IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:
	:
v.	:
	:
EDWIN SCARBOROUGH,	:
I.D. NO: 0505000145	:
	:
Defendant.	:

Submitted: May 23, 2007
Decided: July 31, 2007

Robert J. O'Neill, Jr., Esq., Department of Justice, Wilmington, Delaware on behalf of the State.

Kevin M. Howard, Esq., Young, Malmberg & Howard, Dover, Delaware on behalf of Defendant.

ORDER UPON REMAND

Young, J.

Upon Remand from the Delaware Supreme Court, this Court has held a hearing to examine the "outside oral agreement" between the State and the Defendant, the existence of which was evidently conceded by both parties at oral argument before the Supreme Court, though not described at the time of the plea in the Superior Court, when the plea agreement and colloquy questions were asked and answered.

The facts of the "outside" (the plea discussion) agreement which were educed at the hearing are obfuscated to some extent because of Defendant's imprecise description of events, even from his point of view. Nevertheless, the following may be gleaned safely.

Four witnesses testified: the deputy attorney general, who negotiated the submitted plea; the investigating officer, with whom one "deal" (at least) was discussed; the attorney for Defendant during the plea negotiations and submission; and Defendant, who was the last of the four (disregarding re-call) to testify.

Defendant testified that he was aware that he "was potentially habitual offender." (*sic*) (Transcript of hearing, initial rough draft, page 82 at line 7, or "T82/7").[1] Nevertheless, Defendant claims that he "thought...that probation would be recommended...under exchange for my testimony against the other two defendants in the robbery charge." (T71/12-23).

That is the concept presented by Defendant, an individual who, by plea, was being convicted of maintaining a vehicle for keeping controlled substances (16 *Del.*

[1] Note that the transcript page numbers refer to the "running" page numbers, rather than those at the foot of each page, since the line numbers are coordinated to that pattern.

C. § 4755), tampering with physical evidence (11 *Del. C.* § 1269) and resisting arrest (11 *Del. C.* § 1257), a total exposure of 6 years imprisonment, plus additional incarceration up to the terms of his life pursuant to 11 *Del. C.* § 4214 (a). In that situation, Defendant would have the Court believe that he would have from the prosecutor a "recommendation" of probation, forbearance by the State from filing for Habitual Offender Declaration, and the acceptance by the Court of such "recommendation." That, to reiterate, was to be "in exchange" for "testifying truthfully," as the plea agreement requires, against two co-defendants; as if this Defendant would have had any choice in the matter, once subpoenaed by the State. That version of things presents a good bit to swallow, even if uncontroverted.

In fact, though, it is controverted. First, we look to other descriptions by the Defendant himself. Defendant states, variously, that he was "working with the investigating officer" (T98/18); that he could "do some other [specified] people" (98/7); that "in return for leniency [he] could deliver the person who is cooking 17 ounces of powder" (T 99/10); that he wasn't really "for sure [because] I don't remember what went on back then" (T 99/11); that "the deal I had with [the investigating officer] fell through (T 100/14); that, according to his counsel, the prosecutor – if the "outside agreement" was fulfilled – was "supposed to recommend probation" (emphasis added) (T 106/16).

Notably, of course, any such "agreement" to testify truthfully was not outside the plea agreement at all. It was specifically noted in the plea agreement. That is underscored by Defendant's testimony that "the only agreement is what's in the plea agreement itself" (T 107/3). Further, as Defendant agreed, when he entered the plea,

he was told that the potential of being declared an habitual offender existed.

Again, all of that is the Defendant's version of things. The testimony of others diametrically contradicts it.

The prosecuting attorney testified unequivocally that "the deal" was to "do work" (T 43/15) helpful to the police, nothing of which was accomplished by Defendant (T 43/23). Presuming an "outside agreement," the prosecutor described the "terms" as requiring Defendant to provide an in-effect Delaware address for a Louis Tolson a/k/a Jeffrey Tolson (T 10/13). Even if Defendant were to accomplish that, the State "would have...given him a break on the plea and sentence." (T10/15). All parties, including Defendant (T 100/19), agree that no such performance occurred. Other options (all involving providing for some type of proof of illegal drug activity on the part of someone in whom the police had interest) were discussed and/or considered by the State. One way or the other, according to testimony of the prosecutor (T 13/15 and T50/12-13), counsel for Defendant (T67/3-15), the investigating officer (T 75/6-13), and even Defendant (T 101/4), the Defendant never performed any services to induce the State to "take habitual off the table."

Accordingly, if there ever were an agreement,[2] and if its performance would have brought about a State recommendation for leniency, including the absence of

[2] While the Supreme Court recognized the parties' concession that an outside agreement existed, that Court also reiterated, citing *Cole v. State* 2005 WL 2805562 (Del.) and *Washington v. State*, 844 A2d. 293, 296 (Del. 2004), that the existence of any oral agreement is to be "consistent with contract principles." Those principles, at their most fundamental, require an agreement to do a particular thing, which is unconditionally accepted by the offeree. *Fuller v. Gemini Ventures*, 2006 WL 2811708 (Del. Super.). Given only the variety of "terms" stated by Defendant, it is difficult to see a contract enforceable by Defendant.

any request for a declaration of habitual offender, there is utterly nothing to suggest that it was performed. That conclusion is based upon a factual finding, which this Court certainly makes, that any obligation to testify truthfully in a trial against co-defendants did not create a "quid" for which the State was required to provide the "quo" of recommending leniency and no finding of habitual offender status.

The next question, then, is whether the requirements of compliance delineated by the State were intrinsically unfulfillable by Defendant. This issue can relate only to the "delivery" of Jeff Tolson or the later mentioned individuals. Defendant takes the position that, because of his brother's becoming aware (by way of coming into possession of mail from Defendant's counsel intended for Defendant, as opposed to any "leak" by the State) of the possible Tolson arrangement, if Defendant followed through on any information to the investigating officer, the drug or prison community would decipher the source of Tolson's outing, and respond poorly *vis á vis* Defendant. Assuming, clearly without accepting, that Defendant ultimately would be identified as a "snitch" and that such identification would jeopardize his well-being, such a circumstance does not create an impossibility of fulfillment. Every person who contracts with the thousands of municipalities every July 4th to create a fireworks show exposes himself to physical injury. That does not equate to an to an inability to comply with the contract's terms. Compliance which is <u>possibly</u> or <u>arguably</u> more difficult or more risky than originally contemplated does not, at least within the parameters cavilled about by Defendant, relieve Defendant from compliance, particularly when he wants his non-compliance to bring about none-the-less the State's purported obligations.

As to the "alternate plans," the possible fact that the Defendant had information concerning people in whom the State had no interest was nothing that gave rise to any potential agreement creating any obligations on the part of the State. It is not an impossibility to perform merely because the offered alternate consideration is not acceptable.

Thus, the Defendant is not excused from his performance whereby he could insist upon the State's performance of any contract said to exist. As a result, the State was not foreclosed from any "option" to seek a declaration of habitual offender status of Defendant, which the Court previously imposed and hereby confirms. The Defendant has exhibited utterly no basis for any reasonable misapprehension about the effect of his guilty plea.

SO ORDERED.

/s/ Robert B. Young
J.

RBY/sal
oc: Prothonotary
cc: Counsel
John Williams, Esq.
Bernard J. O'Donnell, Esq.
Sandra Dean, Esq.
Cathy Howard, Clerk, Supreme Court