Denver Law Review

Volume 27 | Issue 10 Article 4

January 1950

Procedure on Plea of Guilty

Max D. Melville

Procedure on Plea of Guilty

PROCEDURE ON PLEA OF GUILTY*

MAX D. MELVILLE
of the Denver Bar, Assistant District Attorney

Two questions are presented: (1) Is it necessary, under section 482, chapter 48, '35 C.S.A., on a plea of guilty to take evidence to prove that the offense was in fact committed? (2) Is it mandatory under that section, when the court has discretion as to the extent of the punishment, that witnesses be examined as to the aggravation and mitigation of the offense, and, if so, can defendant waive such examination?

The conclusions reached on these questions are these:

1. It is unnecessary, under section 482, chapter 48 (relating to pleas of guilty), for the court to take any evidence to sustain a plea of guilty. The plea itself proves the validity of the charge and every constituent element of the stated offense; for example, it proves the value of the stolen property in larceny, the intent in felonious assaults and aggravated robberies, and the knowledge the goods were stolen in receiving stolen goods.

2. The requirement of section 482, chapter 48, that when the court has any discretion as to the punishment it must examine witness as to aggravation and mitigation of the offense does not contemplate a "trial," since nothing remains to be tried on the issue of guilt or innocence, and the evidentiary and constitutional restrictions on trials are waived by the plea. The evidence contemplated by the statute on the questions of aggravation and mitigation is usually entirely different from the evidence which would be competent and relevant on a trial of the issue of guilt. Although the requirement as to evidence as to aggravation and mitigation is mandatory, it may be advisedly and expressly waived by the defendant.

There appears to be no Colorado authority either way on some of these conclusions, but most of them are supported by Illinois decisions; and since the Colorado statute was taken practically verbatim from Illinois, the cases from that jurisdiction are, under the familiar rule, at least persuasive.

The Illinois statute on pleas of guilty follows,[1] and the differences in the Colorado statute are indicated in parentheses:

> In cases where the party (indicted shall plead) pleads "guilty," such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea, after which if the party (indicted) persists in pleading "guilty," such (said) plea shall be received and recorded, and the court (proceed) shall proceed to enter judgment and execution thereon, as if he (or she) had been found guilty by a jury. In all cases where the

* This is one of a series of briefs prepared for Colorado district attorneys by Mr. Melville.

[1] ILL. CRIM. CODE, par. 732, Smith-Hurd's Ill. Stat., c. 38.

court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense.

I. Need Fact of Guilt Be Proved?

The rule at common law is stated as follows:[2]

> Where the prisoner on arraignment confesses the indictment, or during the trial withdraws a plea of not guilty, a verdict of guilty on his own confession is entered and the court proceeds to judgment.

The rule is more fully stated in *Green v. Commonwealth*:[3]

> There is no principle of the common law better settled or more familiar than that which declares that whatever crime is duly set forth in an indictment, of that a party may be convicted. If a jury would be warranted in finding a person guilty of a particular offense charged in an indictment, the party accused may confess such offense by a plea of guilty; in other words, a plea of guilty may be supported whenever a verdict of a jury finding a person guilty of a crime would be held valid. A conviction of a crime may be had in two ways; either by the verdict of a jury, or by the confession of the offense by the party charged by a plea of guilty, "which is the highest conviction. . . ." *And the effect of a confession is to supply the want of evidence.* . . . When therefore a party pleads guilty to an indictment, he confesses and convicts himself of all that is duly charged against him in that indictment.

The general law is stated in Corpus Juris Secundum as follows:[4]

> In the absence of a statute to the contrary, where accused enters a plea of guilty, or of *nolo contendere*, the court has the power and duty to pronounce judgment or sentence as though a verdict of guilty had been found against him, and with the same effect. A judgment so rendered is not violative of accused's constitutional right of trial by jury. To warrant the pronouncement of judgment or sentence in such case there is ordinarily no need for evidence establishing guilt, or for any independent adjudication of guilt; and, although there is authority to the contrary, the right to pronounce judgment has been said to exist even though the facts appearing on an examination may indicate that the accused is not guilty.

Scope of Court's Duty on Plea of Guilty

Under section 482, chapter 48, '35 C.S.A., the court, on a plea of guilty, has one duty to perform at all events, and, if it has discretion as to punishment, a second duty. The first is to make certain that the accused fully understands the consequences of his plea. If he thereafter persists in his plea, the court must receive and record it. The second duty, if there is discretion as to punishment, is to examine witnesses as to the aggravation and mitigation of the offense.

---

[2] 2 Russell on Crimes, 1815-1816 (8th ed.).
[3] 12 Allen (Mass.) 155, 172 (1866).
[4] 24 C.J.S. Criminal Law, §1563.

The mandatory warning of the accused as to the consequences of the plea cannot be merely perfunctory. This is illustrated in *Krolage v. People*,[5] where the Illinois court merely inquired of the defendant "whether he understood that if he pleaded guilty the court would sentence him to the penitentiary, and the defendant thereupon informed the court that he did so understand," and the court entered the plea without further warning as to his right to a trial by jury and as to the possible length of sentence.

THERE IS NO DUTY TO TAKE EVIDENCE TO PROVE GUILT

It is not the purpose of this paper to contend that a court may not, if it wishes, take evidence to prove guilt. The point sought to be made is that it is not legally necessary. It has been suggested by one judge that the taking of such evidence is mandatory because the statute requires, where there is discretion as to punishment, that evidence as to aggravation and mitigation must be taken, it first must be established by evidence that there is in fact "something to aggravate or mitigate." This view, however, finds no support in any authority this writer has been able to find.

In the absence of a specific statute, such as that of Michigan apparently requiring proof of guilt, the universal rule clearly appears to be that the court is under no duty to take evidence as to the fact of crime and defendant's guilt, since each element of the charged offense is proved by the defendant himself when he advisedly pleads guilty.

The United States Supreme Court has passed upon the present question, where a plea of nolo contendere was involved, in *United States v. Norris*.[6] There, the Court of Appeals had reversed a judgment of the District Court denying a motion in arrest of judgment by one who had entered a plea of nolo contendere upon the ground that facts stipulated showed him not guilty. One of two defendants charged with conspiracy to violate the Prohibition Act pleaded guilty, and the other, Norris, entered a nolo contendere. The district court considered the stipulation of facts for the sole purpose of determining what punishment should be imposed. The Court of Appeals also considered the facts in the stipulation on the question of guilt and determined that no offense had been committed. The Supreme Court reversed the Court of Appeals and held that the stipulated facts could not be and should not have been considered on the question of guilt or innocence, but could be used only in determining the amount of punishment. After stating that the indictment was sufficient in form and substance, the Supreme Court continued:[7]

---

[5] 224 Ill. 456, 79 N. E. 570 (1906).
[6] 281 U. S. 619 (1929).
[7] 281 U. S. 619, 621 (1929).

> . . . the stipulation was ineffective to import an issue as to the sufficiency of the indictment, or an issue of fact upon the question of guilt or innocence. If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found. . . . If filed before plea and given effect, such a stipulation would oust the jurisdiction of the court. . . .
>
> After the plea, nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record. Regarded as evidence upon the question of guilt or innocence, the stipulation came too late, for the plea of *nolo contendere* upon that question and for that case, was as conclusive as a plea of guilty would have been. And as said by Mr. Justice Shiras in *Hallinger v. Davis*, 146 U. S. 314, 318: "If a recorded confession of every material averment of an indictment puts the confessor upon the country, the institution of jury trial and the legal effect and nature of a plea of guilty have been very imperfectly understood, not only by the authors of the Constitution and their successors down to the present time, but also by all of the generations of men who have lied under the common law."
>
> The court was no longer concerned with the question of guilt, but only with the character and extent of the punishment. . . . The remedy of the accused, if he thought he had not violated the law, was to withdraw, by leave of court, the plea of *nole contendere*, enter one of not guilty, and, upon the issue thus made, submit the facts for determination in the usual and orderly way.

In *United Brotherhood v. United States*,[8] where certain of the defendants had pleaded nolo contendere on a charge of conspiracy to violate the Sherman Act, other defendants had stood trial and been convicted. The Supreme Court reversed the convictions on the ground that the trial court had given vitally erroneous, and had refused correct, instructions on a point which the Supreme Court subsequently, and in other cases, determined oppositely to the view of the trial court. As to the pleas of nolo contendere by some of the defendants, the Supreme Court said that while ordinarily a plea of nolo contendere leaves open for review only the sufficiency of an indictment, nevertheless in this instance it would exercise its power to notice plain error in the interests of justice, and held that such defendants should be given an opportunity to stand trial in the situation created by the court's later rulings.

Plea Proves All Allegations of the Information

The plea of guilty proves all of the elements of the offense, such as the value of property in larceny;[9] the fact that property received was known to be stolen and had been retained with intent to deprive the owner permanently of it;[10] the existence of the person whose name is charged to have been forged;[11] the fact of being

[8] 330 U. S. 395 (1947).
[9] Marx v. People, 204 Ill. 248, 68 N. E. 436 (1903); People v. Carter, 394 Ill. 78. 71 N. E. (2d) 737 (1946).
[10] People v O'Brien, 306 Ill. 340, 137 N. E. 808 (1922).
[11] People v. Lantz, 387 Ill. 72, 55 N. E. (2d) 78 (1944).

armed on a charge of armed robbery;[12] the ownership of stolen property;[13] the intent on a charge of assault with intent to commit rape.[14] The court is under no duty to take evidence on a plea of guilty as to guilt or innocence.[15]

The above conclusions are drawn from cases decided under the Illinois statute which, as has been seen, is in all essential particulars identical with section 482, chapter 48, '35 C.S.A. They illustrate the proposition that on a plea of guilty, defendant himself, by his plea of guilty, furnishes all necessary evidence to support every element of the charge. This is exemplified by *Marx v. People* [16] where it was said:

> Under the plea of guilty, it was not necessary for the court to hear evidence to determine any matter fully set out in the indictment, as the plea, as shown by the record, is that plaintiff in error is "guilty of receiving stolen property, knowing the same to have been stolen. In manner and form as charged therein." Nor do we think it necessary that the court shall hear evidence as to the value of the property where the indictment charges and specifies the value thereof, and the value is alleged as above $15, and it is sufficient that the larceny charged, by which the goods were obtained, is grand larceny, and the crime is a felony.
>
> When the plea is "Not Guilty," and the cause is heard by a jury, the defendant admits nothing, or if upon the trial he admits the larceny—that is, the taking of the goods—he does not admit that they were taken feloniously, or that they had any value, nor does he admit any other matter material to his conviction as charged in the indictment, but all matters not expressly admitted must be proved; and in such case the value of the property, being a material part of the offense as fixing the grade of the offense, must, under our statute, be proved, and found by the jury, that the court may know he is justified in imposing the penalty recommended by the jury, as was the practice in this class of cases prior to the enactment of the parole law, or to enable the court to determine what penalty to impose where the same is not fixed by the jury.
>
> But where the defendant pleads "Guilty," he pleads to every fact averred in the indictment, and there is neither law, reason, nor necessity requiring proof of the things admitted by the plea. . . .
>
> The statute requires that, before such plea shall be allowed to be entered, the court shall fully explain to the accused the consequences of entering it (Hurd's Rev. St. 1901, p. 658, §424), and the record in this case shows that duty was performed by the court. Under the indictment in question the court must have told the plaintiff in error that if he persisted in his plea it would be the duty of the court to sentence him to the State Reformatory or to the Penitentiary, according to his age. With these facts before him, the plaintiff in error entered his plea; and to require testimony to establish that which the plaintiff in error by his plea admitted would be to require a useless thing, which the law does not indulge.

---

[12] People v. Creviston, 396 Ill. 78, 71 N. E. (2d) 25 (1947).
[13] People v. Conn, 391 Ill. 190, 62 N. E. (2d) 806 (1945).
[14] People v. Yukich, 374 Ill. 375, 29 N. E. (2d) 603 (1940).
[15] People v. Day, 404 Ill. 268, 88 N. E. (2d) 727 (1949); People v. Bennett, 401 Ill. 403, 82 N. E. (2d) 465 (1948).
[16] *Supra*, note 9.

DIFFERENCE BETWEEN CONFESSION AND PLEA OF GUILTY

There is a recognized distinction between a "judicial confession," or plea of guilt, and an "extra-judicial," or out-of-court, confession.[17] Either kind must be free and voluntary and the court must be satisfied of that fact. The court itself handles the matter on a plea of guilty under section 482, chapter 48, '35 C.S.A., by its admonition to the defendant, and its inquiry as to his understanding of the consequences of the plea.

But the authorities previously considered seem to be uniform that no corroboration of a judicial confession is necessary, while on the other hand there can be no valid conviction on the basis of an extrajudicial confession alone, even though the corroborating evidence need be but slight.[18]

The distinction has been repeatedly recognized by the courts. Thus, in *State v. Branner*,[19] it was said:

> A plea of guilty is not only an admission of guilt, but is a formal confession of guilt, before the court in which the defend- is arraigned. It is in this respect altogether different from a full and voluntary confession formally made before a magistrate or to some other person. The latter is merely evidence of guilt. . . . When the plea of guilty is formally entered to an indictment, no evidence of guilt is required in order to proceed to judgment, for the defendant has himself supplied the necessary proof. He has convicted himself. The judge could, therefore, have entered judgment upon the plea in this case in like manner as he could have done if there had been a formal verdict of guilty returned by a jury upon evidence.

Again, in *People v. Brown*,[20] the court said on this point:

> The plea of guilty precluded any such inquiry or taking of evidence as suggested by appellant, because such plea was a conclusive admission of his guilt of the crime charged as against him. . . . We do not desire to be understood as saying that one may be convicted upon his confession alone without further proof of the *corpus delicti;* but the plea of guilty in this case removes from consideration such question.

II. EVIDENCE AS TO AGGRAVATION AND MITIGATION

The taking of evidence as to aggravation and mitigation is not a trial.

> The examination of witnesses for this purpose does not constitute a trial in the ordinary sense of the word. The hearing is not for the purpose of determining guilt or innocence but has for its sole object the determination of the degree of punishment of the prisoner in the light of the circumstances surrounding him. . . . In deciding this question, this court has held it is not confined to the

[17] WHARTON, CRIMINAL EVIDENCE, §586 (11th Ed.).
[18] Williams v People, 114 Colo. 207, 158 P. (2d) 447 (1945).
[19] 149 N. C. 559, 63 S. E. 169 (1908).
[20] 140 Cal. App. 616, 36 P. (2d) 194 (1934).

> evidence showing guilt, for that issue has been settled by the plea. The rules of evidence which ordinarily obtain in a trial where guilt is denied do not bind the court in its inquiry. It may look to the facts of the killing and it may search anywhere within reasonable bounds for other facts which tend to aggravate or mitigate the offense.[21]

The evidence taken as to aggravation and mitigation is different in purpose from that given on a trial of the issue of innocence or guilt. The right to a jury is waived, and with it, of course, the constitutional guaranties with respect to the conduct of criminal trials. A plea of guilty waives any defect not jurisdictional.[22]

Some of the evidence, of course, may be the same in both situations, as where the defendant has put his character in issue and his reputation in that respect is before the jury, or where he becomes a witness and felony convictions against him are shown, or where similar offenses by him are properly shown. But in the main the evidence as to aggravation and mitigation will be different than that which would have been brought forward on a trial of the issue of guilt.

That evidence in aggravation or mitigation is not limited to such as would be admissible on a trial of the issue of guilt is made certain by *Smith v. People*,[23] where the question was as to whether the statutory provision as to taking evidence as to aggravation and mitigation is mandatory. The court held that it is, but the dissenting opinion was based strictly upon the proposition that "testimony as to the aggravation and mitigation of the offense should be confined to those matters which would be relevant at a trial." The majority opinion pointed out, however, that if this were true, mitigating circumstances "which are usually shown as appealing to the fairness and mercy of the judge could not be shown, because wholly irrelevant."

The court, in *Smith v. People,* had this to say on aggravation and mitigation:

"Aggravation is defined to be, 'Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself'. — Black's Law Dictionary. 'Mitigating circumstances are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.'—Black's Law Dictionary."

The evidence as to aggravation and mitigation may be as to matters which, if admissible at all on a trial of the issue of guilt

---

[21] People v. Vincent, 394 Ill. 165, 68 N. E. (2d) 275 (1946).
[22] People v. Popescue, 345 Ill. 142, 177 N. E. 739 (1931).
[23] 32 Colo. 251, 75 P. 914 (1904).

or innocence, would be so for a very limited purpose, as, for example, proof of similar offenses to show a system or plan or design of which the act charged in the information is a part, and to be considered by the jury for that limited purpose only. Yet such evidence may be considered by the court in passing sentence because of its bearing on the habits and previous record of the accused. It is not uncommon for courts in pronouncing judgment to take into consideration the habits of the defendant, whether or not his conviction is for a first offense, or whether or not he is a habitual criminal. Such circumstances surrounding the defendant, if within the knowledge of the court in any way, may properly be taken into consideration in the exercise of discretion within the statute in determining the measure of punishment that should be imposed.[24]

It must be remembered that the statutory requirement applies only when there is discretion vested in the judge as to punishment. It does not apply to pleas of guilty to a charge of murder, for in such case it is the exclusive function of the jury to determine whether the murder was of the first or of the second degree, and, if of the first degree, to fix the punishment. In those cases, the evidence taken is circumscribed by the rules of evidence, and, if the defendant is a minor, must be strictly applied by the court even though defense counsel fails in his duty.[25]

However, in jurisdictions such as Illinois where the court may accept a plea of guilty to murder and itself fix the punishment, it may consider evidence which would not be admissible if the case was being submitted to a jury on such a plea. Thus, in *People v. Popescue*,[26] where defendants had pleaded guilty to murder, and the judge, after receiving the pleas and while taking evidence on aggravation and mitigation, heard the defendants themselves admit that they had committed another murder three hours before the crime charged in the indictment. It was urged that the hearing of this testimony was prejudicial to the defendants and beyond the scope of the court's authority under the statute.

As to this contention the supreme court of Illinois, construing a statute practically identical with that of Colorado, said:

> In approaching the issue involved, the distinction between the respective duties of the court and jury must be constantly borne in mind. In this state the jury in a homicide case not only have to determine the guilt or innocence of the defendant, but when they find him guilty must also fix the punishment. This double duty of determining both guilt and penalty distinguishes the function of the jury from that of the court, where on a plea of guilty all questions of guilt or innocence are disposed of and the only remaining duty is to determine what penalty to impose.

---

[24] Meyers v. People, 65 Colo. 450, 177 P. 145 (1918).
[25] Reppin v. People, 95 Colo. 192, 34 P. (2d) 71 (1934).
[26] 345 Ill. 142, 177 N. E. 739 (1931).

> Under general rules repeatedly reaffirmed by this court, evidence of separate crimes cannot be admitted in support of another and distinct offense. There are certain well-known exceptions to this rule which will be discussed later in this opinion, but such separate crimes are admissible only to show guilt where guilt or innocence is an issue and for no other purpose. . . . Even if it were proper for a jury to hear evidence of other crimes before fixing punishment in homicide cases, where three sentences are discretionary (death, life imprisonment, or any term not less than 14 years), yet such evidence would be manifestly improper, because it might tend to influence their decision on the all-important first question to be determined —i.e., Is the defendant innocent or guilty? Where a jury hears the evidence, they must at the same time and from the same evidence determine not only guilt or innocence, but in the same verdict, if guilt is found, they must also fix the punishment. Once the question of innocence or guilt is decided by a plea of guilty, then no such compelling reason exists for barring evidence of former crimes from the trial judge, who then has the heavy and sole responsibility of examining witnesses as to the aggravation and mitigation of the offense and of pronouncing judgment. . . .
>
> Even if it be held that in a trial before a jury it is improper to receive evidence of other offenses than that charged in the indictment, "it is otherwise when, after a verdict of guilt, the court is called upon to sentence. In such case the court may of its own motion take notice of a prior conviction of the defendant on its own records, or will hear proof of his character and antecedents, either to aggravate or extenuate his guilt." 3 Wharton's Crim. Proc. (10th ed.) §1890, p. 320, and many cases cited.

The United States Supreme Court has examined this question of the difference between evidence admissible at a trial involving the issue of guilt or innocence and evidence which may be considered by a trial judge in imposing sentence. In *Williams v. New York*,[27] the court refused to hold that a death sentence imposed by a judge who, because of facts brought to his attention through a probation department report and through other sources on a pre-sentence investigation, refused to accept a jury's recommendation against imposition of the death penalty, was a violation of the 14th Amendment. It was claimed there was a failure of due process in that defendant had been deprived of the right of cross-examination of witnesses against him.

The pre-sentence investigation was made under section 482 of the New York Criminal Code which provided:

> Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.

In passing sentence of death, the trial judge,[28]

[27] 337 U. S. 241 (1949).
[28] *Id.* at 244.

narrated the shocking details of the crime as shown by the trial evidence, expressing his own complete belief in appellant's guilt. He stated that the pre-sentence investigation revealed many material facts concerning appellant's background which though relevant to the question of punishment could not properly have been brought to the attention of the jury in its consideration of the question of guilt. He referred to the experience appellant "had had on 30 other burglaries in and about the same vicinity" where the murder had been committed. The appellant had not been convicted of these burglaries although the judge had information that he had confessed to some and had been identified as the perpetrator of some of the others. The judge also referred to certain activities of appellant as shown by the probation report that indicated appellant possessed "a morbid sexuality" and classified him as a "menace to society." The accuracy of these statements made by the judge as to apellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked to disregard any of them by cross-examination or otherwise. The case presents a serious and difficult question. The question relates to the rules of evidence applicable to the manner in which a judge may obtain information to guide him in the imposition of sentence upon already convicted defendants.

The court continued:[29]

Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders. A recent manifestation of the historical latitude allowed sentencing judges apears in Rule 32 of the Federal Rules of Criminal procedure. The rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information "as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant. . . ."

In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether the defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.

[29] *Id.* at 246.

PRIVILEGE OF TAKING EVIDENCE CAN BE WAIVED

In *Arrano v. People*,[30] it was held that the provision of the statute requiring examination of witnesses as to aggravation and mitigation of the offense is mandatory, and that the record must affirmatively show that this was done.

In *Smith v. People*,[31] the defendant pleaded guilty to a charge of perjury in a former case. At the sentencing, witnesses were present for the purpose of giving evidence as to aggravation and mitigation, but the judge refused to take the testimony because, he said, he had presided at the trial in which the perjury occurred and all of the facts regarding it were within his knowledge. The situation, then, was that the court was requested to comply with the statute and refused. The supreme court reversed the judgment of conviction, saying that the taking of such evidence was mandatory.

But although the cases say that examination of witnesses in such circumstances is "mandatory," and that "the failure to make such examination is a good ground of complaint in a direct attack upon the sentence,"[32] nevertheless, if the court had jurisdiction of the offense and of the convicted person, a judgment rendered in such a case, though all the requirements as to procedure were not followed, is merely irregular and voidable, not void.[33] There is a distinction between a void and an erroneous judgment, and the general rule is that where the court has jurisdiction of the subject matter and of the person, its judgment in the case will not be void, although it may be erroneous, and that in a collateral proceeding the validity of the judgment cannot be called in question.[34] In *Lakomy v. People*,[35] the question arose as to proof of a former conviction in a liquor case, and the court refused to inquire into the validity of the former conviction despite the claim that the statutory examination had not been made by the trial court.

Accordingly, if a failure to examine witnesses as to aggrevation and mitigation merely makes the judgment "irregular," and not "void," it would seem that a defendant may advisedly and expressly waive such examination and allow the court to inform itself in some other manner.

The Illinois supreme court, in construing the same statute, has held that while the provision is mandatory, it may nevertheless be waived by the defendant. They have held, it will be seen, that there is a waiver of examination when the defendant fails to demand it, but it is unnecessary to go that far here. Nothing in *Smith v. People, supra,* militates against the idea that the examination may be expressly waived by the defendant, for that

[30] 24 Colo. 233, 49 P. 271 (1897).
[31] *Supra,* note 23.
[32] Lakomy v. People, 66 Colo. 19, 178 P. 571 (1919).
[33] *Ibid.*
[34] Hart v. Best, 119 Colo. 569, 205 P. (2d) 787 (1949).
[35] *Supra,* note 32.

case turned upon the point that the defendant requested such examination and the court refused it.

Having in mind that the Colorado statute is essentially identical with that of Illinois, the following Illinois cases will be found to be in point on this question of waiver:

In *People v. Pennington,*[36] it was said:

> That part of section 4 of division 13 of the Criminal Code making it the duty of the court to examine witnesses as to the aggravation and mitigation of the offense in cases where the party pleads guilty is mandatory, and it is necessary for the court to make such examination when requested or desired, either on the part of the people or of the defendant. This is a privilege which may be waived by the parties, and some other method of supplying the court with the information be substituted in its stead. Should the court fail to perform its duty in this regard, or should it be claimed that the punishment was more severe than the circumstances shown would warrant, such matters must be presented for review by a bill of exceptions.

In *People v. Crooks,*[37] the defendant was a minor. The Illinois court said:

> The defendant contends that the said motion ought to have been sustained on three legal grounds: the first being that under section 4 of division 13 of the Criminal Code (Smith-Hurd Rev. St. 1925, c. 38, §732) in all cases where there is a plea of guilty and the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense. In the case of *People v. Pennington,* 267 Ill. 45, 107 N. E. 871, this court held that it is necessary for the court to make such examination when requested or desired by either the people or the defendant. This court further held in that case that the privilege given by the statute is one that might be waived by the parties and some other method of supplying the court with the necessary information be substituted. The privilege was waived in this case by both the defendant and the state, as neither of them asked nor desired any other witness to be examined. The court on its own motion ascertained all further facts that appeared necessary for it to know, by information given it by both the state's attorney and by the attorney for the defendant. The fact that the defendant is a minor does not preclude him from making any waiver that might have been made in the case of an adult.

The Illinois cases go so far as to say that if a defendant fails to ask that evidence be taken in aggravation and mitigation, he waives the right. Such undoubtedly would not be true in Colorado in view of the ruling in *Arrano v. People, supra,* that the record must affirmatively show that such evidence was taken. But the Illinois cases do support the proposition advanced here that a defendant may advisedly and expressly waive that privilege and that the court may advise itself from other sources.

---

[36] 267 Ill. 45, 107 N. E. 871 (1915).

[37] 326 Ill. 266, 157 N. E. 218 (1927). As to a minor waiving his rights and pleading guilty after being fully informed of his rights, *see* Reppin v. People, supra, note 25, death penalty case.