

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES DARNELL COTTON,

Defendant-Appellant.

UNPUBLISHED
December 30, 2014

No. 321146
Wayne Circuit Court
LC No. 12-009374-FH

Before: MURRAY, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the trial court's order denying defendant's motion to enforce a plea agreement. Because the evidentiary record is insufficient to allow meaningful review of defendant's claim, we vacate the trial court's order denying defendant's motion to enforce his plea agreement and remand to the trial court for further proceedings consistent with this opinion.

At issue in the present case is whether defendant and the prosecution entered into a plea agreement and whether, given defendant's reliance on that agreement, defendant is entitled to specific performance of its terms. Specifically, defendant maintains that he and the prosecutor entered into a plea agreement, pursuant to which he would provide the prosecution with information leading to "bodies and parts," in exchange for which the prosecutor would allow him to plead guilty to one count of receiving and concealing stolen property while the remaining counts (including a 2-year felony firearm charge) would be dismissed. According to defendant, under this agreement, he would receive extended probation and no jail time. Defendant asserts that, after he fulfilled his obligations under the agreement by providing pertinent information to police which led to "bodies and parts," the prosecution reneged on the agreement and offered him, at best, a two year prison sentence. Defendant contends that he is entitled to specific performance of the agreement because he acted in reliance on the prosecution's offer when he provided his cooperation to police and the prosecution accepted defendant's valuable information to its benefit.

In contrast, the prosecution disputes defendant's account of the plea agreement and, in the trial court, maintained that the offer extended by the prosecutor was contingent on information leading to one specific target individual who subsequently became unavailable due to a federal investigation. Further, the prosecutor asserted that any offer was contingent on the

approval of dismissal of the felony firearm charge by the prosecuting attorneys' supervisor. Because the target individual was unavailable, the prosecution contended no enforceable plea agreement existed between the parties. While acknowledging that defendant supplied other information to police which the police acted upon, the prosecution maintains on appeal that defendant's cooperation with police was "nothing more than a gift."

The parties did not enter into a written plea agreement and specifics of their discussions were not placed on the record. Many of the discussions were, however, conducted before the trial court in chambers, off the record. Nevertheless, when defendant sought to enforce the agreement, the trial court declined the request because there was no written agreement and the trial court did not have a clear recollection of the specific terms. Defendant now appeals as on leave granted.

On appeal, we review any factual findings by the trial court for clear error. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Contract principles apply by analogy to the consideration of plea agreements, *People v Swirles (After Remand)*, 218 Mich App 133, 135; 553 NW2d 357 (1996), and "[t]he existence and interpretation of a contract are questions of law reviewed de novo," *Kloian v Domino's Pizza LLC*, 273 Mich App 449; 733 NW2d 766 (2006). In addition, a defendant may have a constitutional right to relief in cases involving a breach of an authorized plea agreement by the prosecution. *People v Gallego*, 430 Mich 443, 449; 424 NW2d 470 (1988). Consequently, to the extent defendant's effort to enforce a plea agreement implicates constitutional concerns, those issues are reviewed de novo. *LeBlanc*, 465 Mich at 579.

As a general matter, the prosecutor is not required to offer defendant a plea agreement. *Weatherford v Bursey*, 429 US 545, 561; 97 S Ct 837; 51 LEd 2d 30 (1977). Nevertheless, when undertaken, any plea bargaining that occurs must be conducted with "fairness in securing agreement between an accused and a prosecutor." *Santobello v New York*, 404 US 257, 261; 92 S Ct 495; 30 L Ed 2d 427 (1971). When there exists an authorized plea agreement between the prosecutor and a defendant, as a matter of due process, the terms of the agreement must be fulfilled by the prosecutor. *Id.* at 262. That is, "when a 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." *Id.*

To allow the prosecutor to renege on the agreement would make the bargain illusory and would render the promises meaningless. . . . It would be an abuse of the prosecutor's authority, particularly in light of the disparity in the respective bargaining positions, to permit the prosecutor to retain the right to withdraw the agreement even after defendant had acted in reliance on the promises contained in the agreement and had provided her full cooperation and the police and prosecutor received what they had bargained for. [*People v Lombardo*, 216 Mich App 500, 512; 549 NW2d 596 (1996) (quotation marks and citation omitted).]

Simply put, once the prosecutor has pledged the public faith by entering into a plea agreement with a defendant, "the prosecution is bound by the terms of the agreement." *People v Arriaga*, 199 Mich App 166, 168; 501 NW2d 200 (1993). See also *People v Heiler*, 79 Mich App 714, 717; 262 NW2d 890 (1977). The relief available to a defendant for a prosecutor's breach of a

plea agreement will depend on the circumstances of the particular case. See *Santobello*, 404 US at 263. It may, when warranted by the circumstances, include specific performance of the agreement. See *id.*; *People v Reagan*, 395 Mich 306, 316; 235 NW2d 581 (1975).

A defendant is not, however, entitled to specific performance of a tentative agreement. *In re Robinson*, 180 Mich App 454, 459; 447 NW2d 765 (1989) (“*Santobello* and its progeny do not involve court-compelled performance of a tentative agreement from which the prosecutor has withdrawn prior to judicial approval.”). Specific performance is also not available until after a defendant has pled guilty or performed part of the plea agreement to his prejudice in reliance upon the agreement. *Heiler*, 79 Mich App at 719 n 4. For example, fulfilling an obligation to provide beneficial information to police may constitute performance in reliance on the agreement. See, e.g., *Lombardo*, 216 Mich App at 512. See also *Custodio v State*, 373 SC 4, 12; 644 SE2d 36 (2007). Further, typically, to become binding, plea agreements must be made in open court or subscribed in writing. *People v Mooradian*, 221 Mich App 316, 319; 561 NW2d 495 (1997); MCR 2.507(G). Nevertheless, it has long been the rule that, courts, as a matter of equity, have the “undoubted power” “to relieve a party who has, in good faith, relied upon and acted on an alleged parole agreement between counsel.” *Greenberg v Kaplan*, 277 Mich 1, 9-10; 268 NW 788 (1936).

In this case, it appears uncontested that defendant did in fact provide the prosecution with information leading to “bodies and parts,” namely information leading to “fairly substantial charges” involving a chop shop. Defendant maintains that he provided this information in reliance on a plea agreement. Given defendant’s cooperation with police, at some risk to his own personal safety, it appears that he has shown reliance generally entitling him to enforcement of a plea agreement, provided that his conduct fulfilled the terms of an agreement. See *Lombardo*, 216 Mich App at 512; *Heiler*, 79 Mich App at 719 n 4. This presupposes, however, that a more than tentative plea agreement had been reached by the parties. Thus, the central question in this case is whether an enforceable plea agreement existed.

When determining whether a plea agreement exists and enforcing its terms, “[c]ontractual analogies may be applied in the context of a plea agreement, although . . . contractual theories will not be applied if to do so would subvert the ends of justice.” *Swirles (After Remand)*, 218 Mich App at 135. See also *People v Abrams*, 204 Mich App 667, 672; 516 NW2d 80 (1994) (“[C]ooperation agreements that affect the disposition of criminal charges must be reviewed within the context of their function to serve the administration of criminal justice.”). “A valid contract requires: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.” *Barclae v Zarb*, 300 Mich App 455, 471; 834 NW2d 100 (2013). These elements have been said to “reflect the fact that the parties to a contract must have ‘a meeting of the minds on all essential terms of a contract.’” *Calhoun Co v Blue Cross Blue Shield Mich*, 297 Mich App 1, 13; 824 NW2d 202 (2012) (citation omitted). “A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.” *Id.* (quotation marks and citation omitted). In particular, oral conversations forming the basis to establish a contract must be considered in light of the surrounding circumstances, and “frequently subsequent conduct of the parties is important or determinative of whether a contract was made or its construction.” *Pajalich v Ford Motor Co*, 267 Mich 418, 423; 255 NW 219 (1934).

In this case, the record shows that, in July 2012, in three related cases, defendant was charged with several offenses: operating a chop shop, MCL 750.535a(2); two counts of receiving and concealing stolen property, MCL 750.535(3)(a), (4)(a); one count of receiving and concealing a motor vehicle, MCL 750.535(7); possession of a weapon by a felon, MCL 750.224f; felony firearm, MCL 750.227b; and being a habitual offender, fourth offense. Initially, the prosecution offered defendant a plea agreement involving a two year prison sentence. Defendant rejected that initial offer.

Subsequently, in May of 2013 there was a conference in the trial court's chambers. Present were the trial court judge, defendants' two defense attorneys, two assistant prosecuting attorneys, including APA Dennis Doherty, and a police detective. No record was made of the discussions before the trial court. Defense counsel both submitted affidavits in the trial court, however, attesting to the substance of the discussions and the plea agreement offered by the prosecution. They averred as follows:

The conference was held to discuss [defendant's] cooperation with [police].

During the conference APA Dougherty expressed that if [defendant's] cooperation resulted in the recovery of "bodies and parts", [defendant] would receive a plea agreement resulting [in] probation, and no time in jail or prison.

The plea agreement discussed by APA Dougherty involved a global resolution of [defendant's cases].

At no time did APA Dougherty express that the plea agreement was contingent on information regarding any specific individual or criminal endeavor.

Consistent with defendant's version of events, following this meeting, the trial court adjourned the case. This adjournment lasted for several months, during which defendant, at some risk to his own safety, cooperated with police and the police acted on information provided by defendant, which led to "fairly significant charges" involving a chop shop. After this assistance from defendant, the prosecution offered defendant at best a two-year agreement, which was identical to an agreement defendant had previously rejected before cooperating with police and endangering his own safety. Stated differently, contrary to defendant's expectations of a plea agreement, he gained absolutely nothing from his cooperation with police.

In contrast to the affidavits provided by defendant's attorneys, APA Doherty did not submit an affidavit attesting to his memory of the discussions, nor did he appear at the hearing related to defendant's motion to enforce the agreement. By the time defendant sought to enforce his plea agreement, a new prosecuting attorney had replaced APA Doherty. In responding to defendant's motion, the prosecution relied on an unsworn "response" drafted by Doherty in which he acknowledged extending a plea offer to defendant but he maintained that the offer was limited to defendant's cooperation with a specific individual. Specifically, Doherty's unsworn "response" stated that:

APA Doherty told those present at the meeting that if [defendant's] assistance led to the arrest of [a target individual], APA Doherty would request permission from his supervisor APA Stevens to dismiss the felony firearm charge against

defendant. APA Doherty added that APA Stevens would most likely agree to dismiss the felony firearm.

Interestingly, while Doherty maintained that the offer was limited to a specific “target,” Doherty apparently nonetheless approached APA Stevens about dismissing the felony-firearm charge as evidenced by Doherty’s report in his “response” that: “[t]o date, APA Stevens has denied permission to dismiss the felony firearm charge against Defendant Cotton.” Further, while Doherty maintained the agreement pertained to a specific “target,” the adjournment nevertheless continued even after the parties knew the target was unavailable while the prosecution continued to elicit defendant’s cooperation with respect to other individuals.

Aside from the unsworn “response” from Doherty, the prosecutor presented no evidence in support of its position regarding the existence and terms of the plea agreement. Neither the second prosecuting attorney present for the discussions nor the police detective provided any indication regarding their recollections of the plea discussions in May 2013 or any subsequent discussions between the parties.

Following a motion by defendant to enforce the plea agreement, on November 15, 2013, the trial court held a hearing on defendant’s motion. At this hearing, the trial court did not hear testimony from any of the individuals present for the various plea negotiations. The trial court did not assess the respective credibility of the defense attorneys, Doherty, or any other witness to the events. Doherty, in fact, did not even appear at the plea enforcement hearing. Indeed, despite the fact that the parties agreed a plea offer was extended by Doherty, ultimately missing from the trial court’s conclusions are any particular findings with regard to the terms of that offer or whether it was accepted. Rather than decide these credibility issues and determine whether a plea agreement had been reached, the trial court instead declined to enforce the agreement because the parties could not now agree on its terms and the trial court itself had an inability to personally recall the particular discussions. Most relevantly, the trial court explained its reasoning, in part, as follows:

Anyway, the problem that I have with this is that - - and I think I told you folks this before - - that I don’t remember in those meetings a specific discussion about what the terms of the deal were.

And again, *I’m not saying that those discussions didn’t take place.* Don’t take it the wrong way. You’ve stated clearly in your affidavits that it did. All I’m saying is that, I don’t remember those discussions. And I don’t remember being a part of those. [Emphasis added.]

As made plain in this statement by the trial court, the trial court did not actually find that defendant’s attorneys were not credible witnesses or that they were mistaken in their recollection of events, nor did the trial court determine that Doherty correctly recollected events. Instead, the trial court essentially failed to decide the factual question of what was said because he could not himself recall the particulars of the discussions.

In other words, the lower court record discloses that defendant’s attorneys recalled an agreement premised on “bodies and parts,” Doherty recollected an offer based on a specific

“target” that was conditioned on approval from his supervisor, and the trial court simply did not recall the particulars of the discussions. Merely because the parties disagree regarding the terms of their agreement and the substance of their discussions, does not mean, however, that no agreement was reached. Instead, whether a meeting of the minds occurred is judged, not by what the parties’ subjectively believe, but from an “objective standard, looking to the express words of the parties and their visible acts,” including their subsequent conduct. *Calhoun Co*, 297 Mich App at 13. See also *Pajalich*, 267 Mich at 423. Thus, central to resolution of the present dispute was first of all a factual determination regarding what was said in the plea negotiations and whether, viewed objectively in conjunction with the parties’ conduct, the parties manifested an intent to be bound. Given the differing recollections between the parties and the offer of proof from defendant’s attorneys, inherent in such a determination was a credibility issue that should have been decided in regard to what was said in the meetings and whether an agreement was reached. That is, if the trial court could not itself recall the particulars of the discussions (and was not in fact present for all discussions), it should have assessed the respective credibility of those individuals present for the discussions who did purport to recollect the details of the plea agreement.

Given the absence of specific findings by the trial court and the paucity of information in the lower court record regarding the details of the negotiations between the parties, we are unable to judge on this record whether a plea agreement was reached and, if so, what the agreement entailed. Cf. *People v Swirles*, 206 Mich App 416, 419; 522 NW2d 665 (1994). In light of the offer of proof made by defendant in the form of the affidavits provided to the trial court by defendant’s attorneys, we are also persuaded that defendant is entitled to an evidentiary hearing on this issue. Cf. *People v Bartlett*, 17 Mich App 205, 218-219; 169 NW2d 337 (1969).

We therefore remand with instructions that the trial court conduct an evidentiary hearing involving testimony from those present for the plea discussions in order to ascertain as a factual matter the substance of those discussions and whether, viewed objectively, the parties’ words and conduct manifested an intent to be bound. If the trial court concludes an agreement was reached, it should also determine the terms of that agreement and whether defendant has, to his detriment, performed his obligations under the agreement. Because of defendant’s cooperative efforts with police, he would be entitled to enforcement of the agreement, provided that such an agreement exists and that defendant’s cooperation with police fulfilled his obligations under the bargain. In these circumstances, the trial court should enforce the agreement by ordering specific performance by the prosecutor. See *Lombardo*, 216 Mich App at 512.

Vacated and remanded. We retain jurisdiction.

/s/ Christopher M. Murray

/s/ Henry William Saad

/s/ Joel P. Hoekstra

Court of Appeals, State of Michigan

ORDER

People of MI v Charles Darnell Cotton

Docket No. 321146

LC No. 12-009374-FH

Christopher M. Murray
Presiding Judge

Henry William Saad

Joel P. Hoekstra
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, *People v Cotton*, unpublished opinion per curiam of the Court of Appeals (Docket No. 321146), the trial court shall conduct an evidentiary hearing involving testimony from those present for the plea discussions in order to ascertain as a factual matter the substance of those discussions and whether, viewed objectively, the parties' words and conduct manifested an intent to be bound. If the trial court concludes an agreement was reached, it should also determine the terms of that agreement and whether defendant has fulfilled his obligations under the agreement through his cooperative efforts with police. If the trial court concludes an agreement exists and that defendant relied on the agreement through his performance, the agreement must be enforced through specific performance. See *People v Lombardo*, 216 Mich App 500, 512; 549 NW2d 596 (1996). The proceedings on remand are limited to this issue.

Appellant shall file with this Court a copy of the order entered by the trial court on remand within 7 days. Any objections either party has to the order must be filed in this Court within 21 days of its entry. If an objection is filed, thereafter the objecting party shall cause to be prepared a transcript of the proceedings on remand. The transcript shall be completed and filed with this Court within 21 days of its being requested. After filing of the transcript, the objecting party has 14 days to file a brief in this Court and the non-objecting party then has 14 days to file a response.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 30 2014

Date

Chief Clerk