



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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June 26, 2018

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Re: *Commonwealth of Virginia v. Sophann Mao*, Case No. FE-2018-167

Dear Counsel:

The issue before the Court is whether the Commonwealth may unilaterally revoke a plea agreement between it and a defendant prior to a court's acceptance, but after a defendant waives his preliminary hearing in reliance on that agreement. The Court holds that the Commonwealth may do so, and that a defendant's waiver of a preliminary hearing does not categorically constitute detrimental reliance sufficient to compel enforcement of the agreement.¹

Sophann Mao was arrested and charged with Possession with Intent to Distribute a Controlled Substance (Cocaine) ("PWID") under Virginia Code § 18.2-248. At a preliminary hearing on August 22, 2017, his attorney and the prosecutor negotiated a plea offer. Pursuant to the offer, the prosecutor agreed to reduce the charge to Possession of a Controlled Substance under Virginia Code § 18.2-250 ("Possession"). In exchange, Mr. Mao agreed to plead guilty to

¹ Courts refer to "Plea Agreements" and "Plea Bargains" interchangeably. They mean the same thing. This Court will refer to them as "plea agreements."

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the amended charge, receive probation, and be barred from requesting that the Court defer and dismiss the reduced charge, pursuant to Virginia Code § 18.2-251 (“251 Disposition”).²

Mr. Mao did not accept that plea offer at the time because the Certificate of Analysis of the alleged cocaine was not complete. The prosecutor agreed to keep the offer open, and the parties asked the Court to continue the preliminary hearing to November 8, 2017.

On November 8, 2017, due to the unavailability of a Commonwealth witness, the parties agreed to ask the Court to continue the hearing to January 29, 2018. The prosecutor agreed to keep the original offer open.

On January 29, 2018, a prosecutor different than the one who originally negotiated the plea offer became involved in the case because the original prosecutor left the Office of the Commonwealth’s Attorney. Not realizing the original open offer, she extended a plea offer less favorable to Mr. Mao – she would reduce the PWID charge down to Possession with Intent to Distribute as an Accommodation under Virginia Code § 18.2-248 (D), if he agreed to plead guilty to the reduced charge. Per the offer, there would be no agreement as to the sentence. When Mr. Mao, through his attorney, complained that this offer was less favorable than the “open” plea offer to Possession, the new prosecutor agreed to honor her former colleague’s offer.

The parties dispute what happened next. Mr. Mao believes that he negotiated a new plea offer wherein the prosecutor would amend the charge from PWID down to Possession and that there would be no offer as to the sentence, leaving open the possibility of a 251 Disposition but risking incarceration. So while Mr. Mao risked possible jail time in this scenario, he also had a chance in ultimately getting the charge dismissed. The prosecutor believes that she offered only what her colleague originally had — to amend the charge from PWID down to Possession, with no agreement to sentence other than a bar to a 251 Disposition. Mr. Mao’s former lawyer testified, as proof that his version was the accurate one, that it would have been malpractice to accept the prosecutor’s version of the deal without the possibility of an eventual dismissal. It was a worse deal because it risked incarceration for no benefit. The prosecutor testified, as proof that her version was the accurate one, that her notes reflected the original plea offer. Both agree that they each believed that they entered into an oral plea agreement, and Mr. Mao waived his preliminary hearing in the General District Court.³

When the case came before the Circuit Court for the entry of the plea, Mr. Mao discovered that the plea agreement forms prepared by the prosecutor reflected what he later learned was the prosecutor’s version of their agreement. Thinking it was an error, he unsuccessfully failed to persuade her that his version was the correct version. He continued his court date in order to file a Motion to Enforce Plea Agreement.

² A 251 Disposition defers disposition of a case for one year, after which time the charge is dismissed on the condition that the defendant not further violate the law, and that he comply with a series of statutory conditions.

³ There was no evidence presented as to whether the parties presented their agreement to the General District Court.

On June 14, 2018, this Court heard evidence on the motion. Mr. Mao's former lawyer – the one who engaged in the General District Court proceedings — testified as to his version of events and the agreement; the second prosecutor — who entered into the final oral plea agreement — testified as to her version. The Court found each witness to be credible.

According to his former lawyer, Mr. Mao, in reliance on the agreement, waived his preliminary hearing even though the Commonwealth's Certificate of Analysis of the alleged cocaine was not complete and filed.⁴ He also, in preparation for his argument in support of a 251 Disposition, allegedly took a number of drug tests, engaged in community service, and compiled a religious activity history for punishment mitigation purposes.

I. Plea Agreement Withdrawals.

As a general rule, either party may unilaterally withdraw from a plea agreement prior to a court's ultimate acceptance. "A plea bargain standing alone is without constitutional significance; *in itself it is a mere executory agreement* which, until embodied in the judgment of a court, does not deprive an accused of any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution." *Commonwealth v. Sandy*, 257 Va. 87, 91 (1999) (quoting *Mabry v. Johnson*, 467 U.S. 504 (1984) (emphasis added)).

It is axiomatic that a defendant may unilaterally withdraw from a plea agreement prior to a court accepting the plea and agreement for any reason. *Id.* at 92; *see also* Virginia Code § 19.2-296. Any other principle would void a court's mandate to ensure that a defendant only pleads guilty if he so pleads knowingly, intelligently, and voluntarily with an understanding of the nature of the charge, the consequences of the plea, and his legal rights. *See generally Brady v. United States*, 397 U.S. 742 (1970). Even if the Commonwealth relies to her detriment on a defendant's promise to plead guilty pursuant to a guilty plea, a defendant cannot be bound. *See Sandy*, 257 Va. at 92.

A Commonwealth's Attorney may also withdraw from a proposed plea agreement at any time prior to a court accepting the plea and agreement by a defendant -- but with an extra condition. If, in reliance of the agreement, a defendant changes his position resulting in prejudice to him because of that reliance the Commonwealth is bound to its agreement. *Id.* at 91.

II. Preliminary Hearing Waivers after Plea Agreements Do Not Categorically Bar a Commonwealth Rescission.

Since the Commonwealth is bound to its agreements even prior to court acceptance if the defendant detrimentally changes his position under *Sandy*, the question arises as to whether a defendant's waiver of a preliminary hearing in reliance on the agreement categorically binds the Commonwealth to the agreement. This Court holds that it does not.

⁴ The Commonwealth filed the Certificate of Analysis on January 30, 2018. This makes moot any potential argument that Mr. Mao "gave up" something by forgoing the opportunity to see the Certificate of Analysis.

The preliminary hearing is essentially a screening process. Its primary purpose is to determine whether there is "sufficient cause" for charging the accused with the crime alleged, that is, whether there is reasonable ground to believe that the crime has been committed and whether the accused is the person who committed it. *Moore v. Commonwealth*, 218 Va. 388, 391 (1977). Lawyers understand that preliminary hearings provide ancillary benefits that come from being able to subpoena evidence, examine witnesses under oath, and offer and test other evidence. However, preliminary hearings are not intended as a supplement for general discovery. *Foster v. Commonwealth*, 209 Va. 297, 300 (1968). Any benefits of a preliminary hearing to a defendant other than the probable cause determination are incidental.

Preliminary hearings on felony cases are the creation of statute and are not jurisdictional or constitutionally imposed. *Triplett v. Commonwealth*, 212 Va. 649 (1972). Virginia Code § 19.2-218 reads that "[n]o person who is arrested on a charge of a felony shall be denied a preliminary hearing . . . and no indictment shall be returned in a court of record against any such person prior to such hearing unless the hearing is waived in writing by the accused." However, when the Commonwealth seeks to prosecute an adult for a felony, it has several options how to proceed, including direct indictment, presentment, information, or arrest warrant followed by a preliminary hearing. *Burfoot v. Commonwealth*, 23 Va. App. 38, 44 (1996) (citing Virginia Code § 19.2-217).

As a result, a defendant is not always entitled to a preliminary hearing. *Payne v. Warden of Powhatan Corr. Ctr.*, 223 Va. 180, 183 (1982). No preliminary hearing is required prior to a direct indictment by a Grand Jury, and such an indictment preempts a defendant's right to such hearing. *Id.* at 184. This means that a prosecutor may bypass a preliminary hearing by taking a *nolle prosequi* on the charge and obtaining a direct indictment. *Moore*, 218 Va. at 394. The prosecutor has this power even if he takes the case to a preliminary hearing and loses by failing to prove probable cause. *Id.*

Summarizing the above authority, a defendant has no constitutional or statutory right to a preliminary hearing. The Commonwealth can (and often does) lawfully prosecute defendants in the Circuit Court via indictment without any preliminary hearing. A prosecutor can obtain a *nolle prosequi* prior to a preliminary hearing only to turn around and obtain a Grand Jury indictment to proceed with the prosecution in the Circuit Court. Even if a prosecutor loses at a preliminary hearing, he can still proceed to trial in the Circuit Court after obtaining a Grand Jury indictment. Therefore, when a defendant waives his right to a preliminary hearing, he gives up only that which a prosecutor could otherwise take away. So, a defendant who waives a preliminary hearing in reliance on a plea agreement is not necessarily changing his position in prejudice to himself.

However, there are circumstances where the waiver of a preliminary hearing could result in prejudice. For example, if a defendant is incarcerated and waives a preliminary hearing in reliance on a plea agreement, he gives up a chance to be released by winning the hearing. Absent a waiver, a prosecutor who obtains a *nolle prosequi* related to an incarcerated defendant runs the risk of his release until such time that a Grand Jury can meet for an indictment. In both of these

circumstances, the defendant could be giving up his chance at liberty in reliance on the plea agreement.

Even in cases involving an unincarcerated defendant, there could be circumstances where his waiver of a preliminary hearing could result in the maintenance of onerous bail conditions that would otherwise have been mitigated had he had a preliminary hearing and prevailed. In these circumstances, the defendant could be giving up his chance at liberty in reliance on the plea agreement.⁵

Unrelated to the sole act of waiving a preliminary hearing, there are numerous acts that a defendant could take in reliance of a plea agreement that would result in a prejudicially changed position. For example, if a defendant agrees to incriminate himself or provide important information on a co-defendant to the prosecutor or police in reliance of a plea agreement, it could be detrimental reliance that could forever prejudice his case. *See, e.g., Commonwealth v. Brown*, 79 Va. Cir. 659 (Alexandria 2007). If a defendant agrees to serve as a confidential informant, his dangerous work in reliance of the plea agreement could bind the Commonwealth. This list is not intended to be all-inclusive. Courts will have to make case-by-case decisions.

None of these circumstances exist in the present case.

III. The Commonwealth Could Lawfully Withdraw from Her Plea Agreement.

As related to the present case, the Commonwealth had full power to withdraw any plea agreement it entered into with Mr. Mao. He was neither incarcerated, nor subject to onerous bail conditions. He did not otherwise change his behavior to his prejudice. His acts subsequent to the plea agreement – negative drug screens, community service lists, and church involvement lists – are routine acts that many defendants make in an effort to impress a sentencing judge. The fact that he waived the preliminary hearing without having the Certificate of Analysis of the cocaine does not amount to detrimental reliance binding the Commonwealth to the plea agreement. Had he insisted on the hearing without the Certificate being available, the prosecutor could have asked for a *nolle prosequi* and sought a direct indictment, bypassing the preliminary hearing. The plea agreement remained an executory agreement that either party could have revoked prior to a court accepting the plea and plea agreement. The Court has not yet accepted any plea agreement in this case.

Because the Commonwealth had the right to withdraw from *any* plea agreement Mr. Mao thought he had in this circumstance, it is unnecessary to determine which version of the plea agreement was the correct one. In any event, and as an alternative holding, this Court found both

⁵ At least one Virginia court has written that “it could be argued” that a defendant’s waiver of his preliminary hearing in reliance of a plea agreement constituted detrimental reliance and could, under normal circumstances, entitle a defendant to specific performance of the agreement. However, this was *dicta* to its opinion and did not discuss what constituted “normal circumstances” because, in that case, the defendant made a fatal concession in the case that made the matter moot. *Commonwealth v. Carter*, 64 Va. Cir. 224, 226 (Norfolk 2004).

witnesses to be credible and finds that there was a simple misunderstanding. There was no actual meeting of the minds as to what the agreement was. The prosecutor and defense attorney each thought they negotiated something different. So, for this alternative reason, it denies Mr. Mao's Motion to Enforce Plea Agreement. Virginia Supreme Court Rule 3A:8(c)(2) wisely requires that plea agreements in every felony case be reduced to writing, signed by the lawyers and the defendant, and presented to the court for approval. It prevents the awkward scene of having hearings with prosecutors cross-examining defense attorneys and defense attorneys cross-examining prosecutors in an effort to prove what an oral agreement actually was — as happened here.

This letter is what this Court's June 15, 2018 Order, denying Mr. Mao's motion, anticipated incorporating by reference. For convenience and an accurate record, the Order is attached.

Kind regards,



David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit

Enclosure

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