

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 1529 – 2010  
:   
vs. : CRIMINAL DIVISION  
:   
JOSEPH C. NEWMAN, :   
Defendant :

**OPINION AND ORDER**

Before the Court is Defendant’s Motion to Enforce Plea Agreement, filed November 29, 2010. Argument on the motion was heard December 28, 2010.<sup>1</sup>

Defendant was charged with theft by deception (false impression) and bad checks. At his preliminary hearing on October 11, 2010, Defendant and the Assistant District Attorney handling the matter entered an agreement which was recorded on the Criminal Case Scheduling Form by the ADA<sup>2</sup> as follows:

PLEA AGREEMENT: Dism per Rule 586 if Mr. Newman pays full restitution by arraignment.

Arraignment was noted to be scheduled for November 15, 2010. At the arraignment, although Defendant indicated he had paid the full restitution, the District Attorney<sup>3</sup> refused to move for a 586 dismissal but instead indicated he wished to pursue prosecution as Defendant had a history of theft offenses. The matter was then continued to February 11, 2011, in order that Defendant might file the instant motion. Defendant now seeks to have the Court enforce the terms of the agreement by entering a 586 dismissal.

The Commonwealth argues that the agreement at issue should be considered a plea agreement and that as such, they are not bound by it until it is accepted by the Court. While the

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<sup>1</sup> Defendant’s motion is based on his allegation that he paid restitution in accordance with the agreement at issue, but he was unable at the time of argument to present written verification of such payment. The Court therefore allowed the Assistant District Attorney until January 10, 2011, to investigate the alleged payment and notify the Court whether she wished to dispute Defendant’s allegation of payment. On December 30, 2010, the ADA notified the Court that she had verified the payment through the South Williamsport Police Department.

<sup>2</sup> The handwriting of the terms of the agreement matches that of the ADA’s signature at the bottom of the form.

<sup>3</sup> The arraignment was handled by the District Attorney rather than the Assistant District Attorney who had handled the preliminary hearing.

Court agrees with that proposition in general,<sup>4</sup> it does not view the instant agreement as a plea agreement. Defendant did not agree to plead guilty to the charges; on the contrary, he agreed to pay restitution in exchange for the Commonwealth's offer to move for dismissal of the charges. Therefore, the Court believes the matter should be viewed as a dispositional agreement, and the Court looks to cases such as Commonwealth v. Ginn, 587 A.2d 314 (Pa. Super. 1991), and Commonwealth v. Stipetich, 621 A.2d 606 (Pa. Super. 1993), reversed on other grounds, 652 A.2d 1294 (Pa. 1995), for guidance.

In Commonwealth v. Ginn, the defendants were charged with various crimes related to an alleged loss of funds suffered by Mrs. Ginn's employer. The District Attorney and the defendants entered into a dispositional agreement with the court's approval whereby a mutually acceptable accountant would perform an audit on the employer's records and if the accountant found a diversion of funds, the defendants would plead guilty as charged. If he did not find such a diversion, the charges would be dropped. When the accountant found no diversion, the District Attorney attempted to challenge the accountant's methods of review but, in response to the defendants' motion to enforce the agreement, the trial court dismissed the charges, noting, "Nowhere in here does it say if you don't like the report you can come in and question it in court. Now it seems to me you've got a moral obligation here to live up to the agreement." *Id.* at p. 315. In upholding the trial Court, the Superior Court stated:

The Commonwealth in this case has a duty to live up to the terms of the bargain it made with the Ginns. ... The Ginns' promise to plead guilty in [the] face of a decision by the auditor that a diversion of funds had been committed was a risk they undertook and one that would have been enforced by the courts in the event such a decision was made. Likewise, the courts of this Commonwealth must seek to hold the Commonwealth to [the] terms of the agreement and dismiss the charges in view of the auditor's report.

*Id.* at p. 316. The Court analogized the situation to that in which a prosecutor and defendant enter a plea agreement, and relied on the Supreme Court's statements in Commonwealth v. Zuber, 353 A.2d 441 (Pa. 1976), that "there is an affirmative duty on the part of the prosecutor to honor any and all promises made to a defendant in exchange for the defendant's plea" and

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<sup>4</sup> See Commonwealth v. McElroy, 665 A.2d 813 (Pa. Super 1995)(plea offer which had not yet been accepted by the trial court was not enforceable against the state).

that “[o]ur courts have demanded strict compliance with that duty in order to avoid any possible perversion of the plea bargaining system”. Id. The Court also referenced “[s]imilar concerns over the public faith placed on such a pledge” by courts which have considered the enforceability of agreements to drop a prosecution based upon the results of a polygraph test. Id.

In Commonwealth v. Stipetich, after searching the defendants’ home pursuant to a search warrant and finding various illegal substances and paraphernalia, the city police entered an agreement with the defendants that if defendants would answer all questions concerning the source of the illegal substances and paraphernalia, no charges would be filed. The defendants answered all questions asked of them by the city police but the county police filed charges anyway. The trial court granted the defendants’ motion to dismiss and, in upholding that decision, the Superior Court cited Ginn, *supra*, noting that

we implicitly applied contract law standards to analyze the mutual conditional promises made by both the potential defendants and the prosecutor and held that the integrity of the judicial system demanded that the Commonwealth live up to its obligations under the agreement.

The Court also relied on the reasoning of the dissenting opinion authored by Justice Cavanaugh in People v. Gallego, 424 N.W.2d 470, 477-78 (Mich. 1988), as follows:

The precept that people should keep their promises should apply to the state no less than to individuals. When a promise is made by the state to an individual involved in the criminal justice system, the standards of substantive due process hold the state to a high duty of care in keeping its promise. Although the constitution may not specifically require specific performance in this case, the principle of fundamental fairness does. It is fundamentally unfair for the state to create and then destroy a defendant’s expectations while reaping the benefit of its bargain.

Commonwealth v. Stipetich, *supra*, at p. 611. The Court held that enforcement of the agreement between the city police and the defendants was required “under accepted notions of equity and fundamental fairness”. Id. at p. 612.<sup>5</sup>

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<sup>5</sup> The Court wishes to note that the Superior Court’s decision in Commonwealth v. Stipetich was reversed by the Supreme Court because it found that agreements made by police agencies are not binding on prosecutors. Commonwealth v. Stipetich, 652 A.2d 1294 (Pa. 1995). It appears, however, that the Superior Court’s reasoning with respect to the agreement’s enforceability outside of the issue of who entered the agreement, would be

In the instant case, the Court believes the same notions of equity and fundamental fairness require enforcement of the agreement. Defendant fulfilled his part of the bargain in reliance on the prosecutor's promise to move for a Rule 586 dismissal. While the District Attorney does have "a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case", Commonwealth v. Stipetich, 652 A.2d 1294, 1295 (Pa. 1995), (*quoting* Commonwealth v. DiPasquale, 246 A.2d 430, 432 (Pa. 1968), he nevertheless has a "duty to live up to the terms of the bargain" made by his assistant. The Court respectfully suggests that his "power to conduct criminal litigation" in instances such as this should be directed at either (1) requiring his assistants to investigate the defendant's criminal record before entering such agreements, (2) requiring his assistants to make any such agreements specifically contingent on a satisfactory record check, or (3) giving his assistants the right to make the final decision in such matters.

**ORDER**

AND NOW, this            day of December 2010, for the foregoing reasons, the Defendant's Motion to Enforce Plea Agreement is hereby GRANTED. The charges in this matter are hereby dismissed under Pa.R.Crim.P. 586. Defendant is directed to pay all costs within 6 months of the date of this Order.

cc:    DA  
      PD  
      Eileen Dgien, DCA  
      Gary Weber, Esq.  
      Work file

BY THE COURT,

Marc F. Lovecchio, Judge

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accepted by the Supreme Court if called upon to address the issue: in a per curiam opinion granting allocatur in Commonwealth v. Robey-Spencer, 911 A.2d 503 (Pa. 2006), the court directed the parties to brief the following issue: "Whether the Superior Court erred in failing to evaluate the agreement to move for petitioner's admission into the ARD program as a specific performance of a contract type of action (non-prosecution agreement) and to decide the matter pursuant to the analysis set forth in Commonwealth v. Stipetich, 423 Pa. Super. 427, 621 A.2d 606 (Pa. Super. 1993), and Commonwealth v. Ginn, 402 Pa. Super. 405, 587 A.2d 314 (Pa. Super. 1991). Unfortunately, the Supreme Court later dismissed the petition for allowance of appeal as having been improvidently granted. Commonwealth v. Robey-Spencer, 934 A.2d 693 (Pa. 2007).