STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED October 5, 2004
v	No. 255247 Genesee Circuit Court
DEQUAN LAQUAVIS MAHAN, Defendant-Appellee/Cross-Appellant.	LC No. 03-012777-FC

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

In this interlocutory appeal, the prosecutor appeals by leave granted an order suppressing an incriminating statement made by defendant to a polygraph examiner and evidence discovered as a result of the statement. The circuit court's order also denied defendant's motion for specific performance of a plea agreement, which defendant challenges on cross-appeal. We reverse the denial of specific performance, rendering the suppression issue moot.

This case arises out of the robbery of an elderly couple in their home on a warm summer night in 2003 by three young males, one of whom was wielding a firearm in perpetrating the armed robbery. Defendant maintains that the circuit court erred in not ordering specific performance of a plea agreement, which had been placed on the record, reduced to writing, and followed by the entry of an order of nolle prosequi with respect to the charges of armed robbery, MCL 750.529, and assault with intent to rob while armed, MCL 750.89.

We briefly address some of the history of the case without direct discussion of prior plea negotiations of which we studiously examined. A preliminary examination was scheduled for October 1, 2003. The gun unit's chief prosecutor and the person in charge of the unit, Tim Cassady, reviewed his files for hearings scheduled for October 1, and on reviewing defendant's file, he saw a notation regarding a previous pretrial conference conducted by an assistant prosecutor. Cassady understood the notation as reflecting that an actual plea agreement had been reached pursuant to which defendant would enter a guilty plea to first-degree home invasion, MCL 750.110a, and felony-firearm, MCL 750.227b. Cassady, despite being in charge of the unit handling the case and never personally approving or authorizing the deal, proceeded to inform prosecuting attorney Shari Baran that an agreement had been reached per the notation, and he gave her the file for the hearing after she agreed to cover the hearing for Cassady. Cassady himself drew up a waiver of examination – plea form for Baran so she could place the

plea agreement on the record. Cassady had never met with defense counsel up to that point. Baran went to court where she met defense counsel, and he asked her, on the basis of prior discussions with the prosecutor's office, if the deal for first-degree home invasion and felony-firearm had been approved. Baran responded affirmatively pursuant to her instructions from Cassady. They proceeded to place the agreement on the record. A transcript of the hearing indicates that defense counsel noted the terms of the agreement to the district court, which included, in relevant part, an agreement by defendant to plead guilty to first-degree home invasion and felony-firearm, along with an agreement by defendant to take a polygraph test and to testify truthfully against accomplices. With respect to the polygraph and truthful testimony, defense counsel stated:

> Uh, my client will offer to take a polygraph and, uh, to determine whether he's going to give truthful testimony and if the other co-defendants are charged and tried, he will testify truthfully as to what occurred.

Baran, on the record, approved of the plea agreement and defense counsel's statements, and she submitted a writing to the court supposedly reflecting the agreement. The writing does incorporate the agreement in regards to the crimes that defendant would plead guilty to in the circuit court and the necessity of defendant to testify truthfully against accomplices if necessary; the writing says nothing of a polygraph examination. A motion and order of nolle prosequi regarding armed robbery and assault with intent to rob while armed was signed by the district court judge and entered into the record. The case was bound over to the circuit court for a hearing on October 20, 2003, where, presumptively, the plea would be presented for approval and entry by the circuit court.

A transcript of the October 20, 2003, hearing indicates as follows:

> *Defense Counsel:* Well, Judge, I was informed by Mr. Riggs [another prosecutor] that they wish to remand this case back to District Court. We had reached a plea agreement; however, there was a bit of a mistake. It's my understanding the prosecutor wanted him to first pass the polygraph before they did it, and so we're going to remand it to set up a polygraph and have that happen.
>
> *Court*: All right. Any objection to that, Mr. DeWitt [another prosecutor]?
>
> *Mr. DeWitt*: No. We've submitted the order for remand.

The remand order indicates merely that the case was remanded to the district court for further necessary proceedings. We note that at the subsequent hearing on the motion for specific performance out of which arose the orders that are on appeal, defense counsel stated that it was his understanding that the remand was solely for the purpose of conducting a polygraph examination pursuant to the plea agreement. This is consistent with the October 20, 2003, transcript. Prosecutor Richmond Riggs, who handled the motion for specific performance and who had originally informed defense counsel that the prosecutor's office demanded a remand, stated that remand was demanded because there was no deal for first-degree home invasion and felony-firearm in light of miscommunications in the prosecutor's office. This is not consistent with the October 20, 2003, transcript, where prosecutor DeWitt agreed with defense counsel that remand was simply requested so that a polygraph examination could be taken.

On November 18, 2003, defendant appeared to take a polygraph examination. A state police officer was present to administer the polygraph examination and began by first taking a pre-polygraph exam statement. In that statement, defendant gave his version of events, indicating that he was the gunman, telling the officer where the gun was located (police proceeded to locate the gun), and implicating his two accomplices. On the basis of the statement, the police officer decided not to administer the polygraph examination, and the prosecution decided to move forward on all of the original charges.

Defendant maintains that the plea agreement is valid and should be specifically enforced because it was authorized and defendant relied on the agreement to his detriment. We agree. The prosecution contends that defendant is not entitled to specific performance because there was no valid, authorized agreement and, regardless, defendant failed the polygraph examination, in essence, by confessing that he was the gunman.

In *People v Ryan*, 451 Mich 30, 41; 545 NW2d 612 (1996), our Supreme Court stated that, as a general rule, fundamental fairness requires that promises made during plea-bargaining be respected. The rule, however, has two conditions: (1) the agent must be authorized to enter into the agreement; and (2) the defendant must rely on the promise to his detriment. *Id.* In *Ryan*, the Supreme Court found that the agent was not authorized by federal or state prosecutors to make a deal, nor did the defendant incur detrimental reliance. *Id.*

We conclude that the plea agreement should be deemed as valid and authorized. The agreement was placed on the record, reduced to writing, and a nolle prosequi order was entered. Although it is believable that Cassady may have mistakenly interpreted notes of the pretrial hearing as reflecting the existence of a plea agreement, Cassady, as head of the gun unit and personally unaware of any authorization for the deal, should have investigated the matter before sending another prosecutor to court to place the "agreement" on the record. Moreover, when demanding that the case be remanded from the circuit court to the district court, the prosecutor's office, as reflected in defense counsel's statements and prosecutor Dewitt's' acknowledgement at the circuit court hearing, indicated that the remand was merely for the purpose of conducting the polygraph examination and not that the entire deal was invalid. If that had been the prosecution's position, the position should have been made clearly known to defense counsel before the polygraph examination, nor should the prosecution have proceeded with the examination. Based on the history of prior negotiations in the case, defendant certainly would not have gone to the polygraph examination had it been known that the exam was not part of a deal to plead guilty solely on the charges of first-degree home invasion and felony-firearm. On this record, we are left with only one conclusion; there existed a valid, authorized plea agreement.

Additionally, defendant detrimentally relied on the plea agreement by going to the scheduled polygraph examination and making extensive incriminating comments when providing his version of events to the examiner before the exam was to begin. It could be argued that specific performance is not the appropriate remedy under *People v Wyngaard*, 462 Mich 659; 614 NW2d 143 (2000), and *People v Gallego*, 430 Mich 443; 424 NW2d 470 (1988), because suppression of the evidence can cure the detrimental reliance. We disagree, however, because although suppression might somewhat assist in placing defendant in the position he occupied before making his statements to the polygraph examiner in reliance on the plea agreement, he can never be fully restored to that position. This is so because defendant revealed

to authorities everything that transpired relative to the crime and information concerning accomplices, which by necessity would hamper and compromise any potential subsequent plea negotiations or offers by defendant and, despite the suppressed evidence, give the prosecution a step up or an advantage at trial given the additional insight. Needless to say that any prosecutor could only dream of the trial in which he or she could formulate their trial strategy and examinations with full knowledge of the inner workings of the crime as provided by a defendant with no motive to lie at the time the defendant proffered the information. Further, the discovery of the gun by way of defendant's incriminating statements, although assuming suppression based on detrimental reliance, could arguably be admitted under the "inevitable discovery" rule as the gun might have been found through an inventory search. *People v Stevens (After Remand),* 460 Mich 626, 641-643; 597 NW2d 53 (1999); *People v Toohey*, 438 Mich 265, 271-272; 475 NW2d 16 (1991). The point being that no one can say with one-hundred-percent certainty that the gun would have in fact been discovered, but with the discovery predicated on defendant's revelation, it opened the door to an inevitable discovery argument by the prosecutor that might be legally sound and succeed, considering the location of the gun. In a broad sense and under the circumstances, defendant can never truly be returned to the position he had before the incriminating statements were made, and they were made in justifiable reliance on an agreement that was placed on the record. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *People v Lester,* 232 Mich App 262, 276; 591 NW2d 267 (1998), citing *California v Trombetta,* 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984). Due process demands that the plea agreement be specifically enforced.

Outside the context of due process, defendant relies on the case of *People v Reagan,* 395 Mich 306; 235 NW2d 581 (1975). In *Reagan,* the prosecution agreed to drop the charges against the defendant if he passed a polygraph examination. The defendant was administered the examination and passed. The prosecutor prepared an order of nolle prosequi and the order was approved by the trial court. Later, the prosecution developed doubts about the accuracy of the polygraph examination taken by the defendant because of compelling circumstantial evidence of the defendant's involvement in the crime and after the prosecution was informed by an expert that examination results can be distorted if administered to a schizophrenic. The prosecution then pursued a new complaint on the same charges, and the defendant was convicted. Our Supreme Court reversed the defendant's conviction on the basis that the prosecutor "gave a pledge of public faith which became binding when the nolle prosequi order was approved by the trial judge." *Id.* at 309. Although *Wyngaard, supra* at 665-666, can be read as holding that *Reagan* has little, if any, remaining precedential value because it was outside the context of due process, to the extent that *Reagan* remains viable, it provides further support for our holding. We do not, however, rely on *Reagan* for our ruling.

The next prosecution argument we address is, if there exists a binding plea agreement as we indeed have found, and defendant went to the polygraph examination in execution of and in reliance on the agreement, because defendant failed the examination, the deal would have been off, the prosecution could have pursued all the charges, and arguably the incriminating statements and the gun could be admitted into evidence. The problem with this position is that the prosecution's assertion that defendant failed the examination, in essence, by providing a pre-polygraph statement that he was the gunman is dubious. The record does not reflect that the purpose of the polygraph was to rule defendant out as the gunman. To the contrary, defense

counsel, with prosecutor Baran's agreement, stated that "my client will offer to take a polygraph and, uh, to determine whether he's going to give truthful testimony . . . ." This statement indicates that the purpose of the polygraph was to simply see whether defendant would give the examiner a truthful version of the events that transpired, not to exclude defendant as the gunman. This could be used as the basis for discovering and prosecuting defendant's accomplices of whom the police had no information. Further, defendant was pleading guilty to felony-firearm, thus begging the question, why would a polygraph be necessary to determine whether defendant was the gunman. Moreover, at the evidentiary hearing, prosecutor Riggs indicated his lack of understanding why the polygraph examiner decided not to conduct the examination. Additionally, we cannot help but ponder why defendant would openly reveal, prior to the examination, that he was the gunman if he realized the whole purpose of the exam was to rule him out as the gunman. The writing reflecting the plea agreement that was placed on the record, which was prepared by the prosecution, does not even mention the polygraph. On this record, it cannot be said that defendant failed to keep his end of the bargain with respect to the polygraph.[1]

Reversed with respect to the order of specific performance and remanded for entry of a guilty plea pursuant to the plea agreement, thereby rendering the suppression issue moot. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage

[1] Of course, defendant must still keep his end of the bargain and pass a polygraph examination (for the purpose indicated in this opinion and not to determine if he was the gunman) and testify truthfully against accomplices. Should defendant decide not to plead guilty to first-degree home invasion and felony-firearm per the agreement, fail to take and pass a polygraph exam, or fail to testify truthfully against accomplices, the prosecution may of course pursue the original charges. If that occurs, the statements made by defendant to the polygraph examiner shall be admissible at trial pursuant to *People v Ray*, 431 Mich 260, 266; 430 NW2d 626 (1988), as there was no coercive conduct or denial of constitutional rights.