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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002237-MR

MICHELLE SMITH

APPELLANT

v. APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE C. RENE WILLIAMS, JUDGE
ACTION NO. 09-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE, STUMBO, AND WINE, JUDGES.

MOORE, JUDGE: Michelle Smith appeals from the Crittenden Circuit Court's order sentencing her to five years' imprisonment. After a thorough review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2009, Smith was indicted for Possession of Drug Paraphernalia, Second Offense. On September 10, 2009, Smith pled guilty to the charge. Pursuant to the plea agreement, which was executed by all parties, the Commonwealth recommended that Smith receive pretrial diversion for five years and a five-year sentence if she failed to successfully complete the pretrial diversion program. The trial court sentenced Smith to five years' pretrial diversion, and further ordered that "[i]f the Court finds the defendant fails to successfully complete pretrial diversion and voids the agreement, the Court may impose a sentence equal to or less than the penalty recommended by the prosecutor..." On October 14, 2010, the trial court found that Smith had violated the terms of her pretrial diversion.

At sentencing, Smith argued that she was entitled to be sentenced under the lesser penalties imposed by KRS¹ 218A.500(5), as amended. At the time Smith committed the offense and entered her plea, the penalty for Possession of Drug Paraphernalia, Second Offense was one to five years' imprisonment. KRS 218A.500(5); KRS 532.020(1)(a). However, during the time that Smith was on pretrial diversion, KRS 218A.500(5) was amended, making the offense a Class A misdemeanor subject to a term of imprisonment between ninety days and twelve months. KRS 532.020(2).

¹ Kentucky Revised Statute.

Smith argued that she was entitled to a lesser penalty pursuant to KRS 446.110, which states in relevant part that “[i]f any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.” The Commonwealth argued that its consent was necessary as the “party affected” before the trial court could sentence Smith under the new penalty provisions. It also argued that KRS 446.110 was inapplicable where Smith had already entered into a plea agreement with the Commonwealth. Smith, however, asserted that she was the “party affected,” and that only her consent was necessary in order for the trial court to proceed with sentencing under the new provision. The trial court rejected Smith’s argument and sentenced her to five years’ imprisonment pursuant to the Commonwealth’s recommendation. Smith now appeals.

II. ANALYSIS

As a general rule, “[n]o statute shall be construed to be retroactive, unless expressly so declared.” KRS 446.080(3). Thus, Kentucky courts have as a rule applied the law in existence at the time of the commission of the crime. *Lawson v. Commonwealth*, 53 S.W.3d 534, 550 (Ky. 2001). However, KRS 446.110 provides an exception to this rule, where the amended provision is “‘certainly’ or ‘definitely’ mitigating,” *id.* (footnote omitted), and where the defendant has given her consent as the “party affected.” *Id.* at 551 (“[Defendant] certainly did not consent to the application of the modified provisions.”);

Commonwealth v. Phon, 17 S.W.3d 106, 107 (Ky. 2000) (“[P]enalty...could be applied, with the defendant’s consent...”); *Coleman v. Commonwealth*, 160 Ky. 87, 169 S.W. 595, 597 (1914) (“unless the punishment is definitely mitigated by the new law and the accused consents . . .”).

On appeal, Smith reiterates her argument that it was her consent, and not the Commonwealth’s, that was needed in order for the court to apply the amended penalty. Although Kentucky case law supports Smith’s contention that her consent was required as the “party affected,” *id.*, we conclude that the Commonwealth correctly argues that Smith is precluded from requesting a lesser penalty under the amended statute because she had previously entered a plea agreement with the Commonwealth in which she agreed to the recommended sentence of five years.²

“[A]ccepted plea bargains are binding contracts between the government and defendants.” *Elmore v. Commonwealth*, 236 S.W.3d 623, 626 (Ky. App. 2007) (citing *Hensley v. Commonwealth*, 217 S.W.3d 885, 887 (Ky. App. 2007)). “Once a plea agreement is accepted by a defendant, the agreement is binding upon the Commonwealth – subject to approval by the trial court - and the accused is entitled to the benefit of his bargain.” *Id.* “[P]lea agreements are interpreted according to ordinary contract principles.” *Id.*

² It appears that the trial court made its ruling based upon its interpretation of the “party affected” language. This has no bearing on our analysis however, because we may affirm the trial court on any basis that is supported by the record. *Kentucky Farm Bureau v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991) (citing *Richmond v. Louisville & Jefferson County MSD*, 572 S.W.2d 601 (Ky. App. 1978)).

Based upon these principles, we conclude that a defendant is precluded from consenting to the imposition of a lesser penalty pursuant to KRS 446.110 where she has already entered a valid plea agreement. Here, Smith has already received the benefit of her bargain by being afforded pretrial diversion, *i.e.* an opportunity to avoid the felony charge in its entirety had she complied with the conditions of her diversion. Accordingly, she is bound to the remaining provisions of that contract, as she chose to violate the terms of her pretrial diversion. We therefore conclude that the trial court was within its discretion when accepting the Commonwealth's recommendation contained in that agreement. Accordingly, we affirm.

WINE, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS.

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