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## The Early Guilty Plea: The Need for Adequate Disclosure

Ed Johnston<sup>1</sup>

In February 2016, the Sentencing Council issued a consultation which is intended to encourage a greater number of defendants to enter a guilty plea at the 'first reasonable opportunity'. Currently, s.144 Criminal Justice Act 2003 provides that a sentence discount for a guilty plea can be given by the court and the amount of discount is dependent on two factors; the stage in the proceedings which the offender indicated his intention to plead guilty and the circumstances in which the indication was given.

The new proposals will provide a tiered approach to the amount of discount offered. The first tier provides the maximum discount of one-third should they indicate a guilty plea at the first time they are asked in court. The second tier has a discount of one-fifth should the defendant enter a guilty plea at a later opportunity **but** before the trial commences. The third tier states that should the defendant enter a guilty plea on the first day of their trial they will only receive a discount of one-tenth. Finally, should the defendant enter a guilty plea part way through the trial, they will not be eligible for any sentence discount.

The consultation outlines the importance of an early guilty plea; such a plea has numerous benefits, including:

- Victims and witnesses will be informed earlier than in the past that their evidence will not be necessary. Furthermore, victims will see a more consistent approach to determining sentence reductions.
- Earlier guilty pleas will represent a significant resource saving for the police, CPS, the Legal Aid Agency and the courts.
- Defence lawyers will have a clearer idea of the likely outcome for clients who choose to enter a guilty plea at different stages of the criminal process and can therefore provide better advice to clients.

The primacy of improving the efficiency of the criminal justice process can be traced back to the turn of the Century and remains a central goal (see, for example, Brian Leveson's 'Review of Efficiency in Criminal Proceedings' and the ongoing *Transforming Summary Justice* initiative). The creation of the Criminal Procedure Rules in 2005 (hereafter, CrimPR) codified this desire and created an Overriding Objective of 'dealing with cases justly' which includes 'dealing with the case efficiently and

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expeditiously' (Rule 1.1(1)(e)). Lord Justice Auld's 2001 *Review of the Criminal Courts of England and Wales* summarises the modern approach to criminal proceedings:

'[A] criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself...'

The courts quickly adopted this approach and have continued to reiterate this principle over the last 15 years (see *R v Gleeson* [2003] EWCA Crim 3357, *R (on the application of the DPP) v Chorley Justices & Anor* [2006] EWHC 1795, *Malcolm v DPP* [2007] EWHC 363 (QB), *Payne v South Lakeland Magistrates' Court* [2011] EWHC 1862 (Admin)). The Sentencing Council consultation also reiterates this very point at p.15, stating that the proposed changes leave 'much less scope for offenders to play the system'. In summary, three assumptions are made by the modern approach to criminal procedure – defendants primarily wish to illegitimately manipulate criminal process; such behaviour compromises both the integrity and efficiency of the system; and steps must be taken (in the form of procedural changes) to prevent this.

The consultation does explicitly acknowledge some of the basic due process rights of the defendant in our adversarial system, for example, the right against self-incrimination and to put the prosecution to proof. However, the tenor of the modern adversarial process appears to imply that defendants know if they are guilty or not, should be clear about this at an early stage, and be cooperative'. This notion of co-operation is evident in the various obligations the defence must discharge under the CrimPR. For example, the defence has to identify the 'real issues' they have with the prosecution's case (Rule 3.2(2)(a)) and identify any significant failures or problems in case preparation and inform the court (see Rule 3.10 and various case law examples). The Early Guilty Plea scheme continues in this vein, prioritising efficiency and economy.

The concept of the Early Guilty Plea scheme is not, in itself, an offensive one. Where a case is straightforward, a defendant accepts their guilt, and the evidence is substantial and undisputed, it seems justifiable to encourage a guilty plea at the initial stages, so long as the circumstances of the defendant do not negate his or her free and informed choice. In circumstances where these conditions are not met, the scheme poses problems. The scheme states that the discount is not a reward but an incentive, but this is arguably a matter semantics rather than substance. In reality, a defendant may view the discount as neither a reward for 'doing the right thing' and admitting guilt nor an incentive to assist those prosecuting him or her - but as a temptation to reduce the risk of

conviction for an offence they have not committed or an inducement to sacrifice their legitimate fair trial rights.

Furthermore, any guilty plea should be grounded in sound legal advice based on the weight of evidence the prosecution holds. However, there is clear evidence that pre-trial disclosure by the CPS is often inadequate in practice and this poses a difficulty for defence lawyers (see the recent report by HM CPS Inspectorate 'Transforming Summary Justice: An Early Perspective of the CPS Contribution' and 'The Practice of Pre-trial Detention in England and Wales' by Cape and Smith). At present, there is little regulation of disclosure prior to the first hearing - the only point at which a defendant would be eligible for the maximum sentence discount for a guilty plea. The prosecution are only required to disclose Initial Details of the Prosecution Case (IDPC) if the defence request it (Rule 8.2(2)). The scope of this disclosure is narrow (particularly for defendants brought to court in custody): prosecutors are mandated to share details of circumstances of the offence and the criminal record of the defendant, and little else. This appears to be in breach of the EU directive of the right to information which, under Articles 6 and 7 requires extensive disclosure of materials and information essential to an effective defence. This poses a very serious question: How are defence lawyers expected to give sound legal advice as to plea when they are only advising on a partial picture of the evidence? Arguably, improvements in pre-trial disclosure should be explored rather than increasing the incentive/pressure to enter a guilty plea at the earliest opportunity. This could bolster equality of arms at the earliest stage of the process, assist defence lawyers in providing realistic advice to their clients, and avoid the risk of inappropriate 'not guilty' pleas being entered simply because the defence do not have enough information.

The dangers of being pressured to enter a guilty plea are stark, demonstrated in the recent case of *R v on the application of the DPP v Leicester Magistrates' Court* (Unreported, 9<sup>th</sup> February 2016). The claimant appealed for judicial review to re-open his conviction for common assault. The offence had allegedly been committed against a 14-year-old boy, in the care of the defendant as an agency worker in a care home. At his first appearance in court, he intended to enter a not guilty plea on the basis of self-defence. However, he changed this on the first day of his trial. He asserts that his then-solicitor had pressured him into entering a guilty plea; as a result, he was no longer able to find work in the social care sector. Whilst the magistrates' court can make an order to re-open a conviction when it is in the interests of justice (under s.142 Magistrates' Courts Act 1980) it can only be exercised where there has been a mistake or a situation akin to a mistake. A subsequent change of heart or regret at entering a guilty plea will not suffice as a mistake and the defendant's conviction was reinstated. This is arguably a matter of interpretation. One could feasibly argue that 'regret'

over changing a plea due to inappropriate pressure from lawyers is tantamount to a mistake. Clearly, the defendant's first inclination was to plead not guilty, but he was persuaded to plead otherwise. In the same way that false confessions are subsequently considered to be mistaken when extracted under police pressure, there seems no logical reason why a 'change of heart' about a guilty plea in such circumstances should be considered any differently. In contrast, where a defendant pleads guilty and has a more vague or ill-defined 'regret' based on nothing more than the desire to avoid conviction, it seems more reasonable to prevent the overturning of convictions.

## **Conclusion**

This article raises a number of issues related to early guilty pleas. At present, the defence are arguably given inadequate access to information prior to the first hearing. This can affect the ability of the defence lawyer to advise on the appropriate plea. Equally, a defendant may be pressured by his or her lawyer to enter a guilty plea or tempted to do so because of the sentence discount. In such cases, there is a risk that the overriding objective of the CrimPR will be undermined – that is, to deal with cases justly, which includes acquitting the innocent and convicting the guilty, and ensuring that appropriate information is available to the court when bail is considered. Whilst it is important to consider the effects of lengthy criminal proceedings on victims and witness, it is often the defendant who is forgotten in any reform. The rise of the CrimPR and its implicit goals of managerialism have arguably diluted the adversarial nature of the criminal justice process, emphasising the importance of co-operation throughout proceedings. There is undoubtedly an agenda, for better or worse, to encourage defendants to enter early guilty pleas, and it seems that should the defendant regret doing so, a remedy will rarely be offered by the courts. It is therefore imperative to ensure that any decision to enter a guilty plea is based on full and accurate evidence from the police and prosecution, made available at an early stage. This is arguably commensurate with the objectives of the CrimPR and the general culture change that has seen a drift from away from pure adversarialism, where each parties hides their case for as long as possible. If sharing is to be encouraged, it should be done so on an equal basis. This would ensure the defence lawyer can adequately advise the client as to plea, Moreover, it would (perhaps ironically) re-assert the adversarial tradition of English and Welsh criminal justice by moving away from a system reliant on a defendant to 'know' when to plead guilty towards a system which requires the prosecution discharge the burden of proof by revealing the totality of their case from the beginning of the process.