

29 A.D.2d 656, 286 N.Y.S.2d 644  
(Cite as: 29 A.D.2d 656, 286 N.Y.S.2d 644)


**C**

Supreme Court, Appellate Division, Second Department, New York.  
The PEOPLE, etc., Respondent,  
v.  
Theodore Roosevelt MITTEL, Appellant.  
Jan. 8, 1968.

Coram nobis proceeding to vacate conviction upon guilty plea. The Supreme Court, Queens County, denied the application without hearing, and appeal was taken. The Supreme Court, Appellate Division, held that prisoner was entitled to hearing on contentions that he had been induced to plead guilty because of assistant district attorney's threat of maximum sentence otherwise possible and because of judge's promise that if he did plead guilty he would not get more than five years' confinement, absent conclusive repudiation of those contentions in minutes at time of guilty plea.

Reversed; remitted for hearing and new determination.

West Headnotes


**[1] Criminal Law 110**  **1655(3)**

110 Criminal Law  
110XXX Post-Conviction Relief  
110XXX(C) Proceedings  
110XXX(C)3 Hearing and Determination  
110k1651 Necessity for Hearing  
110k1655 Particular Issues  
110k1655(3) k. Plea. **Most Cited**

**Cases**

(Formerly 110k9971/4(5), 110k997(16))  
Prisoner seeking coram nobis relief from conviction on guilty plea was entitled to hearing on contentions that he had been induced to plead guilty because of assistant district attorney's threat of maximum sentence otherwise possible and because of judge's promise that if he did plead guilty he would not get more than five years' confinement, absent

conclusive repudiation of those contentions in minutes at time of guilty plea.

**[2] Criminal Law 110**  **1618(3)**

110 Criminal Law  
110XXX Post-Conviction Relief  
110XXX(C) Proceedings  
110XXX(C)2 Affidavits and Evidence  
110k1616 Sufficiency  
110k1618 Particular Issues  
110k1618(3) k. Plea. **Most Cited**

**Cases**

(Formerly 110k997.15(1), 110k997(15))  
In coram nobis proceeding wherein prisoner sought relief from conviction on guilty plea on ground, inter alia, that he had been told by assistant district attorney that if he did not plead guilty he would get the maximum sentence possible upon conviction, district attorney should have produced affidavit from the assistant district attorney, who was still in active practice.  
**\*\*645** Thomas J. Mackell, Dist. Atty., Queens County, Kew Gardens, Timothy J. Flaherty, Asst. Dist. Atty., of counsel, for respondent.

Anthony F. Marra, New York City, **Joel A. Brenner**, New York City, of counsel, for appellant.

Before BELDOCK, P.J., and BRENNAN, RABIN, HOPKINS and BENJAMIN, JJ.

**MEMORANDUM BY THE COURT.**

**\*656** In a Coram nobis proceeding to vacate a judgment of the former County Court, Queens County, rendered March 29, 1960 upon appellant's guilty plea, order of the Supreme Court, Queens County, dated November 16, 1966 and made upon reargument, which denied the application without a hearing, reversed, on the law, and proceeding remitted to the Supreme Court, Queens County, for a hearing and new determination. No questions of fact were

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considered on this appeal.

Defendant's allegation in this proceeding is that he was told by an Assistant District Attorney that, if he did not plead guilty to robbery in the second degree and went to trial, he would get the maximum sentence possible upon conviction; that despite the threat he 'did not want to take the plea (even at that point), but then the Hon. George P. Stier told \*657 defendant \* \* \* (within the hearing of witnesses) that if he plead guilty, he would not get any more than five years at Elmira Reception Center \* \* \*.' Defendant pleaded guilty and was sentenced to a term of 3 to 15 years at Elmira Reception Center. His present twofold contentions are that he was induced to plead guilty 'because of the District Attorney's threat and because of the Judge's promise \* \* \*.'

[1][2] In our opinion, the minutes at the time of the guilty pleading do not conclusively refute defendant's claim as to the Assistant District \*\*646 Attorney's threat and the court's promise ( [People v. Granello](#), 18 N.Y.2d 823, 275 N.Y.S.2d 528, 222 N.E.2d 393; [People v. Elfe](#), 18 N.Y.2d 601, 272 N.Y.S.2d 373, 219 N.E.2d 195; [People v. Glasper](#), 14 N.Y.2d 893, 252 N.Y.S.2d 92, 200 N.E.2d 776). Moreover, we are of the opinion that the District Attorney should have produced an affidavit from the Assistant District Attorney, who is presently in active practice ( [People v. Scott](#), 10 N.Y.2d 380, 223 N.Y.S.2d 472, 179 N.E.2d 486).

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