

[J-36-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 114 MAP 2006
	:	
Appellee	:	
	:	Appeal from the Order of the Superior
	:	Court dated March 29, 2006, at No. 1175
v.	:	MDA 2005, reversing the Order of the
	:	Court of Common Pleas of Bradford
	:	County entered on June 13, 2005 to
JUNE M. ROBY-SPENCER,	:	Docket No. 05 CR 000178.
	:	
Appellant	:	898 A.2d 1133 (Pa. Super. 2006)
	:	
	:	ARGUED: May 14, 2007

DISSENTING STATEMENT

MR. JUSTICE BAER

FILED: November 20, 2007

I respectfully disagree with the Majority of this Court's decision to dismiss the above matter as having been improvidently granted. In my view, this case raises an important issue of first impression concerning the enforceability of a written agreement executed by a defendant and a district attorney (DA) wherein the defendant agrees to certain sanctions and remedies and, in exchange, the DA agrees to recommend to a court that the defendant be permitted to enter an Accelerated Rehabilitative Disposition (ARD) program.

The facts reveal that on February 28, 2005, Appellant was charged with ten counts each of forgery and theft for failing to make required disposition of funds received in the course of performing her duties as a notary public. During the criminal investigation in this matter, the prosecution engaged in several discussions with defense counsel regarding Appellant's desire to be recommended for the ARD program. Eventually, the parties

entered into a written agreement (“the agreement”) wherein Appellant agreed to relinquish her notary public license, discontinue her notary business, deposit funds into an escrow account for restitution, and waive her constitutional right to a preliminary hearing. In exchange, the Commonwealth agreed to recommend that Appellant be admitted into the ARD program upon successful completion of the above terms.

Following the parties’ agreement, Appellant performed her end of the bargain in reliance on the Commonwealth’s promise. However, when Appellant later sought to schedule the matter for an ARD hearing, the DA informed her that he was reneging on her obligation under the parties’ agreement.¹ Appellant then filed a petition with the trial court seeking to enforce the agreement, asserting, in substance, that she and the DA had exchanged an offer and an acceptance, and that there had been both consideration and detrimental reliance; and that the DA was bound to its contractual obligation. Following a hearing, the trial court agreed with Appellant and granted the requested relief by entering an order directing the Commonwealth to move for Appellant’s admission into the ARD program.

Upon appeal by the Commonwealth, the Superior Court reversed the trial court in an unpublished memorandum, citing case law holding that the prosecutor is vested with sole discretion to recommend a defendant for ARD. See Commonwealth v. Lutz, 495 A.2d 928 (Pa. 1985). However, Lutz is obviously distinguishable from the instant case. In Lutz, the issue before the Court was whether a party other than the attorney for the Commonwealth

¹ According to the trial court’s unpublished opinion, the Commonwealth did not offer much reason for refusing to uphold its obligation under the agreement, other than stating that the nature of the crimes militated against recommending Appellant for the ARD program.

can move for a defendant's admission into the ARD program.² Lutz, 495 A.2d at 932. We held that the discretion for recommending entry into the ARD program lies solely with the prosecution. Id. This Court was not asked, nor did we offer an opinion on, the impact of an enforceable written agreement between a DA and a defendant in the context of ARD.

The Superior Court also cited its own decision in Commonwealth v. Cline, 800 A.2d 978 (Pa. Super. 2002), where it held that the DA may withdraw an ARD recommendation at any point prior to the trial court ruling on the Commonwealth's motion for the defendant's acceptance into ARD. Again, this case is not dispositive of this matter. In Cline, the prosecutor and the defendant reached a tentative agreement whereby the prosecutor would recommend ARD if the defendant made restitution payments. Cline, 800 A.2d at 979-80. At a status conference, the parties could not reach an agreement on how the restitution payments would be made. Nonetheless, the trial court ordered that the defendant be admitted into the ARD program. Id. The Superior Court reversed and held that the Commonwealth was entitled to withdraw its ARD recommendation at any point prior to the trial court accepting the recommendation. Id. at 982. The ARD agreement in Cline was at best tentative, as the parties in that case never reached a meeting of the minds on the all-important question of restitution. Thus, Cline, unlike the case at bar, did not involve a completed contract, and a DA's decision to renege thereon.

As the above discussion illustrates, Lutz and Cline speak to different issues and do not mandate a particular conclusion in this case. Nevertheless, the Superior Court in this case, relying on these cases, concluded that the DA acted within his discretion when he disregarded the agreement because the trial court had not formally accepted his ARD recommendation.

² In Lutz, which addressed several related cases, trial courts were ordering prosecutors to consider defendants for the ARD program in DUI cases. In some cases, the courts were actually ordering their admission over the prosecutors' objections.

Presently, Appellant asserts that the Commonwealth should be bound to honor its completed contract. In support of her position, Appellant cites Superior Court cases providing that non-prosecution agreements are enforceable. See Commonwealth v. Ginn, 587 A.2d 314, 316-17 (Pa. Super. 1991) (finding that a prosecutor cannot renege on a validly executed non-prosecution agreement); Commonwealth v. Stipetich, 621 A.2d 606, 608-12 (Pa. Super. 1993) (finding a formal non-prosecution agreement enforceable where the defendant performed in reliance on agreement), *rev'd*, 652 A.2d 1294 (Pa. 1995).³ Although Appellant acknowledges that the instant case involves an ARD agreement as opposed to a non-prosecution agreement, she contends that these types of agreements are analogous because, in both instances, there are no records of charges against the accused once he or she satisfies certain conditions.

In accordance with all of the above, the impact of an agreement between the DA and a defendant remains an open question in Pennsylvania. In no obvious scenario would a party be permitted to enter into a binding written agreement, induce actions in reliance on the agreement, reap the benefits of the agreement, and thereafter renege on the agreement where there is no change in circumstances. For example, in Commonwealth v. Zuber, 353 A.2d 441, 444 (Pa. 1976), this Court held, with regard to plea bargaining, that “there is an affirmative duty on the part of the prosecutor to honor any and all promises made to a defendant in exchange for the defendant’s plea.” See also Santobello v. New York, 404 U.S. 257, 262 (1971) (“ . . . a constant factor is that when a plea results in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be

³ Although this Court reversed the Superior Court’s decision in Stipetich, it did so on the basis that the agreement itself was invalid. Stipetich, 652 A.2d at 1295. In that case, police officers had entered into the non-prosecution agreement with the defendant. This Court held that the police did not have authority to bind the DA’s office as to whether charges would be filed. Id.

part of the inducement or consideration, such promise must be fulfilled.”). See also, Ginn and Stipetich, discussed above.

I believe the Superior Court’s decision herein is worthy of this Court’s full consideration. The question now before us is not what a majority of this Court would decide, but whether it will undertake its normal comprehensive and thoughtful process, and decide something on this important issue.

Mr. Justice Castille and Madame Justice Baldwin join this dissenting statement.