation but there was no assurance that his application would be granted." [12] It would indeed have been uncalled for and premature to give such an assurance in advance, when the post-sentence investigation had not even started.

It is thus clearly established that petitioner openly admitted that he was caught while in possession of three (3) sticks of marijuana cigarettes. Considering that an application for probation is an admission of guilt on the part of the accused for the crime which led to the judgment of conviction, [13] even if we were to evaluate the merits of his said application, the same should be denied on the ground that to rule otherwise will not only depreciate the seriousness of the offense committed but will also subvert the ends of justice and the best interest of the community. [14]

Equally devoid of merit is petitioner's contention that the filing of an application for probation suspends the running of the period for perfecting an appeal.

The pertinent portion of Section 4 of Presidential Decree No. 968, as amended by Presidential Decree No. 1990, provides:

"SEC. 4. Grant of Probation. - Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant, and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, That no application for probation shall be entertained or granted if the defendant has perfected an appeal from its judgment of conviction." (Italics supplied.)

It is clear that what the law requires is that the application for probation must be filed within the period for perfecting an appeal. The need to file it within such period was intended to encourage offenders; who are willing to be reformed and rehabilitated, to avail of probation at the first opportunity. [15] Such provision, was never intended to suspend the period for the perfection of an appeal.

As earlier noted, the filing of the application for probation operates as a waiver of the right to appeal. Thus, there is no more opportunity for the accused to exercise his right to appeal, much less to withdraw a supposed improvident plea of guilty, the judgment having become final by the filing of the application for probation. Significantly, the judgment was promulgated on June 11, 1986 and became final on June 26, 1986, but it was only on September 15, 1986, almost three (3) months later, that petitioner moved to withdraw his plea of guilty.

The last issue has already been resolved by the Court in *Amandy vs. People, et al.* [16] which likewise involved a violation of Section 8, Article II of Republic Act No. 6425, and the elucidation wherein we reiterate:

"The original Probation Law of 1976, Presidential Decree No. 968 provided in its Section 9 that '(t)he benefits of this Decree shall not be extended to those: a) sentenced to serve a minimum term of imprisonment of more than six years. x x x'

"In 1980, Batas Pambansa Blg. 76 amended Section 9 of P.D. 968 by stating that the benefits of the Decree shall not be extended to those 'sentenced to serve a maximum term of imprisonment of more than six years and one day.'

"Subsequently, in 1985 then President Marcos promulgated Presidential Decree No. 1990 which amended BP 76 and returned to the earlier formulation in P.D. No. 968. The latest decree on the matter excludes from the benefits of the Probation Law any applicant who has been 'sentenced to serve a maximum term of imprisonment of more than six years.'

"It is apparent from the history of the provision in question that a disagreement on policy matters existed between the then President and the then legislature. In the two Presidential Decrees, the President was for denying probation to any one sentenced to imprisonment of more than six years. The Batasan, on the other hand, was for amending the applicable term of imprisonment to more than six years and one day. Since under the unusual situation then existing, both the Batasang Pambansa and the President could legislate on the same subject at the same time, the latter issuance has to prevail. This is P.D. 1990.

"As stated by the Solicitor General, P.D. 1990 realizes the need to correct B.P. 76 which extended to offenders penalized to suffer the penalty of 6 years and 1 day, the benefits of the Probation Law. Thus, it amended B.P. 76 by reverting to P.D. 968 such that only those sentenced to suffer correctional penalties shall be entitled to suspended sentences through probation. x x x

xxx xxx xxx

"The other argument that the omission of 'one day' from P.D. 1990 is the result of a misprint or inadvertence in the careless preparation of Presidential Decrees cannot be given serious consideration. P.D. 1990 merely went back to the P.D. 968 wording. The supposed misprint is the exact dividing line between correctional penalties and afflictive penalties."

It is suggested that petitioner's deprivation of the benefits of probation was a product of misunderstanding or miscommunication and that he would not have pleaded guilty had that amendment by Presidential Decree No. 1990 been brought to his attention. We are, however, bound by the actual proceedings that transpired and not by what is represented to have been a party's intent. Yet, assuming that there is some truth in said surmise, from what has been said and while one may empathize with petitioner's submission, still even if he had not pleaded guilty the end result would have been the same. From the judicial record, a guilty verdict, and even a higher penalty, would have been a distinct probability. All told, *dura lex sed lex* is the trite dictum which those caught in the toils of the law have to live with, including the changes therein and the misapprehensions thereon.

ACCORDINGLY, the petition at bar is hereby DISMISSED and the temporary restraining order issued pursuant to the Court's resolution of October 27, 1986 is hereby LIFTED.

SO ORDERED.

Melencio-Herrera, (Chairman), Paras, Padilla, and Sarmiento, JJ., concur.

[1] Rollo, 10.

[2] Ibid., 11.

[3] Ibid., 13.

[4] Ibid., 14.

[5] Ibid., 15-18.

[6] Ibid., 19-20.

[7] Ibid., 21-23.

[8] Ibid., 40; Memorandum for the Petitioner, 4.

[9] See Sec. 5, Rule 116, 1985 Rules of Criminal Procedure.

[10] Rollo, 52.

[11] Ibid., 10.

[12] Ibid., 50.

[13] Yusi, et al. vs. Morales, 121 SCRA 853 (1983).

[14] Tolentino vs. Alconcel, 121 SCRA 92 (1983).

[15] Preamble clauses, P.D. No. 1990, amending P.D. 968.

[16] 161 SCRA 436 (1988).

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