

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**KEVIN MCNALLY,
Defendant**

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**CR: 164-2011
CRIMINAL DIVISION**

OPINION AND ORDER

The Defendant filed a Motion for Preliminary Hearing on March 26, 2012. A hearing on the Motion was held April 30, 2012.

Background

Kevin McNally (Defendant) was charged with Loitering and Prowling at Nighttime, Public Drunkenness, and Harassment. A Preliminary Hearing was scheduled for this case on January 20, 2012. On that same day, Defendant agreed to a 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and agrees that he/she **MAY NOT** remand this matter for a preliminary hearing should this plea recommendation be withdrawn by the Commonwealth prior to the entry of the guilty plea.” Further, the agreement states that “The Defendant will plead guilty to: Apply ARD.” On January 20, 2012, Defendant, while being represented by Timothy Reitz, Esquire, waived his right to a preliminary hearing in front of Magisterial District Judge Jon Kemp.

With the recommendation of Assistant District Attorney Melissa Kalaus, Defendant applied for Accelerated Rehabilitative Disposition (ARD) on February 23, 2012. On March 12, 2012, the Defendant’s application for ARD was denied. On March 26, 2012, Defendant filed a

Motion for Preliminary Hearing. The Court had a conference on the Motion on April 30, 2012. During the Conference it was revealed that the Defendant was denied ARD because of the nature of his offense, which included a charge of Loitering and Prowling at Nighttime. Defendant now requests that this Court grant him a Preliminary Hearing.

Motion for Preliminary Hearing

Defendant does not question whether he has waived his right to a preliminary hearing in the agreement he made with the Commonwealth. Defendant, however, contends that the agreement to waive his preliminary hearing was illegal due to two contract law issues: (1) no exchange of consideration and (2) an unenforceable adhesion contract. For a contract to be enforceable in a court of law it must be a mutual agreement, exchange consideration, and outline the terms of the bargain with sufficient clarity. Com. Dept. of Transp. v. First Penna. Bank, 466 A.2d 753 (Pa. Commw. 1983). Specifically, “[c]onsideration is defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. It is undoubted that the benefit or detriment may be very slight.” Esakovich v. Groudine, 14 A.2d 850, 854 (Pa. Super. 1940) (internal citations omitted). The Court will not evaluate the value of consideration exchanged or the fairness of the agreement. The only consideration of the Court is whether the requirement of consideration is met.

In this case, Defendant agreed to waive his right to a preliminary hearing in exchange for the Commonwealth’s recommendation for ARD. In general, the District Attorney has the responsibility for determining which cases will be recommended for entry into the ARD program. See Commonwealth v. Lutz, 495 A.2d 928, 923 (Pa. 1985); see also Pa.R.Crim.P. 300. This is the sole discretion of the District Attorney and it is not provided to any other parties. See

id. Defendant agreed in exchange for the waiver of his preliminary hearing that the District Attorney would recommend him for entry into ARD. Defendant received a benefit that he would not have received unless he made an agreement with the District Attorney and therefore the agreement did have consideration.

The fact that the Defendant was not admitted into ARD is irrelevant to the discussion of consideration. Admittance into ARD is “subject to local procedures formulated by the President Judge pursuant to Rule 300(D).” Pa.R.Crim.P. 301. Here, Defendant was denied admission to ARD because of the nature of his offense. The District Attorney only had discretion in making a recommendation for ARD and not the acceptance into the program. The Defendant and his counsel were aware that the Commonwealth was not in a position to guarantee acceptance into ARD.

Further, it is well established that consideration must be determined based on the time the agreement was mutually agreed upon. The fact that the agreement became worthless to one party after the fulfillment of the agreement is not controlling. What is determinative is that all contracting parties had consideration at the enactment of the agreement. The Defendant should have considered his individual likelihood of being accepted into ARD and determined whether any risk of being denied was worth the agreement offered by the Commonwealth.

Defendant’s second argument, that the agreement to waive his preliminary hearing was an adhesion contract, is also without merit. “An adhesion contract is defined as a ‘standard form contract prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms.’” Robson v. EMC Ins. Cos., 785 A.2d 507, 510 (Pa. Super. 2001) (citing Black’s Law Dictionary (7th ed. 1999)). The contract, however, is not automatically unenforceable just because it is considered an adhesion contract. To become

unenforceable or unconscionable the contract must have unreasonably favorable terms to the drafter and there must be no meaningful choice on the part of the other party regarding the acceptance of the agreement. Todd Heller, Inc. v. United Parcel Service, Inc., 754 A.2d 689, 700 (Pa. Super. 2000).

Here, even assuming that adhesion contracts apply to agreements outside of goods and services, the Defendant's argument lacks merit. Defendant was represented by counsel when he made the agreement and was not in a weaker position than the Commonwealth. The terms of the contract were not standard form or boilerplate. Moreover, the terms in question were discussed by both parties prior to the agreement. It does not appear to the Court that the law of adhesion contracts was meant to apply to individuals in Defendant's situation.

Finally, the agreement was not unconscionable and therefore is enforceable in this case. Defendant's agreement was not one sided. Defendant gave up his right to a preliminary hearing in order to apply to ARD, which was an opportunity to have no conviction result from the charges filed against him. Further, the Defendant was not left without a meaningful choice. Defendant could have proceeded with the case instead of taking the agreement. Defendant could have had his preliminary hearing, filed motions to suppress evidence, continued to negotiate a plea agreement, and/or continued to trial.

In conclusion, if Defendant's claim has merit then any agreement the Commonwealth makes with a defendant would be considered an adhesion contract. Defendant's interaction with the Commonwealth was not outside a typical plea negotiation. Further, the agreement was not one sided or unconscionable. Therefore, the Court finds that the agreement that the Defendant entered into was a valid and enforceable contract.

ORDER

AND NOW, this ____ day of May, 2012, based upon the foregoing Opinion, the Court finds that the Defendant's waiver of his preliminary hearing had mutual consideration and was not an adhesion contract. Therefore, the Defendant's Motion for Preliminary Hearing is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA (MW)
Timothy Reitz, Esq.
Eileen Dgien, Dep. CA
Gary Weber