

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

DONOVAN BUTLER,  
Defendant

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CR: 524-2012  
CRIMINAL DIVISION

**OPINION AND ORDER**

The Defendant filed a Motion to Dismiss Information and Remand for Preliminary Hearing on May 23, 2012. A hearing on the Motion was held August 28, 2012.

***Background***

Donovan Butler (Defendant) was charged with Delivery of a Controlled Substance, Possession with Intent to Deliver, Criminal Use of a Communication Facility, Delivery of a Controlled Substance, Possession with Intent to Deliver, Criminal Use of a Communication Facility, Delivery of a Controlled Substance, Possession with Intent to Deliver, and Criminal Use of a Communication Facility. A Preliminary Hearing was scheduled for this case on March 15, 2012. On that same day, Defendant agreed to a “Guilty Plea Recommendation” made by the Commonwealth. The agreement, *inter alia*, stated that “The Defendant, by signing this plea recommendation, understands and agrees that he/she **MAY NOT** remand this matter for a preliminary hearing should this plea recommendation be withdrawn by the Commonwealth prior to the entry of the guilty plea.” The Defendant waived his Preliminary Hearing in exchange for the plea agreement. The Waiver of Preliminary Hearing document stated that “I understand that I have a right to this hearing . . . I knowingly, voluntarily, and intelligently make this waiver of my preliminary hearing.”

On April 23, 2012, at Arraignment, the District Attorney informed the Defendant that he would not accept the terms of the plea recommendation and would need to talk to the Assistant District Attorney that made the plea. The Commonwealth subsequently informed Defense Counsel that the plea agreement that was recommended had been rescinded. On May 23, 2012, the Defendant filed a Motion to Dismiss Information and Remand for Preliminary Hearing. The Motion contends that Defense Counsel would not have advised the Defendant to waive his Preliminary Hearing if he knew the Commonwealth would not honor the plea agreement.

*Motion for Preliminary Hearing*

At the Hearing on this Motion, the Defendant argued that the document he signed entitled “Guilty Plea Recommendation” was an illusory contract, which did not have mutual consideration between the parties. In addition, the Defendant alleged that he relied on the “Guilty Plea Recommendation” document when he waived his rights to have a Preliminary Hearing and therefore the Defendant believes he is entitled to have his Preliminary Hearing reinstated. The Commonwealth’s argument relies predominantly on a specific opinion recently published by this Court. The Commonwealth, however, did not know the name of the case or have the case with them at the date of the hearing.

The Common Pleas Court of Lycoming County has addressed various issues dealing with the waiver of Preliminary Hearings in the recent past. The Court believes that the Commonwealth was referring to a case published recently dealing with a Preliminary Hearing and Accelerated Rehabilitative Disposition (ARD). In McNally, the Defendant received a Recommendation for ARD and in exchange waived his Preliminary Hearing. The Defendant, however, was later denied ARD because of the type of crime he had committed. This Court

determined that the Defendant's agreement for waiver had consideration and was not an adhesion contract, as specifically alleged by the Defendant. Commonwealth v. McNally Lyc. Cty. No. 164-2012 (Butts, J. May 23, 2012). McNally, however, is distinguishable from the facts in this case. The District Attorney has the sole responsibility for determining which cases will be recommended for entry into the ARD program and did in fact give that defendant a recommendation. Further, the District Attorney did not rescind the recommendation but it was merely determined later that the defendant did not qualify for ARD. Here, the Defendant's plea agreement was rescinded by the Commonwealth at no fault of the Defendant. As McNally does not apply in this case, this Court will determine whether the Defendant reasonably relied on the "Guilty Plea Recommendation" form.

The Common Pleas Court of Lycoming County has already addressed reliance on plea agreements. In Brown, the defendant waived his Preliminary Hearing after he agreed to a plea agreement. Commonwealth v. Brown, Lyc. Cty. No. 874-2010 (Lovecchio, J. Dec. 21, 2010). Subsequently, the District Attorney rescinded the plea agreement and the Defendant requested to have his Preliminary Hearing. The Court found that the agreement was a binding contract and not merely a revocable offer. Further, the Court found that the agreement was revoked at no fault of the Defendant and therefore was entitled to reinstatement of his Preliminary Hearing.

This case, however, is substantially different because the District attorney has changed the plea agreement form since that decision. The document is now entitled "Guilty Plea Recommendation." The document only uses the language "plea recommendation" and not "plea agreement." In addition, the form clearly states that:

The Defendant, by signing this plea recommendation, understands and agrees that it is subject to final approval of the District Attorney, and may be subject to being withdrawn by the Commonwealth at any time prior to the entry of the guilty plea.

The contract law theory of reliance, also known as promissory estoppel, requires three elements that include: “(1) the promisor made a promise that he should have *reasonably* expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise.”<sup>1</sup> Thatcher’s Drug Store of West Goshen Inc. v. Consolidated Supermarkets Inc., 636 A.2d 156, 160 (Pa. 1994) (emphasis added). The Defendant argues that he relied on the agreement that he signed. This Court, however, finds that if the Defendant did in fact rely on the document, he did so unreasonably.

The “Guilty Plea Recommendation” form that the Defendant signed does not say “plea agreement” anywhere on the document. The document constantly refers to itself as a “plea recommendation.” Further, there were only seven enumerated sections in the document. The second section unambiguously states that final approval of the elected District Attorney is needed and that the plea recommendation may be withdrawn by the Commonwealth at any time prior to the entry of the guilty plea. The document does not hide the relevant and important language in boilerplate but actually places it at the beginning of the document. The Defendant also had an attorney present when he reviewed and signed the document and the District Attorney has rescinded plea recommendations in the past. Therefore, the Court finds that reliance on the plea recommendation was unreasonable and therefore there is no reliance or promissory estoppel.

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<sup>1</sup> see also The Restatement (Second) of Contracts § 90 (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.”).

Now that the Court has determined that the Defendant is not entitled to relief on the contract theory of promissory estoppel it is irrelevant whether the “Guilty Plea Recommendation” document was illusory or not. The Defendant’s waiver of his Preliminary Hearing was not located within the four corners of the document at issue. The Defendant independently waived his Preliminary Hearing in a different document entitled “Waiver of Preliminary Hearing.” Even if the “Guilty Plea Recommendation” was illusory or invalid the Defendant would still have to show that the “Waiver of Preliminary Hearing” document was not done knowingly, voluntarily, and intelligently. As the Defendant was not reasonable in relying on the “Guilty Plea Recommendation,” promissory estoppel does not circumvent the Defendant’s knowing, voluntary, and intelligent waiver of his Preliminary Hearing. The Defendant has not raised any additional reasons for why the “Waiver of Preliminary Hearing” document is not enforceable and therefore he is not entitled to a Preliminary Hearing.

**ORDER**

AND NOW, this \_\_\_\_\_ day of October, 2012, based upon the foregoing Opinion, the Court finds that the Defendant's waiver of his preliminary hearing was knowing, voluntary, and intelligent and not a result of promissory estoppel or reliance. Therefore, the Defendant's Motion for Preliminary Hearing is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA (MK)  
EJ Rymysza, Esq.  
Eileen Dgien, Dep. CA  
Gary Weber