IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	**No. CR-448-2011**
vs.	**:**	
	:	
NICOLE EVANS,	**:**	
Defendant	**:**	

OPINION AND ORDER

By Criminal Complaint on February 9, 2011, Defendant was charged with one count of Retail Theft in violation of 18 Pa. C.S.A. § 3929. The preliminary hearing was scheduled for March 28, 2011.

At the scheduled preliminary hearing, the parties agreed to a guilty plea recommendation. In exchange for pleading guilty to the Retail Theft charge, the Commonwealth would recommend a sentence at the bottom end of the standard range. Defendant signed the plea recommendation form acknowledging, among other things, that she understood and agreed that the plea recommendation was subject to final approval by the District Attorney and could be subject to being withdrawn by the Commonwealth at any time prior to the entry of the guilty plea.

A criminal status conference was held in the case on August 12, 2011. At the time of the status conference, the District Attorney withdrew the bottom end standard range sentence and offered a 45-day sentence. Defendant rejected the plea offer.

A criminal pretrial conference was held on August 30, 2011. The District Attorney offered a plea agreement, which consisted of a 30-day period of incarceration to be followed by intermediate punishment supervision. The Defendant understood the plea agreement to be a bottom end of the standard range (BESR) plea agreement, which resulted

in a 30-day period of incarceration to be followed by intermediate punishment supervision.

Defendant pled guilty before this Court on August 30, 2011. Defendant completed a written guilty plea colloquy form that referenced the offense gravity score as a 2, her prior record score as a 5, the standard sentencing range to be one to nine months and the terms of the plea agreement as follows: "BESR." During the oral colloquy, the Court inquired of the parties as to what "BESR" meant. The parties responded that it meant "one month." Accordingly, the Court wrote "one month" in parenthesis and added it to the written guilty plea colloquy form.

By Order of Court dated August 30, 2011, the Court accepted the Defendant's plea of guilty. The Court scheduled sentencing for October 11, 2011. The Court noted further in the Order as follows: "The parties have stipulated that the Defendant has a prior record score of 5, the offense gravity score is a 2 and the standard range would be one to nine months. The plea agreement calls for a one month, bottom end of the standard range sentence."

On or about October 10, 2011, Defendant filed a Motion to Continue the Sentence. Defendant's Motion specifically noted that the Defendant "will be facing 30 days incarceration." The Court granted the continuance and scheduled the sentencing for December 14, 2011. In the Court's Continuance Order, the parties were directed to review Defendant's prior record score. The Court noted that it appeared to be a 3 and not a 5.

In response to the Court's directive, the District Attorney forwarded to the Court and defense counsel an e-mail dated December 2, 2011. After reviewing the matter, the Commonwealth agreed that Defendant's prior record score was a 3. The District Attorney

noted as follows: "Ms. Buzas (defense counsel) and I are attempting to renegotiate the plea agreement prior to the sentencing hearing on the 14th."

At the scheduled December 14, 2011 hearing, Defendant requested another continuance. The Defendant claimed that the Commonwealth was bound by its plea agreement to recommend a sentence in the bottom end of the standard range. The Commonwealth countered that the plea agreement was a 30-day plea agreement. The Court continued the sentencing to March 21, 2012 and scheduled an argument for January 4, 2012 with respect to the plea agreement issue.

Argument was held on January 4, 2012. The parties stipulated that the Court would determine whether the plea agreement was a bottom end standard range or a 30-day recommendation, or whether under the circumstances, no agreement was reached.

In reviewing all of the circumstances, it is evident to the Court that at the time Defendant pled guilty, both parties erroneously believed that she had a prior record score of a 5. With a prior record score of a 5 and an offense gravity score of a 2, the 30-day offer by the Commonwealth was, in fact, a BESR offer. The Commonwealth had offered 30 days in light of its understanding that 30 days was appropriate. The Defendant accepted the offer believing that 30 days constituted the bottom end of the standard range.

The Commonwealth must, of course, honor any and all promises made to a Defendant in exchange for that Defendant's plea of guilty. Commonwealth v. Ginn, 587 A.2d 314, 316 (Pa. Super. 1991); Commonwealth v. Zuber, 353 A.2d 441, 444 (Pa. 1976). In determining the terms of any agreement or whether an actual agreement was reached in a plea agreement context, the courts have applied contract law standards. Commonwealth v.

Kroh, 654 a.2d 1168, 1172 (Pa.Super. 1995); Commonwealth v. Stipetich, 621 A.2d 606, 608 (Pa. Super. 1993), reversed on other grounds, 652 A.2d 1294 (Pa. 1995). A determination of exactly what promises constitute the plea bargain must be based upon the totality of the circumstances. Kroh, supra. at 1172. All ambiguities must be resolved in favor of the Defendant but the agreement itself controls where the language is specific. Kroh, supra. at 1172.

There is no doubt that the parties entered into a contract in which the Defendant agreed to plead guilty and in exchange, the Commonwealth would recommend to the Court that the Defendant receive a term of incarceration of 30 days. The parties reached a mutual understanding, exchanged consideration and delineated the terms of their bargain with sufficient clarity. Lackner v. Glosser, 892 A.2d 21, 31 (Pa. Super. 2006); Weavertown Transport Leasing, Inc.v. Moran, 834 A.2d 1169, 1172 (Pa. Super. 2003), appeal denied, 578 Pa. 685, 849 A.2d 242 (2004).

In reaching their agreement, however, the parties both understood the Defendant's prior record score to be a 5. In fact, Defendant's prior record score was a 3. A contract made under such a mutual mistake as to an essential fact, which formed the inducement to it, may be rescinded if the parties can be placed in their former positions. Hart v. Arnold, 884 A.2d 316, 334 (Pa. Super. 2005), appeal denied, 587 Pa. 695, 897 A.2d 458 (2006).

The party adversely affected by the mutual mistake may obtain relief by being

placed in its former position. Welsh v. State Employee's Retirement Board, 808 A.2d 261 (Pa. Cmwlth. 2002).

Prior to sentencing, a Defendant may withdraw a plea of guilty for any fair or just reason. See Pa.R.Cr.P. 591 and comment; Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268, 271 (1973). Under the circumstances and given the mutual mistake between the parties, if Defendant so chooses, the Court will permit Defendant to withdraw her guilty plea. Otherwise, and if Defendant proceeds to sentencing on March 21, 2012, the Court will consider the plea agreement as being a plea agreement for 30 days of incarceration to be followed by intermediate punishment supervision.

ORDER

AND NOW, this ____ day of January 2012, following a hearing and argument, the Court **DENIES** the Defendant's oral Motion to Enforce the Plea Agreement. The Court finds that the plea agreement consisted of an agreement that the Defendant serve 30 days of incarceration. Because this plea agreement was entered into on the basis of a mutual mistake of fact, the Defendant may file a Motion to Withdraw her plea of Guilty. If Defendant intends to proceed in this manner, the Court will grant the Motion. Any said Motion must be filed within thirty (30) days of the date of this Order.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: DA (EL)
PD (RB)

APO
Work file
Gary Weber, Esquire (Lycoming Reporter)