

**Commonwealth of Kentucky**  
**Kentucky Supreme Court**  
CASE NO. 2012-SC-000034-D

**FILED**  
FEB 11 2013  
CLERK  
SUPREME COURT

**MICHELLE SMITH**

**APPELLANT**

v.

Appeal from Crittenden Circuit Court  
Hon.C. Rene Williams, Judge  
Circuit Court File No. 2009-CR-00036

**COMMONWEALTH OF KENTUCKY**

**APPELLEE**

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**Brief for Commonwealth**

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Submitted by,

**JACK CONWAY**

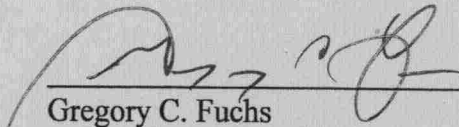
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Commonwealth's Brief has been mailed, postage pre-paid, this 11<sup>th</sup> day of February, 2013, to: Hon.C. Rene Williams, Judge, Crittenden Circuit Court, Judicial Annex, 35 U. S. 41 A.S., P. O. Box 126, Dixon, Ky. 42409-0126; to: Hon. Julia K. Pearsom, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 392, Frankfort, KY 40601; and sent via electronic mail to: Hon. Zachary Greenwell, Commonwealth's Attorney, 215 N. Main St., P. O. Box 341, Ky. 42409-0341.

  
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Gregory C. Fuchs  
Assistant Attorney General

## **INTRODUCTION**

This appeal is on discretionary review from the Court of Appeals affirmance of a Crittenden Circuit Court judgment sentencing appellant to five years imprisonment in accord with the offer entered on a plea agreement including felony pre-trial diversion.

## **STATEMENT REGARDING ORAL ARGUMENT**

The within case appears to present a unique issue for which oral argument is sometimes desirable; however, given the brevity and simplicity of the issue, the Commonwealth does not believe that oral argument is warranted.

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## COUNTERSTATEMENT OF THE CASE

Appellant was indicted in Crittenden Circuit Court for felony possession of drug paraphernalia as a second or subsequent offense. (TR 14). Prior to trial, with the agreement of the Commonwealth's Attorney, appellant entered a guilty plea in exchange for a recommendation for pre-trial diversion and a five year prison sentence. (TR 36-38). As part of her motion for pre-trial diversion, appellant specifically agreed that upon any violation of the terms of the agreement the court may impose the recommended five year sentence. (TR 39-40). As part of the order granting pre-trial diversion order also signed and agreed to by appellant, the court could impose a sentence equal to that five year sentence recommended by the prosecutor. (TR 42-43).

On October 14, 2010, the court entered an order voiding pre-trial diversion for the appellant. (TR 67). At sentencing the following month, the appellant moved for sentencing as a misdemeanor pursuant to the amendment of KRS 218A.500(5) by the 2010 General Assembly. (CD 11/22/10 12:41:24). The trial court denied the motion agreeing with the Commonwealth that it needed to consent as an affected party under KRS 446.110. (CD 11/22/10 12:54:20). An appeal to the Kentucky Court of Appeals was taken from judgment entered in accord with the recommendation of the Commonwealth.

The Kentucky Court of Appeals agreed with the Crittenden Circuit Court that the Commonwealth must consent but not because it was an affected party but instead because appellant had entered into a plea agreement with the Commonwealth and that its agreement was necessary because plea agreements are binding contracts and interpreted

according to ordinary contract principles. This court granted appellant's motion for discretionary review.

### **ARGUMENT**

#### **THE CRITTENDEN CIRCUIT COURT DID NOT ERR IN SENTENCING APPELLANT UNDER THE PRIOR FELONY PROVISIONS OF KRS 218A.500(5) WHICH APPELLANT HAD AGREED WOULD BE APPLICABLE AT THE TIME THAT SHE ENTERED INTO A PLEA AGREEMENT WITH THE COMMONWEALTH.**

The sole question on review is whether appellant was unilaterally entitled to the mitigating benefits of the amendment to KRS 218A.500(5) by the 2010 legislature or whether Commonwealth's consent was necessary for appellant to receive the benefits as appellant had entered into a plea agreement with the Commonwealth. The trial court ruled that the Commonwealth needed to consent under KRS 446.110. KRS 446.110 in part reads "[n]o new law shall be construed to...in any way whatever to affect any...right accrued or claim arising before the new law takes effect" but otherwise allows a mitigated punishment to be applied with the consent of the party affected.

Considering Commonwealth v. Phon, 17 S.W.3d 106 (Ky. 2000)(holding defendant's consent was necessary) the trial court's ruling might at first glance be considered incorrect. However, the present case involves a dynamic not involved in the analysis of Phon in that this was a sentencing following an unsuccessful pre-trial diversion pursuant to a plea agreement and it is upon this dynamic that the Court of Appeals held that the Commonwealth's consent was necessary.

A plea agreement is a binding contract and interpreted under contract law. See Elmore v. Commonwealth, 236 S.W.3d 623 (Ky. App. 2007). In such an agreement, both the defendant and the Commonwealth are parties and herein the Commonwealth's consent was needed not only for the plea agreement but for appellant to enter pre-trial diversion and receive the agreed upon sentence. See Flynt v. Commonwealth, 105 S.W.3d 415 (Ky. 2003).

As noted in the Counterstatement, as part of her motion for pre-trial diversion, appellant specifically agreed that upon any violation of the terms of the agreement the court may impose the recommended five year sentence. (See TR 39-40). And as part of the order granting pre-trial diversion order also signed and agreed to by appellant, the court accepted and memorialized that it could impose a sentence equal to that five year sentence recommended by the prosecutor. (TR 42-43). Appellant, however, would not have received the plea bargain and benefit of pre-trial diversion without the Commonwealth's agreement. Phon.

The plea agreement is an otherwise binding contract between the Commonwealth and appellant. See Hensley v. Commonwealth, 217 S.W.3d 885, 887 (Ky. App. 2007). Appellant received the full benefit of her agreement and as a party to the agreement the Commonwealth would have a right to have the court enforce the obligations she otherwise agreed upon to receive the benefits in that agreement the same as any other contract to the extent they did not violate the applicable law at the time of the agreement. See Mc Clanahan v. Commonwealth, 308 S.W.3d 694 (Ky. 2010).

While appellant has referred to the sentence she received as being an illegal sentence, that is a patent mischaracterization of the law. The sentence agreed upon in this case was proper under KRS 218A.500(5) in effect in 2009 and it would be law applicable to any crime committed prior to its amendment or for any agreement executed likewise prior thereto. See Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001). It would be the application of the new law which is illegal.

Without the parties' consent, the new law would be a violation of the Contract Clause of the United States Constitution because it impairs rights under the plea agreement contract. See Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819). The legislature cannot change the parties's rights under a contract and appellant is incorrect in saying the adoption of the new law changed the terms of the contract. *Id.*

Appellant is correct that he is entitled to a sentencing hearing under Peeler v. Commonwealth, 275 S.W.3d 223 (Ky. App. 2008) as if he had pled guilty without diversion. However, that means only that separate proceedings are contemplated and it does not mean that any plea agreement is set aside. See Peeler, There though were separate hearing therein. It is the diversion that is voided not the plea agreement and there would be chaos in the courts if violation of the terms of a pre-trial diversion agreement sent the parties back to square one. There would simply be no reason for a defendant to enter a guilty plea as part of the diversion if the voiding of the diversion also set aside the plea.

In summary, since the plea agreement, the same as any other contract is interpreted under the applicable law at the time of the agreement, it was not a violation of the law to sentence appellant in accord therewith even though the law may have changed..



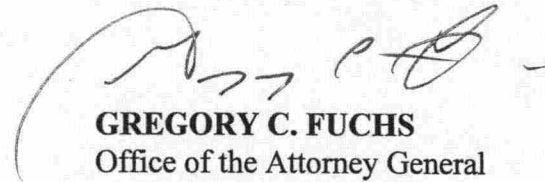
And since the Commonwealth was a party to the agreement, its consent was necessary to change the terms thereof or to otherwise sentence appellant under any change in the law. Reversal now is otherwise unwarranted. .

**CONCLUSION**

For all the foregoing reasons, the Commonwealth respectfully submits that the judgment of the Crittenden Circuit Court and the opinion of the Court of Appeals be affirmed.

Respectfully submitted,

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Attorney General of Kentucky

A handwritten signature in black ink, appearing to read 'G. C. Fuchs', is written over the typed name and address of Gregory C. Fuchs.

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