MRE 410 Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;

(3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

History

410 New eff. Mar 1, 1978; am. eff. Oct 1, 1991

Note

For the most part, the October 1, 1991, amendments conformed MRE 410 to the current version of its federal counterpart. The conforming changes included the placement of the commas around the phrase "in any civil or criminal proceeding." That clarified the rule's original intent as explained in *Lichon v American Universal Ins Co*, 435 Mich 408 (1990). However, the exception in subrule (2), which exception has no federal counterpart, altered one of the holdings in *Lichon* by allowing evidence of a nolo contendere plea in certain circumstances. See also MRE 803(22), which was amended concurrently.

I. Cases Interpreting MRE 410

A. Nolo Contendere

1. In General

§410.1

In re Andino, 163 Mich App 764, 415 NW2d 306 (1987). Evidence of a nolo contendere plea is inadmissible at the adjudicative phase of termination proceedings as proof that the respondent committed the acts forming the basis for the charge to which he or she entered his or her plea. Evidence of the plea is admissible at the dispositional phase, if it is relevant and material, to establish the fact of conviction.

McCarthy v Belcher, 128 Mich App 344, 340 NW2d 848 (1983). It was error, albeit harmless error, for plaintiff to cross-examine a defendant regarding a police report used as the basis for a nolo contendere plea to another action and to ask if defendant's lawyer had admitted that the report was true.

2. Introduction in a Civil Action

§410.2

Lichon v American Universal Ins Co, 435 Mich 408, 459 NW2d 288 (1990), *rev'g* 173 Mich App 178, 433 NW2d 394 (1988). A nolo contendere plea is not an admission of guilt that can be used in a later civil or criminal trial against the pleader. A plea of nolo contendere merely communicates to the court that the criminal defendant does not wish to contest the charges and will acquiesce in the imposition of punishment. In addition, to the extent that a nolo contendere plea is an implicit admission of guilt, it is only for the purposes of the criminal proceeding in which the plea is made. Under both MRE 410 and MRE 803(22), nolo contendere pleas are neither explicit nor implicit admissions of guilt that can be used against a pleader in a subsequent lawsuit. (*Note:* The October 1, 1991, amendments to MRE 410 and MRE 803(22) change *Lichon* on this point. After the amendments, a plea of nolo contendere to a criminal charge may be admitted in a later civil proceeding to support a defense against a claim asserted by the person who entered the plea.)

Shuler v Michigan Physicians Mut Liab Co, 260 Mich App 492, 679 NW2d 106 (2004). Conviction that ordinarily could be used for impeachment purposes under MRE 609 is not excluded from that use under MRE 410 because conviction resulted from a plea of no contest.

Carpenter v Consumers Power Co, 230 Mich App 547, 584 NW2d 375 (1998), *vacated and remanded on other grounds,* 463 Mich 1, 615 NW2d 17 (2000). "MRE 410 was amended in 1991 to provide that evidence of a nolo contendere plea is admissible for the same purposes as evidence of a guilty plea." 230 Mich App at 555. Further, evidence of a nolo contendere plea is barred only in a proceeding against the defendant who made the plea. In this case, plaintiffs' son, a nonparty to this action, pleaded nolo contendere to possession of adulterated milk. Evidence of the plea was properly admitted.

Akyan v Auto Club Ins Ass'n (On Rehearing), 208 Mich App 271, 527 NW2d 63 (1994). Evidence of plaintiff's prior plea of no contest to a criminal charge was admissible pursuant to MRE 410(2) and MRE 803(22) against her in an action alleging breach of an insurance contract but did not automatically and conclusively ban the claim. *Lichon* does not dictate that the plaintiff's no-contest plea to a charge of fraud judicially estops her from pursuing a civil action against her insurer.

McCarthy v Belcher, 128 Mich App 344, 340 NW2d 848 (1983). In a civil proceeding, MRE 410 prohibits cross-examination of a defendant about a criminal proceeding in which he or she pleaded nolo contendere. However, in *McCarthy,* reversal was not required because the criminal nature of the proceeding was not revealed to the jury, defendant had denied the accuracy of the report, and the trial court gave prompt cautionary instruction.

B. Perjury or False Statement

§410.3

People v Brown, 96 Mich App 565, 293 NW2d 632 (1980). Statements made during plea bargaining may be admissible in a proceeding for perjury or false statement. A defendant should always be put under oath at the time of a plea.

C. Plea Negotiations

1. Introduction by the Defendant

§410.4

People v Knight, 122 Mich App 584, 333 NW2d 94 (1983). It is unclear whether MRE 410 allows a criminal defendant to introduce evidence of plea negotiations. But in *Knight,* because defendant injected the issue into the trial, he could not claim reversible error in the prosecutor's further questions on the subject.

2. Necessary for MRE 410 to Apply

§410.5

People v Hannold, 217 Mich App 382, 551 NW2d 710 (1996). Defendant's incriminating statements made to the police on the day of his arrest were not plea negotiations and therefore were not admitted in violation of MRE 410. There was no evidence to indicate that defendant had a subjective expectation to negotiate a plea when he made the incriminating statements, and such expectations would not have been reasonable under the circumstances. No prosecuting attorney was present when the statements were made to the police.

People v Butler, 193 Mich App 63, 483 NW2d 430 (1992). There must be some government action for plea negotiations to have taken place and, thus, for MRE 410 to apply. If the person who allegedly promises leniency is not a government agent, it is not realistic for the defendant to rely on the promise.

People v Heffron, 175 Mich App 543, 438 NW2d 253 (1988). Although statements made during guilty plea negotiations must be excluded, the rule does not apply where the possibility of a guilty plea was never discussed. In *Heffron,* a charge reduction and sentencing recommendation was discussed in exchange for a truthful statement and the confession was admissible at trial.

People v Oliver, 111 Mich App 734, 314 NW2d 740 (1981). A two-tiered analysis must be applied to determine if plea negotiations have taken place. First, has the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion? Second, was the accused's expectation reasonable given the totality of the objective circumstances?

D. Policy Behind MRE 410

§410.6

People v Jones, 416 Mich 354, 331 NW2d 406 (1982), *cert denied,* 460 US 1084 (1983). A confession made in response to a promise of leniency is involuntary and introduction of such a confession violates the Fifth Amendment right against self-incrimination. MRE 410 supports this result. *See also People v Conte*, 421 Mich 704, 365 NW2d 648 (1984).

People v Pearson, 157 Mich App 68, 403 NW2d 498 (1987). The policy of MRE 410 to encourage negotiation and dialogue was not thwarted by the admission into evidence of statements defendant volunteered at the time of arrest.

People v Manges, 134 Mich App 49, 350 NW2d 829 (1984). The principle underlying MRE 410 is that plea negotiations should be encouraged and, for plea bargaining to work, the defendant must be free to negotiate without fear that statements may later be used against him or her at trial.

People v Oliver, 111 Mich App 734, 314 NW2d 740 (1981). Plea bargaining should be encouraged to help achieve the effective administration of criminal justice, and admissibility would discourage such bargaining. For plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that the statements will later be used against him or her.

E. Prosecutor's Duty to Disclose

§410.7

People v Burgess, 153 Mich App 715, 396 NW2d 814 (1986). If a plea agreement between a witness and the prosecution includes consideration for testimony against a codefendant, the prosecutor must disclose the consideration to the jury if defense counsel desires it and if the prosecutor is duty bound to correct any false testimony regarding the agreement.

F. Statements Made in Connection with Pleas

§410.8

People v Dunn, 446 Mich 409, 521 NW2d 255 (1994). Admission at trial of the detectives' testimony concerning statements made by defendant in connection with his offer to plead guilty to a lesser offense was reversible error. Defendant had a subjective expectation of negotiating a plea at the time of the discussion and his expectation was reasonable given the totality of the objective circumstances.

People v Manges, 134 Mich App 49, 350 NW2d 829 (1984). Not only pleas or offers to plea but also any statements made in connection with the plea or offer are inadmissible under MRE 410. A two-tiered analysis applies to the determination of whether a particular discussion is a plea negotiation to which the rule applies. First, did the accused exhibit an actual subjective expectation to negotiate a plea at the time of the discussion? Second, was the accused's expectation reasonable given all the objective circumstances? (Note: This two-tiered analysis predates the 1991 amendments to MRE 410.)

G. Waiver

§410.9

People v Stevens, 461 Mich 655, 610 NW2d 881, *cert denied*, 531 US 902 (2000). The supreme court held that the protections of MRE 410, like other basic rights, are fully waivable. Because defendant was advised of his *Miranda* rights prior to plea negotiations, his statements were admissible at trial in the prosecutor's case-in-chief, as well as in rebuttal. The court noted that its ruling will not discourage plea bargaining and strikes the appropriate balance by retaining MRE protections but allowing defendants to waive those protections. There was no indication that defendant's statements were unknowingly or involuntarily made.