IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No. 227 CR 2014
	:	
KENNETH ALLEN WANAMAKER, JR.,	:	
Defendant	:	

Criminal Law - Enforcement of a Plea Agreement - Enforcement as a Matter of Right – Court Approval as a Condition Precedent to Enforcement - Specific Performance – Pa.R.Crim.P. 590 - Enforcement as a Matter of Judicial Discretion - Fundamental Fairness

1. Pursuant to Pa.R.Crim.P. 590(A)(3), a trial court shall not accept a plea of guilty or *nolo contendere* unless the court first determines after inquiry of the defendant that the plea is voluntarily and understandably tendered.

2. The terms of a plea agreement are not binding upon the court, and unless and until the court approves the agreement, it is not specifically enforceable by either party.

3. Because a plea agreement is subject to the court's approval before it is enforceable, no right to specific performance of a plea agreement exists before this condition precedent has been met.

4. A plea agreement which has neither been entered of record nor accepted by the court is at most an executory agreement; it is not specifically enforceable by either party.

5. Inherent in the powers of a district attorney is the right to exercise prosecutorial discretion in a manner believed to be in the public's best interests, absent invidiously discriminatory factors unrelated to the protection of society such as race, religion, or national origin.

6. Before a plea agreement is presented to and approved by the court, the district attorney may decide, as a function of prosecutorial discretion, that the agreement is not in the best interests and/or for the general welfare of the

citizens of this Commonwealth.

7. Notwithstanding that neither party has a "right" to specific performance of a plea agreement which has not been presented to and approved by the court, enforcement of the agreement may nevertheless be warranted in the interest of justice, as a matter of judicial discretion, and not as a matter of right to specific performance.

8. Defendant was not entitled to discretionary enforcement of a plea agreement whose existence was not disputed and which had not been presented to or accepted by the trial court where the district attorney's decision to withdraw a plea offer previously made to and accepted by the Defendant was a permissible exercise of prosecutorial discretion and where the defendant had not detrimentally relied upon the agreement to his prejudice.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No. 227 CR 2014
	:	
KENNETH ALLEN WANAMAKER, JR., Defendant	:	

Seth E. Miller, Esquire — Counsel for Commonwealth
Assistant District Attorney

Matthew J. Rapa, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – December 21, 2016

This case distinguishes between a criminal defendant's legal right to specifically enforce an executory plea agreement and enforcement of a plea agreement, not as a matter of right, but as a matter of judicial discretion in the interest of justice.

FACTUAL AND PROCEDURAL BACKGROUND

The Defendant in these proceedings, Kenneth Allen Wanamaker, Jr., claims and the Commonwealth admits that shortly before the call of the criminal trial list held on March 29, 2016, the parties negotiated and reached a plea agreement. A written stipulation documenting the terms of this agreement was signed by the Assistant District Attorney assigned to the case, which was in turn signed by the Defendant and his counsel and returned to the District Attorney's Office for filing and the

scheduling of a plea hearing. (Defendant Exhibit No. 1). Pursuant to the terms of this stipulation, Defendant agreed to plead guilty to one count of Possession of Drug Paraphernalia, 35 P.S. § 780-113(a)(32), Count 2 of the criminal information, and one count of Driving Under the Influence of Alcohol, 75 Pa.C.S.A. § 3802(a)(1) (Driving Under the Influence – General Impairment), Count 10 of the criminal information. Count 10 was specially added to the criminal information pursuant to a separate stipulation of the parties filed on February 9, 2016, and approved by court order of the same date.

At the call of the trial list on March 29, 2016, Defendant's counsel advised the court that he had just learned that the Commonwealth was withdrawing its offer, that no satisfactory explanation was given for this withdrawal, and that a continuance of the trial scheduled for April 4, 2016, was therefore requested. Defense counsel further indicated that he intended to review the possibility of enforcing the parties' stipulation. Given these developments, Defendant's continuance request was granted. On May 24, 2016, Defendant filed his Motion to Compel Specific Performance of the Plea Agreement.

In this Motion, Defendant recites the procedural and factual background leading to the entry of the plea agreement[1]

[1] As evidenced by this history, Defendant is not without unclean hands. Previously, Defendant entered a plea agreement in July 2015 to plead guilty to possession of drug paraphernalia, 35 P.S. § 780-113(a)(32), Count 2 of the

and alleges that unexpectedly and shortly before the call of the trial list on March 29, 2016, the Commonwealth suddenly withdrew its offer. In support of his Motion to Compel Enforcement of the Plea Agreement, Defendant cites the Superior Court's decision in Commonwealth v. Mebane, 58 A.3d 1243 (Pa.Super. 2012). In its answer to Defendant's Motion, the Commonwealth admits the existence and signing of the stipulation but notes that it was never filed with the court; contends that "no plea agreement exists unless and until it is presented to the court," citing and quoting Commonwealth v. McElroy, 665 A.2d 813, 817 (Pa.Super. 1995); and argues that no right to specific performance of a plea agreement exists before it is presented to the court for approval, citing Commonwealth v. Spence, 627 A.2d 1176, 1184 (Pa. 1993). The Commonwealth further states in its

---

criminal information, and driving under the influence, 75 Pa.C.S.A. § 3802(d)(1)(ii) (driving when there was present in his blood any amount of a schedule II or schedule III controlled substance which had not been medically prescribed, here methamphetamine), Count 3 of the information. Defendant pled guilty to these charges on August 13, 2015. On December 7, 2015, Defendant filed a motion to withdraw his guilty pleas, which motion, not being opposed by the Commonwealth, was granted by the court by order dated January 19, 2016.

A criminal defendant's pre-sentence motion to withdraw a guilty plea should be granted if supported by a fair and just reason and substantial prejudice will not inure to the Commonwealth. Commonwealth v. Forbes, 299 A.2d 268, 271 (Pa. 1973). In this respect, "a defendant's innocence claim must be at least plausible to demonstrate, in and of itself, a fair and just reason for pre-sentence withdrawal of a plea." Commonwealth v. Carrasquillo, 115 A.3d 1284, 1292 (Pa. 2015). In his motion to withdraw his guilty pleas, Defendant alleged simply that he wished to pursue pretrial motions concerning the stop of his vehicle and he believed he was innocent of driving under the influence of a controlled substance.

answer that the practice and procedure for presenting and accepting plea agreements is governed by Pa.R.Crim.P. 590.[2]

At a hearing on Defendant's Motion held on July 22, 2016, the Assistant District Attorney represented to the court that he had entered the stipulation in good faith, but that afterwards the District Attorney overruled his decision in this regard and that for this reason the Commonwealth's offer was withdrawn. In further explanation, the Assistant District Attorney represented that the District Attorney had recently implemented a new policy - he was uncertain whether this was implemented before or after

[2] Pennsylvania Rule of Criminal Procedure 590 states in relevant part:

> Rule 590. Pleas and Plea Agreements
>
> (A) Generally
>
> (1) Pleas shall be taken in open court.
>
> (2) A defendant may plead not guilty, guilty, or, with the consent of the judge, *nolo contendere*. If the defendant refuses to plead, the judge shall enter a plea of not guilty on the defendant's behalf.
>
> (3) The judge may refuse to accept a plea of guilty or *nolo contendere*, and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record.
>
> (B) Plea Agreements
>
> (1) When counsel for both sides have arrived at a plea agreement, they shall state on the record in open court, in the presence of the defendant, the terms of the agreement, unless the judge orders, for good cause shown and with the consent of the defendant, counsel for the defendant, and the attorney for the Commonwealth, that specific conditions in the agreement be placed on the record *in camera* and the record sealed.
>
> (2) The judge shall conduct a separate inquiry of the defendant on the record to determine whether the defendant understands and voluntarily accepts the terms of the plea agreement on which the guilty plea or plea of *nolo contendere* is based.

Pa.R.Crim.P. 590(A)-(B).

the date of the stipulation, but in either event, he was unaware of the change at the time of the stipulation - pursuant to which a plea to an alcohol only driving under the influence charge would not be accepted where a defendant was charged with being under the influence of both alcohol and some other controlled substance.

DISCUSSION

Defendant asks us to enforce the terms of an executory plea agreement never filed of record and neither presented to nor approved by the court. As a matter of law, "a defendant has no constitutional right to have an executory plea agreement specifically enforced." Commonwealth v. Anderson, 995 A.2d 1184, 1191 (Pa.Super. 2010) (quoting Commonwealth v. Fruehan, 557 A.2d 1093, 1094-95 (Pa.Super. 1989)). For one thing, "the terms of a plea agreement are not binding upon the court," and unless and until the court approves the agreement, it is not specifically enforceable by either party. Commonwealth v. White, 787 A.2d 1088, 1091 (Pa.Super. 2001); Commonwealth v. Spence, 627 A.2d at 1184. In contractual terms, the plea agreement is subject to a condition precedent, namely the court's approval, before it is enforceable. Anderson, 995 A.2d at 1191 (noting that while a plea agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract-law standards) (citing and quoting Commonwealth

v. Kroh, 654 A.2d 1168, 1172 (Pa.Super. 1995)). Hence, it is imprecise and technically inaccurate to assert, as was stated in Commonwealth v. McElroy, that "no plea agreement exists unless and until it is presented to the court." 665 A.2d at 817; Mebane, 58 A.3d at 1248.

Here, as the Commonwealth correctly argues, because the parties' plea agreement was never filed of record nor presented to or approved by the court, Defendant does not have a *right* to specific enforcement of that agreement. Nevertheless, enforcement of a plea agreement may be "warranted in the interest of justice, as a matter of judicial discretion, and not as a matter of right to specific performance." Mebane, 58 A.3d at 1248.

In Mebane, several months in advance of the scheduled trial date, the parties reached a plea agreement of which court staff was timely apprised, but which was not scheduled for a separate hearing in advance of the trial date and, therefore, had not yet been reviewed or approved by the court prior to trial. When the parties appeared in court on the trial date, the Commonwealth for the first time advised the Defendant that it would no longer honor the plea agreement. Sometime between when the plea agreement had been reached and the trial date, the Commonwealth learned of a favorable ruling it had received on an outstanding defense suppression motion the results of which neither party

had been notified of officially and which the defense was not aware of prior to the date of trial. Under these circumstances, the trial court first determined that "fundamental fairness entitled [the defendant] to the benefit of the bargain, finding that although the prosecutor may have inadvertently obtained. . . . the Ruling, he nonetheless vulpinely used . . . information regarding the Trial Court's ruling prior to its disclosure to defense counsel." Mebane, 58 A.3d at 1244. The Court in Mebane then accepted the defendant's plea and sentenced him in accordance with the plea agreement.

On appeal, the Commonwealth argued that the trial court had erred in specifically enforcing the plea agreement because the Commonwealth's offer was withdrawn prior to presentation of the plea agreement to the court. In affirming the trial court's decision to enforce the plea agreement, the Superior Court concluded that the trial court's factual findings that the prosecutor "vulpinely used . . . information regarding the Trial Court's ruling prior to its disclosure to defense counsel, leading the defendant to proceed for a considerable period of time under the impression that he would be pleading guilty on the scheduled trial date under the agreed-upon terms," was adequately supported by the record; that "the trial court acted in conformity with the general policy of maintaining the integrity of the plea bargain process when it determined that

enforcement of the plea agreement was warranted in the unique circumstances" of the case; and that the trial court had not abused its discretion nor committed an error of law. *Id.* at 1249.

The question then before us becomes whether as an exercise of our discretion in the interest of justice, the plea agreement reached between the parties in this case should be specifically enforced in order to maintain the integrity of the plea bargain process. As a matter of fact, we find and accept that the Assistant District Attorney handling this matter acted in good faith in entering the plea agreement but unfortunately, for reasons which are unclear, was unaware of the District Attorney's change in policy. That this occurred is unexcusable and if it occurred routinely, would clearly undermine the integrity of the plea bargaining process. If it were as the Defendant suggests that a plea agreement negotiated by an assistant attorney can be over-ridden at any time in the absolute discretion of the District Attorney, even on the eve of trial, a defendant's belief that an agreement exists would be illusory and the effects on plea negotiations devastating.[3]

---

[3] The entry of guilty pleas and plea agreements are crucial to the administration of criminal justice.

> It is well recognized that the guilty plea and the frequently concomitant plea bargain are valuable implements in our criminal justice system. The disposition of criminal charges by agreement between the prosecutor and the accused, . . . is an essential component of the administration of justice. Properly administered, it

This, however, is not what occurred. A lapse in communication occurred between the District Attorney and Assistant District Attorney. Whether the Defendant should be able to take advantage of this lapse or the District Attorney be able to correct the error made is the real question.

In McElroy, the District Attorney of Warren County offered a proposed plea agreement to the defendant which was accepted. The case involved a high-speed chase of the defendant in which a vehicle driven by a pursuing state trooper crossed into the opposing lane of traffic resulting in the death of an innocent victim. Under the plea agreement, the defendant was to plead *nolo contendere* to a charge of reckless endangerment of the trooper, with the charge of reckless endangerment of the victim to be *nolle prossed*. The victim's family, which had previously commenced a wrongful death action against the defendant, the defendant's trucking company (whose vehicle the defendant was operating at the time of the accident), and the trooper, was outraged by the plea agreement because it permitted the defendant to escape direct liability for the victim's death. In response, the district attorney withdrew the plea offer and the defendant sought to enforce the plea agreement.

> is to be encouraged. In this Commonwealth, the practice of plea bargaining is generally regarded favorably, and is legitimized and governed by court rule.

Commonwealth v. Mebane, 58 A.3d 1243, 1245 (Pa.Super. 2012) (citations and quotation marks omitted).

The trial court's order granting the defendant's motion to enforce the agreement was reversed on appeal by the Superior Court. In explaining its decision, the Superior Court, quoting from the Supreme Court's decision in Spence, stated that "prior to the *entry* of a guilty plea, the defendant has no right to specific performance of an 'executory' agreement," and that because the "plea agreement had neither been entered of record nor accepted by the trial court [it] was, therefore, not enforceable," "[i]t was, at most, executory." McElroy, 665 A.2d at 816 (quoting Spence, 627 A.2d at 1184). With respect to the District Attorney's power to renege on the plea agreement, the Court stated: "A district attorney may decide, as a function of her/his prosecutorial discretion, that a plea bargain agreement not yet entered of record and approved by the court is not in the best interests and/or for the general welfare of the citizens of this Commonwealth." McElroy, 665 A.2d at 817.

Admittedly, the issue in McElroy did not involve the discretionary enforcement of a plea agreement by the trial court. It did, however, involve the enforcement of a plea agreement whose existence was not disputed and which had not been presented to or accepted by the trial court. Importantly, the Superior Court's opinion reversing the trial court strongly affirmed the inherent powers of a district attorney to exercise prosecutorial discretion in a manner believed to be in the

public's best interests, absent invidiously discriminatory factors unrelated to the protection of society. In this case, no claim has been made or proof presented that the District Attorney's decision to withdraw the plea offer was "based upon an invidious classification such as race, religion or national origin, or upon other factors unrelated to the protection of society." McElroy, 665 A.2d at 817 (citations and quotation marks omitted). Nor do we find that the public interests the District Attorney seeks to promote by her policy change are necessarily outweighed by the Defendant's interest in enforcement of an agreement which Defendant has not detrimentally relied upon.

CONCLUSION

Because we are not convinced that what occurred here was an intentional or deliberate attempt by the District Attorney's Office to sabotage the Defendant shortly before trial, because the plea agreement was not presented to or accepted by the court, because this appears to be an isolated instance, and because the Defendant has failed to point to any prejudice he has sustained, other than being unable to enforce the plea agreement, we do not find that the interests of justice requires enforcement of the plea agreement. Accordingly, Defendant's Motion will be denied.

BY THE COURT:

_____

P.J.