IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-0000413-2018**
	:	
vs.	:	
	:	
	:	
PAUL LOWMILLER,	:	
Appellant	:	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's order entered on October 1, 2019, wherein the court denied the Motion to Enforce Plea Agreement filed by Appellant Paul Lowmiller. This opinion only addresses the fourth issue asserted in Appellant's concise statement of matters complained of on appeal.

By way of background, on or about March 5, 2018, the Commonwealth charged Appellant with Statutory Sexual Assault, Involuntary Deviate Sexual Intercourse (IDSI), Aggravated Indecent Assault, Indecent Assault and Corruption of Minors. On May 4, 2018, Appellant entered a guilty plea to IDSI with a person less than 16 years of age, a felony of the first degree. The negotiated plea agreement called for a sentence of 7 ½ to 20 years' incarceration in a state correctional institution and the remaining charges would be dismissed at the time of sentencing. Due to the need for an assessment by the Sexual Offender Assessment Board (SOAB), the court scheduled Appellant's sentencing hearing for August 20, 2018.

On May 30, 2018, Appellant filed a Motion for Discovery because he was contemplating withdrawing his guilty plea and the discovery allegedly would aid in his

decision-making. Appellant believed he had a mistake of age defense to the charges and he thought that evidence supporting such a claim could be found on his cell phone.

On August 22, 2018, Appellant formally filed a Motion to Withdraw Guilty Plea. Despite the fact that no evidence supporting his mistake of age defense was found on Appellant's cell phone and in spite of Appellant's knowledge that he could be facing one or more 25-year mandatory minimum sentences on the charges if he was convicted at trial, Appellant still wished to withdraw his guilty plea. During the hearings on his Motion to Withdraw Guilty Plea, Appellant testified that the complainant told him or otherwise represented that she was almost 18 years old. For this reason and others, Appellant wished to withdraw his guilty plea and pursue a mistake of age defense at trial. In an opinion and order entered on March 15, 2019, the court granted Appellant's Motion to Withdraw Guilty Plea.

The court placed the case on the trial list, but the Commonwealth offered to reinstate the original plea agreement.[1] That offer remained open until approximately the date of the pretrial conference on September 10, 2019. In discussions between the District Attorney, Kenneth Osokow, and Appellant's counsel, Helen Stolinas, that occurred either leading up to or at the pretrial conference, Ms. Stolinas indicated that Appellant might be willing to accept a maximum sentence of less than 20 years so that his maximum sentence (including any sentence for any parole violation) would be completed by the time he reached 50 years of age. Due to some concerns of Martin Wade, the assistant district attorney who would be trying the case, Mr. Osokow told Ms. Stolinas that he believed a 7 ½ to 18 year sentence would be acceptable to the Commonwealth. However, when Mr. Osokow discussed

[1] On or about May 23, 2019, the court appointed Helen Stolinas to represent Appellant because Appellant's counsel resigned from his conflict counsel position when he took a job with a government agency.

the matter with Mr. Wade after the pretrial conference, Mr. Wade had done some additional research and trial preparation and he no longer had the concerns that prompted Mr. Osokow to reduce the maximum sentence to 18 years. After speaking with Mr. Wade, Mr. Osokow decided to rescind the offer within a day or two after the pretrial conference, but he did not convey the rescission to Ms. Stolinas until September 25, 2020, when an email was sent which stated:

> At the pre-trial in this matter on September 10, 2019, I agreed to make an offer of 7.5 years to 18 years. This case is now set for trial and we have subpoenaed our witnesses. Accordingly, not having heard from you, we are revoking our offer and your client will be required to plead open or proceed to trial. Your client has had multiple opportunities to enter a plea pursuant to what was considered a favorable agreement for your client. Your client, in our opinion has given the run around to our victim and under these circumstances we are revoking our offer. If you have any questions, please contact me.

Due to "intervening matters", Ms. Stolinas did not convey the pretrial offer to Appellant until September 26, 2020, after the Commonwealth had already rescinded it. On September 26, 2020, Ms. Stolinas tried to persuade Mr. Osokow to reinstate the offer but he refused. Ms. Stolinas spoke to Appellant about the situation. On October 1, 2019, Ms. Stolinas filed Appellant's Motion to Enforce Plea Agreement.

Following a hearing and argument, the court denied the motion. The court found that there was never a meeting of the minds. Appellant never accepted the offer before the Commonwealth rescinded it. As the court found that the parties had never reached an agreement and there was no "underhanded" conduct by the Commonwealth, the court could not find that there was an enforceable plea agreement in this case.

A defendant has no right to be offered a plea bargain. *Missouri v. Frye*, 566

U.S. 134, 148, 132 S.Ct. 1399, 1410 (2012); *see also Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 846 (1977)("there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."); *Commonwealth v. Stafford*, 416 A.2d 570, 573 (Pa. Super. 1979)(the Commonwealth is not under any obligation to plea bargain with any defendant). Furthermore, the general rule is that no plea agreement exists unless or until it is presented to the court. Pa. R. Crim. P. 590; *Commonwealth v. McElroy*, 665 A.2d 813, 816 (Pa. Super. 1995). Here, the parties never reached an agreement.

Even if they had reached an agreement, however, Appellant was not entitled to enforce that agreement through specific performance. Any alleged agreement had neither been entered of record nor accepted by the court. Therefore, at best, it was a non-enforceable, executory agreement. *Commonwealth v. Spence*, 534 Pa. 233, 627 A.2d 1176, 1184 (1993); *see also Commonwealth v. Anderson*, 995 A.2d 1184, 1191 (Pa. Super. 2010)(a defendant has no constitutional right to have an executory agreement enforced).

Appellant contended that fundamental fairness or the interests of justice permitted the court to enforce the plea agreement because the Commonwealth never provided a deadline for acceptance of the offer. Appellant relied on *Commonwealth v. Mebane*, 58 A.3d 1243 (Pa. Super. 2012) for the proposition that the court had the discretion to enforce the plea agreement in this case. The court rejected these arguments and found that *Mebane* was clearly distinguishable.

In *Mebane*, the Commonwealth extended an offer to the defendant. The defendant accepted the offer and his attorney communicated the defendant's acceptance to the prosecutor. The defendant's attorney attempted to schedule a plea hearing, but the

Minute Clerk did not schedule a new date because the case had already been given a date for trial. At some point after the offer had been accepted, the prosecutor asked the judge's secretary if the judge had issued a ruling on the defendant's suppression motion. Overhearing the question, the court reporter who had transcribed the ruling told the prosecutor that the judge had issued a ruling and showed the prosecutor the transcription. Without disclosing the existence or content of the ruling to the defense, the prosecutor reneged on the plea agreement. The trial court determined that fundamental fairness entitled the defendant to the benefit of the bargain, finding that the prosecutor "vulpinely" used information regarding the ruling prior to its disclosure to defense counsel. The Superior Court agreed.

In contrast, here the parties never reached an agreement before the prosecutor rescinded it. Furthermore, the prosecutor did not rescind the offer by vulpinely using any information regarding a court ruling. Moreover, the equities of *Mebane* simply are not present in this case. Appellant previously pleaded guilty, withdrew his plea, and then had months within which either to accept the original plea offer or to attempt to re-negotiate the maximum sentence. At some point, plea-bargaining must cease and the parties must prepare for trial. Under the facts and circumstances of this case, it was not unreasonable for the Commonwealth to rescind its offer once it had subpoenaed its witnesses and had begun preparing for trial.

The court also rejected Appellant's arguments regarding the potential for a future ineffectiveness claim based on counsel's failure to convey promptly the offer to Appellant. First, defense counsel never expressly stated on the record that Appellant would

have accepted the offer of 7 ½ to 18 years. Second, Mr. Osokow decided to rescind the offer within a day or two after the pretrial conference. Even if Appellant's counsel had immediately informed Appellant of the offer and Appellant had indicated that he would accept it, the Commonwealth decided to rescind the offer before Appellant could present any agreement to the court. Therefore, Appellant likely did not suffer prejudice due to counsel's failure to convey promptly the offer to him. *Missouri v. Frye*, 566 U.S. 134, 147, 132 S.Ct. 1399, 1409 (2012)(to show prejudice from ineffective assistance of counsel where a plea offer has lapsed due to counsel's deficient performance, a defendant must demonstrate a reasonable probability that he would have accepted the offer and that the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it).

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
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