NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA IN THE INTEREST OF E.C.	*	**NO. 2012-CA-1744**
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		COURT OF APPEAL
	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
JUVENILE COURT ORLEANS PARISH
NO. 2009-026-05-DQ-F C\W 2009-146-03-DQ-F, SECTION "F"
Honorable Mark Doherty, Judge
* * * * * *

Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Madeleine M. Landrieu)

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SEPTEMBER 18,2013

AFFIRMED

The State of Louisiana appeals a juvenile court's ruling, which dismissed the charges against E.C.[1] by finding that he made good faith efforts to satisfy the requirements of the plea agreement that he had entered into with the District Attorney for the Parish of Orleans. For the following reasons, we hereby affirm.

Facts and Procedural History

In 2009, fourteen-year-old E.C. was arrested for one count of armed robbery as a principal and one count of second degree murder as a principal.[2] On March 30, 2011, E.C. entered into a plea agreement resulting in an adjudication based on a *nolo contendere* plea, and was sentenced to secure custody with the Louisiana Office of Juvenile Justice until his twenty-first birthday with credit for time served for the two years he had been detained already. In April 2011, E.C. was placed at the Bridge City Correctional Center for Youth ("BCCY") where he remained until released on October 12, 2012.

[1] Since the individual at issue is a minor, his initials will be used throughout this opinion.
[2]There were no charges brought that E.C. possessed, discharged, or brandished a weapon, or that he made a demand or took any action towards the victims.

The plea agreement contained provisions that allowed for E.C.'s early release if he fulfilled certain requirements. Specifically, the State obligated itself to set aside and dismiss the petition against E.C. if he obtained his General Equivalency Diploma ("GED"), or alternately, made good faith efforts toward obtaining a GED, and obtained a vocational trade or skill through a trade/vocational program offered and available at the facility or, alternately, made good faith efforts to enroll in any available vocational training program. The relevant provisions of the plea agreement state, in pertinent part:

> 2. **GED Efforts**. The Juvenile further agrees to obtain a General Equivalency Diploma ("GED") or, alternatively, make good faith efforts toward obtaining a GED by actively participating in GED coursework, if it is offered and available upon his confinement at the juvenile facility to which he is assigned and confined (the "Facility"). To the extent that the Facility does not offer a GED program or does not have GED coursework available, the Juvenile must make good faith efforts by actively participating in academic coursework, if it is offered and available at the Facility upon his confinement.
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> 3. **Vo-Tech Efforts**. The Juvenile further agrees to obtain a trade or skill through a trade/vocational program offered and available at the Facility upon his confinement or, alternatively, to make good faith efforts by actively participating in a trade/vocational program, if one is offered and available at the Facility upon his confinement.

The plea agreement explicitly defined "good faith" and acknowledged E.C.'s learning disabilities in the following sections:

> 4. **Good Faith Defined**. Good faith shall be established by reviewing Juvenile's attendance, participation, teacher evaluations, or other relevant measures of proficiency. It is recommended that upon his confinement at the Facility, the Juvenile be administered the Test for Adult Basic Education ("TABE") to establish a baseline of the Juvenile's current level of academic proficiency.

> 5. The State acknowledges that the Juvenile has been evaluated by both psychiatrist and psychologist and it has been determined that he meets the criteria for Borderline Intellectual Functioning. Additionally, it was determined that he has a learning disability, specifically, a Reading Disorder, and a Disorder of Written Expression. Therefore, the Juvenile is not being required to obtain a GED or High School Diploma or even complete a Vo-Tech Program, but to actively participate to the best of his ability in these programs. (Emphasis added)

In exchange for E.C.'s *nolo contendere* plea under *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160; 27 L. Ed. 2d 162 (1970) to the one count of second degree murder and one count of armed robbery, the District Attorney agreed not to file additional charges against E.C. arising out of the allegations of the petition. Further, the District Attorney obligated himself to set aside and dismiss the petition against E.C., and to expunge his arrest on these charges "upon the Juvenile's compliance with the terms set forth in Paragraphs 2 & 3." Specifically, the plea agreement states:

> 7. Set Aside & Dismissal. The State further agrees that upon the Juvenile's compliance with the terms set forth in Paragraph 2 & 3 of this Agreement, the Juvenile's plea shall be set aside and withdrawn, any and all charges set forth in the Petition against the Juvenile shall be dismissed with prejudice, and the arrest record and charges of the Juvenile related the Petition shall be expunged in accordance with Article 917 *et seq*. of the Louisiana Children's Code.

On October 11, 2011, a report of compliance and motion to set aside plea and dismissal of all charges was filed in accordance with the terms of the plea agreement. The State filed its response to report of compliance and motion to set aside plea and dismissal of all charges stating "E.C. has failed to satisfy paragraphs 2 and 3." Contradictory hearings were held on November 18, 2011 and December 6, 2011; however, on January 13, 2012, the juvenile court concluded that "six

months is not a reasonable period of time on which to base a determination of compliance with the Plea Agreement that has a life span of four years and where the spirit of the Agreement is to prepare [E.C.] for success upon his release, or attempt to do so," and reset the matter for further hearings in May, 2012.

On February 10, 2012, the juvenile court issued its judgment on the November/December, 2011 sentence review, and ordered that (1) E.C. be provided with a tutor for a minimum of three (3) times per week for a minimum of one hour per day; (2) E.C. be placed in the Culinary Arts Program in the immediate next opening to that program; and (3) E.C. submit to additional psychological evaluations and academic testing.

On May 2, 2012, defendant filed a supplemental special monitor report of compliance and motion to withdraw plea and dismiss all charges.[3] On May 9, 2012, the State filed its response to the report of compliance and a motion to set aside plea and dismissal of all charges, again stating that E.C. "has failed to satisfy paragraphs 2 and 3."

After lengthy hearings, the juvenile court issued a judgment on October 12, 2012 finding that E.C. was in compliance with the plea agreement and granted the motion to set aside adjudication. At that time, E.C. was released and placed on an electronic monitoring device. The State now appeals this final judgment.

Discussion

The sole issue on appeal is whether the juvenile judge erred in finding that E.C. fulfilled the terms of the plea agreement he entered into with the State of

[3] On May 3, 2012, the juvenile court convened and allowed the State seven days to file an objection to the supplemental report and motion, and reset the sentence review hearing to May 10, 2012.

Louisiana. The Louisiana Supreme Court has viewed plea agreements as contracts between the state and the defendant; it has generally referred to the rules of contract law for application by analogy in determining the validity of such agreements. *State v. Louis*, 94-0761 (La. 11/30/94), 645 So.2d 1144, 1148. The Louisiana Supreme Court has held that a defendant's constitutional right to fairness may be broader than his or her rights under the law of contract. *State v. Nall*, 379 So.2d 731, 734 (La. 1980).

A basic rule of contract law is that consent of the parties is required for a valid contract. Once there is offer and acceptance, the agreement is subject to specific performance. La. C.C. art. 1986. An obligation cannot exist without a lawful cause, the reason why a party obligates himself. La. C.C. arts. 1966, 1967. In *State v. Hamilton*, 96-0807 (La. App. 4 Cir. 6/7/96), 677 So.2d 539, 542, this Court stated:

> ... [T]he District Attorney is the only official vested with the authority to engage in a plea bargain on behalf of the State. *State v. Howard,* 448 So.2d 150 (La.App. 1 Cir.1984), *writ denied,* 449 So.2d 1355 (La.1984). The trial court has no authority to enter into an *ex parte* plea agreement with a defendant or to enforce its terms. La. C. Cr. P. arts. 558 and 691. When a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *State v. Redfearn,* 441 So.2d 200 (La.1983).

Upon reviewing the record, we find that the plea agreement was a valid contract and that there was overwhelming factual support for the juvenile court's finding that E.C. was in compliance with the terms of the plea agreement. As

previously stated, in order for the District Attorney to dismiss the case, E.C. had to actively participate to the best of his ability in either achieving a GED or academic coursework and vocational training. In the October 12, 2012 reasons for judgment, the juvenile court summarized the testimony and evidence from the hearings, as follows:

> At the hearings in the Fall 2011, the Court accepted Dr. Kristen Lusher as a clinical and forensic psychologist. She opined, based on [E.C.'s] IQ, Borderline Intellectual Functioning, reading disability, disability of written expression, and his TABE scores, and academic work that it is improbable that [E.C.] will ever perform academically higher than the 7th grade and that it is highly improbable that he will be able to earn a GED. Her testimony remained essentially the same in May 2012.
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> From the first series of hearings, the Court determined that the facility at which the youth is assigned does offer the GED, GED coursework, academic work, and a vocational training program. However, as of the close of the first series of hearings, the youth had not been enrolled or admitted into the only vocational training program at BCCY. The Court ordered the Office of Juvenile Justice to enroll and admit the youth to that program at the immediate next opening in the program.
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> **Compliance with Plea Agreement Paragraph Two: GED & Academic Coursework**
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> The May 2012 hearings produced the following testimony: The youth's TABE scores over the past year, grouped by equivalent version of the test administered, were as follows:
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> | | | |
> |---|---|---|
> | April 15, 2011 | E-Version | 4.9[4] |
> | May 14, 2012 | E-Version | 4.7[5] |
> | October 13, 2011 | M-Version | 2.7[6] |

[4] A score of 4.9 on the TABE meant E.C. was performing at the 4th grade level, ninth month.
[5] A score of 4.7 on the TABE meant E.C. was performing at the 4th grade level, seventh month.
[6] A score of 2.7 on the TABE meant E.C. was performing at the 2nd grade level, seventh month.

From the youth's TABE scores, the Court concludes that his test results are consistent with Dr. Lusher's 2009 findings and her 2012 testimony regarding his learning disabilities and the level of his academic functioning, namely, that it is unlikely that he will achieve academic functioning above the seventh grade level.

Dr. Joy Terrell, a clinical psychologist, testified that she administered the Vineland Test for Adaptive Functioning and concluded that the youth functions below the level expected for a seventeen year old. She testified that the youth's ability to receive information is equal to that of an eleven year old (or a student functioning at the sixth grade level) and that in his ability to express himself he functions as an eight year old (or a student at the third grade level); in his ability to express himself in writing, he functions as a ten year old (or a student at the fifth grade level).

From this record the Court concludes that it is improbable that the youth will be able to obtain his GED.

Compliance with Plea Agreement Paragraph Three: Vocational Training

Paragraph Three of the Plea Agreement is conditioned on a vocational program being "offered and available" at the facility at which the youth is placed. The Culinary Arts Program is the only vocational program offered at BCCY. However, because there was never an opening in the space-limited program while the youth has been at the facility, the Court finds the program was not available to the youth. Accordingly, the Court concludes that Paragraph Three of the Plea Agreement did not become operative.

Compliance with Requirement of "Good Faith" Efforts in Academic Coursework

While not defining good faith, the Plea Agreement specifies the items the court must review to determine if the youth has exercised good faith effort in his obligation to "actively participate" in his academic coursework:

[7] A score of 4.7 on the TABE meant E.C. was performing at the 4th grade level, eighth month.

"Good faith shall be established by reviewing the Juvenile's attendance, participation, teacher evaluations, or other relevant measure of proficiency. It is recommended that upon his confinement at the Facility, the Juvenile be administered the Test for Adult Basic Education ("TABE") to establish a baseline of the Juvenile's current level of academic proficiency." Thus, a determination of the youth's compliance with the Plea Agreement turns on whether he made a good faith effort to actively participate in his academic coursework.

School Attendance

The testimony established that the youth attends Riverside School (the school located at the facility at which he is detained) on a regular basis. In January 2012, the Court required the youth also to attend tutoring sessions at the facility. The testimony established that the youth attended 48 of 57 tutoring sessions, for an overall attendance rate of 84%. His nine absences were recorded as due to pink eye, migraine or tiredness (5), court attendance (1), disciplinary matter
(1), no reason stated (2).

Class Participation & Teacher Comments

His teachers testified that the [sic] overall the youth participates in class and is cooperative. The hearing transcripts document the extensive questioning and cross examination of his teachers and tutors regarding his participation and attitude. The transcript passages are too numerous and unnecessary to reiterate here. Though there were specific individual comments that were negative regarding the youth's attitude and participation, taken as a whole, the majority of comments were positive.

TABE Scores

The Court reiterates the youth's TABE score above and finds that they are consistent with expert testimony regarding his learning disabilities and functioning levels.

Conclusion

Applying a "totality of the circumstance" test to the items contained in the Plea Agreement's Paragraph Four to review "good faith," the Court determines that the record supports a finding that the youth has demonstrated "good

> faith" efforts in his compliance with the terms of the Plea Agreement.

After weighing the evidence from the State and the defense, we find that the juvenile judge made a reasonable factual determination that E.C. made the requisite good faith efforts to actively participate in the academic programs available to him, as well as the vocational training available to him at that time, in compliance with the terms of the plea agreement. Although E.C. was to make good faith efforts to actively participate in a trade/vocational program, the Culinary Arts Program was the only vocational program offered at BCCY, and, unfortunately, there was limited space, which prevented him from being accepted into the program. Nonetheless, we find that that record supports the fact that E.C. demonstrated "good faith" efforts to comply with the terms of the plea agreement and that the juvenile court correctly released E.C. from the Office of Juvenile Justice's custody.

AFFIRMED