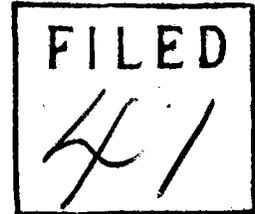


CRIMINAL PROCEDURE: When and for what purpose a plea of nolo contendere may be used as evidence.

June 5, 1945



Mr. J. W. Hobbs, Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date, which reads as follows:

"Enclosed kindly find a photostatic copy which Mr. Rosenbaum of the Better Business Bureau of St. Louis, Missouri, requested that we send your office, along with the request for an opinion as to whether the plea of nolo contendere in the Federal Court is equivalent to a plea of guilty in which he cites some cases on the matter."

From a reading of the data attached to your letter, we conclude that you desire an opinion upon the legal effect of a plea of nolo contendere in a Federal Court in connection with your duties and functions under Sections 10 and 14 of the Missouri Real Estate Commission Act, Laws of Missouri, 1945, page 424.

Section 10 of said Act authorizes the Missouri Real Estate Commission to suspend or revoke the license of any real estate broker or salesman if the Commission finds that such broker or salesman has been guilty of certain conduct.

Section 14 of said Act reads as follows:

"Where during the term of any license issued by the commission the licensee shall

be convicted in a court of competent jurisdiction in the state of Missouri or any state (including federal courts) of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the commission, the commission shall revoke forthwith the license by it theretofore issued to the licensee so convicted. No license shall be issued by the commission to any person known by it to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortions, criminal conspiracy to defraud, or other like offense or offenses, or association or copartnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly."

Your request in reality involves two questions. The first one is whether a plea of nolo contendere entered by a defendant in a Federal Court to a criminal charge can be used as evidence in a proceeding by the Missouri Real Estate Commission under Section 10, supra, as proof that the defendant who entered said plea has been guilty of the conduct charged in the case in which he entered said plea.

The second question is whether a plea of nolo contendere entered by a defendant in a criminal case in a Federal Court amounts to a conviction of the defendant of the charges against him in said court so that same could be used in proceedings under Section 14, supra, as proof that a licensee, or applicant for a license, of the Missouri Real Estate Commission had been convicted of a crime.

There is only one case in Missouri in which the Supreme Court has discussed at length the legal effect of a plea of nolo contendere. That case is *Weibling et al. v. Terry*, 177 S.W. (2d) 502. The following is a portion of said discussion:

"It is settled that a plea of nolo contendere amounts to an implied confession of guilt and for the purposes of the prosecution is equivalent to a plea of guilty. The plea should not be used by one who has not violated the law. United States v. Norris, 281 U.S. 619, 50 S. Ct. 424, 74 L. Ed. 1076.

"The chief distinction of a plea of nolo contendere lies in the fact it is not a general admission of the truth of the facts charged as is a plea of guilty. It is a qualified admission limited for use only in the proceeding in which it is entered and may not be used as an admission in any other proceeding. Its utility was originally found in the class of cases where both a criminal prosecution and a civil suit arose out of the same act such as trespass for assault and battery. In such cases a plea of nolo contendere entered in the criminal prosecution furnished no admission of guilt to be used in the civil suit. On the other hand a plea of guilty in the criminal prosecution, being a confession of the truth of the charge, was available as an admission of the accused in the civil suit.

"We think the confusion in the cases considering convictions on pleas of nolo contendere result from a judicial practice of clothing the judgment of conviction with the characteristics of the plea or in speaking of the plea and the conviction as one and the same. For example, there are cases which hold that a judgment of conviction on a plea of nolo contendere may not be used as an admission of guilt. But a judgment of conviction could never be used as such an admission, regardless of the nature of the plea. It is the plea of guilty which carries the evidentiary force as an admission, not the judgment of conviction entered on the plea.

"Ordinarily a judgment of conviction in a criminal prosecution is not proof of anything in a civil proceeding except the mere fact of its rendition. By statute, in certain instances, a judgment of conviction has been given force because of the fact of its rendition. In such instances the judgment of conviction is made a basis for enforcing a statutory disability. Such statutes in no wise authorize the use of a conviction as an admission to be used to establish liability in a civil suit. Nor do the statutes make any distinction in convictions according to the nature of the plea resulting in such convictions. Nor is there any logical reason for a distinction. For statutory purposes a conviction on a plea of not guilty carries the same force as one entered on a plea of guilty."

As we interpret the above case, the court held that a plea of nolo contendere in a criminal case in a Federal Court is in effect a plea of guilty for the purposes of that case only, but that it is not such an admission by the defendant of the truth of the charges against him in said case as can be used against him in any other case; but that if a judgment of conviction is entered against such defendant in the Federal Court upon said plea of nolo contendere, the conviction is as complete and effective a conviction of the crime charged against the defendant as if said defendant had pleaded not guilty and had been found guilty as the result of a trial.

The foregoing case further discussed at length what constitutes a conviction in a criminal case. The court, l. c. 504, said:

"'Convicted' is generally used in its broad and comprehensive sense meaning that a judgment of final condemnation has been pronounced against the accused."

If, therefore, the defendant in a criminal case in the Federal Court enters a plea of nolo contendere, and upon said

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plea a judgment pronouncing the defendant guilty is entered by the court and sentence is imposed, the defendant then stands convicted of the charges against him in that case. However, in any other proceeding such conviction could not be used for any other purpose than to prove that the defendant had in fact been convicted. It could not be used in any other proceeding to prove that he was in fact guilty of the charges of which he had been convicted. If, therefore, a proceeding is instituted against a licensee under the provisions of Section 14 of the Missouri Real Estate Commission Act, charging such licensee with having been convicted of a crime in the Federal Court, such charge could be proved by proof of a conviction against such licensee entered upon a plea of nolo contendere. However, if a proceeding is instituted before the Commission under the provisions of Section 10, supra, charging a licensee with certain conduct, the conviction of the licensee in the Federal Court entered upon a plea of nolo contendere to the same charges could not be used as evidence to prove the truth of the charges then pending before the Missouri Real Estate Commission.

Your attention is directed to the fact that conviction does not always follow a plea of nolo contendere in the Federal Court. Section 724, Title 18, U.S.C.A., provides:

"When it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby (the court) shall have power * * * * to suspend the imposition or execution of sentence and to place the defendant upon probation."

The practice of suspending the imposition of sentence is quite prevalent in the Federal Courts. If, therefore, a defendant enters a plea of nolo contendere and no judgment of conviction is entered, he has not been convicted of the charges to which he entered said plea. In the recent case of Meyer v. Missouri Real Estate Commission, 183 S. W. (2d) 342, the Kansas City Court of Appeals considered the effect of an order suspending the imposition of sentence entered upon a plea of nolo contendere without a judgment of conviction, and at the conclusion of the discussion said, 1. c. 346:

"Various Federal Courts of Appeals had held that where the sentence had been suspended there was no final judgment and no appeal was allowable, following cases, among others, of the Supreme Court of the United States. The Supreme Court in the Korematsu case, supra, referred to some of these cases where it was held that there is no final judgment in a criminal case prior to sentence, but did not overrule them. We are of the opinion that the two cases cited by the defendant on this point are not applicable, but that they fall into that class of cases mentioned in People v. Fabian and Smith v. Commonwealth, supra, as an appeal is merely a step in the particular case. However, where the reference is to the ascertainment of guilt in another proceeding (as here), and the question as to its bearing upon the status or rights of the individual in a subsequent case is under consideration, a broader meaning is to be attached to the word 'conviction', and a person is not deemed to have been convicted unless it is shown that a judgment is pronounced upon a verdict or plea of guilty. The rule is well stated in People v. Fabian, supra, as follows: 'Where sentence is suspended, and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so, also, the indirect consequences are likewise postponed.'"

In the Meyer case, just cited from, the court held that the Real Estate Commission could not substantiate charges against a licensee of certain conduct by proof that the licensee had entered a plea of nolo contendere in the Federal Court to charges of the same conduct when imposition of sentence was suspended and the defendant was placed on probation. Therefore, the Commission should look beyond a plea of nolo contendere to ascertain whether a judgment of conviction was entered upon such plea before it can consider said plea for any purpose.

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CONCLUSION

It is, therefore, the opinion of this office that (1) a plea of nolo contendere entered by a defendant to criminal charges in the Federal Court cannot be used in any other proceeding except the one in which said plea was entered as evidence of the guilt of the defendant of such charges, but (2) that if a judgment of conviction is entered upon a plea of nolo contendere in the Federal Court, such judgment amounts to a conviction of the defendant of the charges to which he entered said plea, and such conviction can be used in any proceeding where it is sought to prove that the defendant has been convicted of such charges.

Respectfully submitted

HARRY H. KAY
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APPROVED:

J. E. TAYLOR
Attorney General

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