

THE APPLICATION IN ROMANIAN JURISPRUDENCE OF THE “ALFORD PLEA” AND “NOLO CONTENDERE” PRINCIPLES

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Abstract: *The article aims to analyze the jurisprudence of the highest courts regarding the interpretation and application of guilt plea standards known in the United States of America as the "Alford" or "nolo contendere" pleas. In this regard, it will briefly present the special procedure of the guilty plea agreement, with a focus on the acknowledgment of guilt and the imputed offense by the defendants. Furthermore, it will present the elements of the aforementioned American procedures and recent relevant jurisprudence, followed by a conclusion.*

Key words: *Alford plea, nolo contendere, plea agreement, Criminal procedure*

1. Introduction

In the Romanian criminal procedural system, the plea agreement has become a procedural instrument used more and more frequently. Under these circumstances, judicial practice has revealed difficulties in assessing the validity of the agreement given by the defendant in this special procedure when the defendant refuses to make a statement acknowledging the commission of the offense but accepts the conclusion of the guilty plea agreement.

2. The guilty plea agreement in Romanian criminal procedure

As a procedural act, the plea agreement constitutes one of the two ways in which the prosecutor can bring a case before the court, having certain peculiarities compared to the indictment.

One of these peculiarities is that the plea agreement has two participants, expressly provided for by the criminal procedural law: the prosecutor and the defendant. Both participants are actively and directly involved in reaching an agreement on the resolution of the criminal action in question. The superior hierarchical prosecutor also joins them, but their role is strictly limited to approving the boundaries of the agreement and negotiation.

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The prosecutor, as the holder of the plea agreement, oversees or conducts the criminal prosecution, either by initiating the negotiation procedure or by accepting the defendant's initiative. They are the sole authority who can decide to interrupt the negotiation when, despite consensus, they disagree with the limits established by the hierarchical prosecutor.

On the other hand, the defendant, as the person against whom the criminal action is taken, is a co-holder of the procedure and the plea agreement. Their right is limited to initiating the agreement.

According to Article 478 of the Code of Criminal Procedure, the actual conclusion of the plea agreement depends solely on the will of the prosecutor. The plea agreement is valid only if the mentioned participants consent to it. The defendant can refuse the prosecutor's initiative to conclude such an agreement, as their right is personal. The defense counsel has the right to assist the defendant during the negotiated justice procedure.

However, the defendant's right to initiate a plea agreement is not absolute but subject to two expressly regulated limitations: for offenses for which the law provides a maximum prison sentence of 15 years or life imprisonment and not being a minor (Article 480, paragraph 1, of the Code of Criminal Procedure).

Although Article 478 of the Code of Criminal Procedure does not explicitly determine the hierarchical prosecutor's involvement in this procedure, it aims to ensure that the case prosecutor respects the negotiation limits and formal conditions regarding the concluded act. The hierarchical prosecutor's role is to ensure legality rather than opportunity or validity.

Decision No. 235 of the Constitutional Court of Romania dated April 7, 2015, regarding the exception of unconstitutionality of the provisions of Article 484(2) and Article 488 of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, No. 364 of May 26, 2015, established the right of civil parties, injured persons, and civilly liable parties to participate, based on their procedural capacity, in the adjudication of the plea agreement. However, they are not allowed to participate in the negotiation procedure. This decision concluded that the provisions of Article 488 of the Code of Criminal Procedure, as well as the legislative solution included in Article 484(2) of the Code of Criminal Procedure, which exclude these parties from being heard before the trial court, are unconstitutional.

According to Article 479 of the Code of Criminal Procedure, the plea agreement implies the acknowledgment of committing the offense, accepting the legal classification for which the criminal action has been initiated. It relates to the type and quantum of punishment, as well as the mode of its execution. Article 482, item h), of the Code of Criminal Procedure stipulates that the scope can also include waiving the imposition of punishment or deferring its execution.

To conclude the agreement, the defendant must acknowledge the offense without reservations and accept the legal classification, which is closely related to the acknowledgment of the offense itself. Both aspects are included in negotiating the solution to the criminal action, the nature and extent of the punishment, and the mode of execution. Legal classification refers to the correspondence between the offense and

the entirety of special and general norms that determine the legal characterization.

Since the procedure before the court is not adversarial, the defendant must be aware of the applicable legal provisions regarding the corresponding sanction to their legal situation from the initiation phase of the plea agreement procedure (e.g., aggravating circumstances, mitigating circumstances, recidivism). It is the prosecutor who proposes the legal classification to the defendant, and once the legal classification has been established through the order initiating the criminal action or through a change of legal classification, the defendant has no right to negotiate it.

Article 482, item g), of the Code of Criminal Procedure, which establishes the condition for the validity of the agreement (the defendant's express declaration acknowledging the commission of the offense and accepting the legal classification), should be interpreted to mean that until the completion of the negotiated justice procedure during the pretrial phase, the defendant can withdraw their consent.

3. The “Alford” plea system

An Alford plea, also known as an Alford guilty plea or a best-interest plea, is a legal term used in the United States criminal justice system. It allows a defendant to plead guilty while maintaining their innocence or without admitting guilt. By entering an Alford plea, the defendant acknowledges that the prosecution has enough evidence to likely result in a conviction, but they may still assert their innocence.

The name "Alford plea" comes from the U.S. Supreme Court case *North Carolina v. Alford* (1970), where the court recognized the validity of such pleas. In that case, Henry Alford pleaded guilty to second-degree murder while maintaining his innocence, believing that the evidence against him was strong enough to potentially result in a conviction and a more severe punishment.

An Alford plea is typically used as a strategic choice when a defendant wants to minimize the potential consequences of a trial or believes that a guilty verdict is likely. By entering an Alford plea, the defendant may receive a lesser sentence or avoid the risk of a more severe punishment if found guilty at trial.

It's important to note that the specific rules and availability of Alford pleas may vary by jurisdiction within the United States. Some jurisdictions do not allow Alford pleas, while others have specific guidelines and procedures for accepting them.

The main characteristics of the Alford plea are:

1. **Nature of the plea:** An Alford plea allows a defendant to maintain their innocence while still pleading guilty. It is essentially a compromise between asserting innocence and accepting a guilty plea. The defendant acknowledges that the evidence presented by the prosecution is likely to lead to a conviction, even if they personally maintain their innocence.

2. **Legal implications:** When a defendant enters an Alford plea, they are treated as guilty by the court, and a conviction is typically recorded. The plea has the same legal consequences as a regular guilty plea, including potential sentencing, probation, or other penalties associated with the offense.

3. **Factors influencing the use of Alford plea:** Several factors may influence a

defendant's decision to enter an Alford plea. These may include the strength of the prosecution's case, potential risks associated with going to trial, the possibility of receiving a reduced sentence, concerns about the credibility of witnesses, or other strategic considerations.

4. Judicial acceptance: Whether an Alford plea is accepted by the court depends on the specific jurisdiction and the judge overseeing the case. Some judges may reject Alford pleas outright, while others may accept them on a case-by-case basis.

5. Legal rights and consequences: By entering an Alford plea, defendants may waive certain legal rights, such as the right to appeal based on the claim of innocence. However, the specific implications may vary depending on jurisdiction and the terms of the plea agreement.

6. Public perception: Alford pleas can be controversial, as they involve a defendant pleading guilty while maintaining their innocence. Critics argue that it allows guilty individuals to avoid taking responsibility for their actions, while supporters argue that it provides an avenue for defendants who believe they may be wrongly convicted to secure a more favorable outcome.

4. The „nolo contendere” plea

The "nolo contendere" plea, also known as a "no contest" plea, is a legal term used in the United States criminal justice system. It is a plea where a defendant does not admit guilt but also does not contest the charges brought against them. In Latin, "nolo contendere" means "I do not wish to contend."

Here are some key aspects related to the nolo contendere plea:

Legal implications: When a defendant enters a nolo contendere plea, they are treated as if they pleaded guilty for the purposes of the case. While the defendant does not admit guilt, the court proceeds as if they did, and a conviction is typically recorded. This plea can result in the same legal consequences as a guilty plea, including potential sentencing, probation, or other penalties associated with the offense.

Purpose and use: The nolo contendere plea is often used as a strategic choice by defendants who may face civil lawsuits arising from the same incident. By entering a nolo contendere plea, the defendant avoids making an admission of guilt that could be used against them in subsequent civil proceedings.

Limited use and acceptance: The acceptance of a nolo contendere plea depends on the specific jurisdiction and the judge overseeing the case. Not all jurisdictions or judges accept nolo contendere pleas, and their availability may vary. Some jurisdictions may have specific rules or limitations regarding when this plea can be used or accepted.

Effect on evidence: While a nolo contendere plea does not admit guilt, it can be introduced as evidence in subsequent civil proceedings related to the same incident. The plea can be used to establish liability or negligence, as it is considered an admission for civil purposes.

It's important to note that the availability and acceptance of the nolo contendere plea can vary across jurisdictions within the United States. Additionally, the specific rules and implications surrounding this plea may differ depending on local laws and practices.

It's advisable to consult with a legal professional familiar with the laws and procedures of the relevant jurisdiction for accurate and up-to-date information.

5. Jurisprudence

In case no. 1752/62/2021 of the Brasov Court of Appeal, the judicial control body noted that the first instance court rejected the guilty plea agreement because (i) the defendant did not provide a statement regarding the manner in which the offense was committed, as a mere affirmation of acknowledging the offense was deemed insufficient for concluding the agreement, and (ii) there was a lack of negotiation regarding the nature and duration of the supplementary penalty.

During the appeal hearing, it was established that no legal provision conditions the conclusion of a guilty plea agreement or the court's acceptance of the prosecutor's submission under Article 483 of the Criminal Procedure Code on the existence of a specific form of expression by the defendant regarding the acknowledgment of guilt and the request for concluding the agreement. The defendant explicitly waived the right to remain silent and expressed their acknowledgment of the offense and intention to conclude the agreement, both as a suspect during a formal statement and as a defendant.

For assuming responsibility regarding the committed offense, it is not necessary to present a detailed account of the factual circumstances; it is sufficient for the statement to indicate that the defendant understands the accusation, acknowledges the factual circumstances presented in the indictment, accepts having committed the actions constituting the objective elements of the offense, and admits the specific form of guilt attributed to them. Considering that the hearing took place nearly two years after the commission of the offense, it is reasonable that the defendant may not recall or be able to present all the details of the events, but the acknowledgment of guilt cannot be disregarded for this reason.

It is important to emphasize that the statement given by the defendant in the ordinary criminal procedure (regulated in Articles 107-110 of the Code of Criminal Procedure) is different from that in the special procedure (provided for in Article 482 letter g of the Code of Criminal Procedure), not only in terms of its purpose and effects but also in terms of the content imposed by procedural norms and rules. Thus, the statement in the special procedure must be explicit, and its content must consist of acknowledging the commission of the offense and the defendant's acceptance of the legal classification for which the criminal action has been initiated.

Although both statements constitute the same means of evidence, regulated, in general, in Article 97(2) letter a) of the Code of Criminal Procedure, they represent two subcategories of the statement that are fundamentally different in terms of content, the procedure by which they are given by the defendant, the procedural guarantees provided to the defendant, and the purpose of their administration, as mentioned by the Constitutional Court of Romania in decision no. 490/2022.

In the case of the same Court of Appeal, no. 2630/62/2019, the agreement was accepted, dismissing the criticisms that the benefits were not received as bribes since

the respective tasks were not within the defendant's official duties. It was considered on appeal that the defendant, under the pretext of criticizing the legal classification, is in fact retracting their consent to the agreement.

The judicial control body noted that although the defendant emphasizes that their appeal does not retract their consent given for the conclusion of the guilty plea agreement but merely criticizes the typification of the offense regarding the qualification requirement of the active subject of the bribery offense, the Court finds that in this way, the defendant is essentially challenging the legal classification of the imputed offense, which is part of the content of the agreement to which they previously consented, according to Article 479 of the Criminal Procedure Code, which provides that its object consists not only of acknowledging the commission of the offense but also accepting the legal classification. The fact that the appellant dresses their criticism in the cloak of illegality does not change its true legal nature, which pertains to the legal classification of the reported offense, as that correspondence between the concrete factual situation and the abstract typicity of the constituent elements of the incriminating norm.

Thus, noting in this respect that the defendant retracts their consent through the submitted appeal, the Court finds that this procedural attitude contravenes the provisions of Article 485(1)(b) first clause of the Criminal Procedure Code, as interpreted by decision no. 5/2017 of the High Court given in a legal interest appeal, which expressly prohibits the possibility of withdrawing validly expressed consent to the conclusion of the guilty plea agreement.

6. Conclusion

Based on the analyzed jurisprudence, we consider that within the special procedure of the guilty plea agreement, the limits established by law regarding the defendant's acknowledgment of committing the offense and accepting the legal classification for which the criminal action has been initiated make the "nolo contendere" system applicable, but reject the "Alford" plea, which is incompatible with the current regulation.

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