RENDERED: May 22, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-1689-MR

JERRY MILLER FARROW — APPELLANT

V.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 96-CR-54

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

* * * * * * * * * *

BEFORE: GUIDUGLI, KNOX, and MILLER, JUDGES.

KNOX, JUDGE. Jerry Farrow (Farrow) appeals from an order of the Boyd Circuit Court entered on June 19, 1997, denying his motion to modify the judgment brought pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(f) and CR 60.03. After a review of the record, the arguments of counsel and the applicable law, we reverse and remand.

In June 1996, the Boyd County Grand Jury indicted Farrow on four felony counts of First-Degree Trafficking in a Controlled Substance, Second Offense (KRS 218A.1412), related to the sale of cocaine to a confidential informant on four separate occasions in January 1996. The indictment also included a fifth

count charging Farrow with being a Persistent Felony Offender in the Second Degree (PFO II)(KRS 532.080). On November 27, 1996, Farrow entered a guilty plea to all five counts of the indictment pursuant to a plea agreement with Commonwealth. As part of the plea agreement, the Commonwealth recommended the minimum sentence of ten years on each of the four counts of first-degree trafficking in a controlled substance, second offense, with enhancement to twenty years based on the PFO II count. On December 16, 1996, the circuit court sentenced Farrow consistent with the Commonwealth's recommendation to ten years on each of the four counts of first-degree trafficking in cocaine and enhanced each count to twenty years for being a PFO II under count five, all to run concurrently for a total sentence of twenty years in prison.

On June 10, 1997, Farrow, acting pro se, filed a motion for modification pursuant to CR 60.02(f), CR 60.03 and KRS 23A.010. Farrow sought a modification of the judgment and sentence alleging that the conviction improperly subjected him to double enhancement in violation of constitutional due process. Farrow alleged that he could not be subjected to sentences under both KRS Chapter 218A, the drug trafficking statutes, and KRS 532.080, the persistent felony offender statute. Farrow requested that the trial court modify the sentence by reducing it to ten years, the minimum sentence for the offense of first-degree trafficking in a controlled substance, second offense, and delete the sentence for the PFO II charge. After the

Commonwealth filed a response, the trial court summarily denied the motion to modify. On June 25, 1997, Farrow filed a motion to reconsider and for findings of fact pursuant to CR 52.02 and CR 52.04. The circuit court denied the motion for reconsideration. This appeal followed.

Farrow argues that imposing a sentence under both KRS 218A.1412(b), as a subsequent drug offender, and KRS 532.080, as a PFO II, constitutes double enhancement in violation of state law and due process. The Commonwealth argues that Kentucky case law clearly permits a defendant's conviction and sentence pursuant to KRS Chapter 218A to be further enhanced by virtue of his status as a persistent felony offender under KRS 532.080. See, e.g., Peyton v. Commonwealth, Ky., 931 S.W.2d 451 (1996); Brooks v. Commonwealth, Ky., 905 S.W.2d 861 (1995); Dawson v. Commonwealth, Ky., 756 S.W.2d 935 (1988); and Harrison v. Commonwealth, Ky. App., 842 S.W.2d 531 (1992). A review of the case law compels us to conclude that Farrow's convictions constituted impermissible double enhancement, and the judgment must be vacated and remanded.

In Heady v. Commonwealth, Ky., 597 S.W.2d 613 (1980), the defendant was charged with a felony offense of carrying a concealed deadly weapon (CCDW), which alone constituted a misdemeanor, but the offense was enhanced to a felony based on the defendant's prior felony conviction for armed robbery. The Commonwealth also charged Heady with being a PFO I based in part on the same armed robbery conviction used to elevate the CCDW

offense to a felony. The Supreme Court held that the Commonwealth could not use a prior conviction to enhance what would ordinarily be a misdemeanor weapons charge to a felony "and then use the conviction of that felony to 'trigger' further enhanced punishment via the persistent felony offender statute." Id. at 613. See also Boulder v. Commonwealth, Ky., 610 S.W.2d 615 (1980), overruled in part on other grounds by Dale v. Commonwealth, Ky., 715 S.W.2d 227 (1986).

The Heady decision created some confusion in the area of drug offenses given the earlier decision in Rudolph v. Commonwealth, Ky., 564 S.W.2d 1 (1978), wherein the Court noted the potential for abuse through additional enhancement under Chapter 218A and the PFO statutes, but failed to find any error on that ground given the defendant's numerous prior drug convictions. In Eary v. Commonwealth, Ky., 659 S.W.2d 198 (1983), involving a prosecution for possession of a handgun by a convicted felon and PFO I, the Court limited the application of Heady, supra, and Boulder, supra, and held that where a defendant has several existing felony convictions, different individual prior felonies could be used as the basis for creating an offense such as possession of a handgun by a convicted felon and as the predicate offenses for a PFO charge. "Where a defendant is convicted at his trial for possession of a handgun by a convicted felon and has been previously convicted of more than one prior felony, those convictions in excess of that for a single felony may be utilized for the purpose of persistent felony offender

sentencing pursuant to KRS 532.080." Id. at 200 (emphasis added). See also Jackson v. Commonwealth, Ky., 650 S.W.2d 250 (1983).

Finally, in Commonwealth v. Grimes, Ky., 698 S.W.2d 836 (1985), the Court attempted to clarify the issue of double enhancement with respect to subsequent offender drug offenses and PFO offenses. In Grimes, the defendant was convicted of trafficking in a controlled substance, second offense, and of being a PFO II, based on a prior conviction on three counts of uttering a forged instrument[1]. The Court held that the conviction for trafficking in a controlled substance could be enhanced by the PFO conviction pursuant to KRS 532.080(2). However, the Court also stated the underlying predicate felony offenses for the drug offense and the PFO conviction must be different.

> As succinctly stated in Eary, supra, this is the type of case spawned by the previous holdings of this Court in Boulder and Heady, supra. It is yet another problem arising from the unfortunate use of the word "status." This Court has clearly stated its position in Eary as to the holding of Boulder in Jackson v. Commonwealth, supra. When a single prior felony is used to create an offense or enhance a punishment of the second crime so created or enhanced, it may not be used again at that trial to prosecute the defendant under the PFO statute . . . .
>
> It is the holding of this Court that a conviction of a second offense of trafficking in a Schedule III controlled substance under

[1] For purposes of determining the number of prior felony convictions under the persistant felony offender statute, two or more felony convictions for which a defendant serves concurrent or uninterrupted consecutive terms of imprisonment are deemed to be only one conviction. KRS 532.080(4).

> KRS 218A.990(2), may be further enhanced by a persistent felony offender second degree charge pursuant to the general PFO statute, KRS 532.080, where the PFO charge is grounded on a prior, unrelated conviction.

698 S.W.2d at 837 (emphasis added); Cf. Peyton v. Commonwealth, Ky., 931 S.W.2d 451, 455 (1996)(court noted that defendant had several prior felony convictions that could serve as basis for subsequent offense trafficking charge and PFO charge). As the court stated in Corman v. Commonwealth, Ky. App., 908 S.W.2d 122, 123 (1995):

> The rule is now established that when a single prior felony is utilized to create an offense or enhance a punishment at the trial of the second crime, that same prior felony cannot be used at that trial to prosecute the defendant as a persistent felony offender. Eary, supra; Jackson, supra; Boulder, supra. If however, the prior felony used to underlie PFO conviction is a separate prior felony from the one used to create the offense or enhance its punishment, the offense can be further enhanced under the PFO statute.

In the case at bar, Farrow was convicted of trafficking in a controlled substance (cocaine) on September 26, 1988. The June 1996 indictment cited the previous convictions for first-degree trafficking in a controlled substance on September 26, 1988, as the underlying prior offense in charging Farrow with both four counts of first-degree trafficking in a controlled substance, second offense, and with being a PFO II. The Commonwealth utilized the same prior convictions to create the second offense trafficking offenses and as an element of the PFO II charge.

Under KRS 218A.1412, first-degree trafficking in a controlled substance, second offense, is a Class B felony with a

potential sentence of ten to twenty years in prison; whereas, first-degree trafficking in a controlled substance, first offense, is a Class C felony subject to punishment of five to ten years in prison. In addition, under the PFO statute, the potential penalty for a person found to be a PFO II and convicted of a Class C felony is ten to twenty years, while the penalty for a PFO II convicted of a Class B felony is twenty years to life in prison. Farrow's conviction for first-degree trafficking in a controlled substance, second offense, and being a PFO II based on the same underlying predicate felony conviction in the same prosecution subjected him to additional penalties in contravention of the double enhancement principle established in Heady, supra, Eary, supra, and Grimes, supra. Consequently, Farrow could not have been convicted as both a subsequent offense drug trafficker under KRS 218A.1412 and as a persistent felony offender under KRS 532.080 under the facts stated in the indictment.

The Commonwealth contends that Farrow is not entitled to relief because he waived any double enhancement violation by entering a guilty plea. In general, a knowing and voluntary guilty plea waives all defenses to the original charges other than the defense that the indictment failed to charge an offense. Corbett v. Commonwealth, Ky., 717 S.W.2d 831, 832 (1986); Quarles v. Commonwealth, Ky., 456 S.W.2d 693 (1970). However, there are some exceptions to this general rule. For instance, in Hughes v. Commonwealth, Ky., 875 S.W.2d 99 (1994), the Supreme Court held

that a defendant who has unconditionally pled guilty may still raise a challenge to his sentence because sentencing is considered a "jurisdictional" issue. Id. at 100 (citing Wellman v. Commonwealth, 694 S.W.2d 696 (1985)). Similarly, in Sanders v. Commonwealth, Ky. App., 663 S.W.2d 216 (1983), the defendants appealed the validity of their sentences for drug possession convictions under KRS Chapter 218A following guilty pleas. The Court noted that challenges to the sentence or punishment represent an exception to the general waiver rule for guilty pleas. Id. at 218.

The Commonwealth argues that because Hughes, supra, involved a direct appeal, the guilty plea waiver principle should still apply to prevent review of Farrow's complaint. Both Hughes and Sanders appear to allow a direct appeal of a sentencing issue following entry of an unconditional guilty plea despite the fact that there typically is no direct appeal from a guilty plea. Nevertheless, neither case suggests that a direct appeal is the exclusive method for raising the jurisdictional issue of sentencing. As the Court stated in Gaither v. Commonwealth, Ky., ___ S.W.2d ___, 1997 WL 677850 (Oct. 30, 1997):

> Initially we note that this appeal is proper, even though Appellant voluntarily assented to the terms of the plea agreement and unconditionally pled guilty to the offenses charged. See Hughes v. Commonwealth, Ky., 875 S.W.2d 99, 100 (1994). The basis of Appellant's argument is that the trial court did not have the authority to impose the sentence it did. Sentencing is jurisdictional. Wellman v. Commonwealth, Ky., 694 S.W.2d 696, 698 (1985). Subject matter jurisdiction may be raised at any time

> and cannot be consented to, agreed to or waived by the parties. See Commonwealth Health Corporation v. Croslin, Ky., 920 S.W.2d 46, 47 (1996); Thompson v. Commonwealth, Ky., 99 S.W.2d 705, 706 (1936).

In Commonwealth v. Durham, Ky., 908 S.W.2d 119 (1995), the Court addressed the issue of maximum sentencing under KRS 532.110(1)(c) and KRS 532.080 raised initially by the defendant in a motion to modify the sentence nearly ten years after he had been sentenced pursuant to a guilty plea. In McIntosh v. Commonwealth, Ky., 368 S.W.2d 331 (1963), the Court indicated that CR 60.02 could be used where a defendant is prejudiced by the manner in which a sentence is adjudged or pronounced. Cf. Duncan v. Commonwealth, Ky. App., 614 S.W.2d 701 (1981)(holding CR 60.02 was proper procedure for challenge to jail credit amount). We believe that Farrow can proceed by way of a collateral appeal and that his appeal should not be dismissed on procedural grounds based on waiver.

Having decided that the trial court could not sentence Farrow under the enhancement provisions of both KRS Chapter 218A and KRS 532.080, the remaining issue is the appropriate relief. Farrow argues that his sentence should be modified to a term of ten years. He asserts that in accepting the plea agreement, he believed that he was receiving the minimum sentence. Therefore, he requests that the sentence be amended to reflect a corrected minimum sentence of ten years for either first-degree trafficking, second offense, a Class B felony, or PFO II

enhancement based on an underlying offense of first-degree trafficking, first offense, a Class C felony.

Where the prosecution has not breached the agreement but the defendant has been misled as to a significant aspect of the plea, the defendant may seek to have the guilty plea withdrawn and the conviction vacated. See Haight v. Commonwealth, Ky., 760 S.W.2d 84 (1988); Commonwealth v. Martin, Ky. App., 777 S.W.2d 236 (1989). A guilty plea must be entered knowingly, intelligently and voluntarily, which includes the defendant's having an adequate understanding of the consequences of the plea. See McMann v. Richardson, 397 U.S. 759, 766, 90 S. Ct. 1441, 1446, 25 L. Ed. 2d 763 (1970); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990). A guilty plea is valid only if it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432, 434 (1992). While the trial court need not necessarily inform a defendant as to the range of possible sentences, Jewell v. Commonwealth, Ky., 725 S.W.2d 593 (1987), where the defendant is given erroneous information on the maximum possible penalty, the guilty plea may be rendered invalid because it was not made intelligently with an accurate appreciation for the available options. See United States v. Guerra, 94 F.3d 989, 995 (5th Cir. 1996); United States v. Colunga, 786 F.2d 655, 658 (5th Cir. 1986), cert. denied, 484 U.S. 857, 108 S. Ct. 165, 98 L. Ed. 2d 120 (1987). "A guilty plea that was not knowingly, intelligently and voluntarily

entered is invalid and may be withdrawn by the defendant; a conviction resting upon such a plea must be vacated." Guerra, 94 F.3d at 995.

Farrow in effect asks that one aspect of the plea bargain -- a minimum sentence -- be imposed upon a new set of offenses. While a defendant has an absolute right to unconditionally plead guilty to the crime charged in an indictment, if the guilty plea includes conditions such as the limit on the sentence, the prosecution typically must be a party to the agreement. See Commonwealth v. Corey, Ky., 826 S.W.2d 319, 321 (1992). We note that this is not a situation where the plea agreement involved the maximum sentence, or where one or more offenses may be easily severed from the remaining offenses. Under those scenarios, a remand for resentencing on a revised maximum sentence that results in a lesser final sentence or merely vacating the convictions and sentences on the illegal charges may be appropriate. However, the effect of prohibiting double enhancement in the current situation would not necessarily preclude prosecution of Farrow for either first-degree trafficking in cocaine, second offense, alone, or first-degree trafficking in cocaine, first offense, and PFO II. We note that on the four counts of first-degree trafficking, second offense, the penalty range is ten to twenty years and the potential maximum sentence is eighty years, if they are run consecutively. See Commonwealth v. Durham, Ky., 908 S.W.2d 119 (1995); KRS 218A.1412, KRS 532.080(6)(b).

The Commonwealth would be prejudiced by imposing a minimum ten-year sentence despite the fact that the initial bargained for twenty-year sentence is still available on the remaining offenses without an improper double enhancement. Generally, a plea agreement stands or falls as a unit, and a defendant may not be relieved of his part of the plea bargain without giving up the benefits he received in the bargain. See State v. Gibson, 96 N.M. 742, 743, 634 P.2d 1294, 1295 (Ct. App. 1981). A defendant does not have a constitutional right to plea bargain. Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); Commonwealth v. Corey, 826 S.W.2d at 321. A plea agreement has many characteristics of a contract. Commonwealth v. Reyes, Ky., 764 S.W.2d 64 (1989); United States v. Yemitan, 70 F.3d 746, 747 (2nd Cir. 1995).

In the instant case, Farrow felt he was bargaining for the minimum sentence, while the prosecution could argue it was bargaining for a twenty-year sentence. Taking into consideration the interests of both parties, we believe the parties should be returned to their pre-plea agreement positions. The Commonwealth should be allowed the option of prosecuting Farrow on an amended indictment for either first-degree trafficking in a controlled substance, second offense, or first-degree trafficking in a controlled substance, first offense, and PFO II, without the double enhancement involving the same underlying felony. The parties may renegotiate a plea bargain, and if they cannot reach agreement, the Commonwealth may proceed to trial. See, e.g.,

United States v. Maybeck, 23 F.3d 888 (4th Cir. 1994), aff'd after remand 76 F.3d 376 (4th Cir. 1996), cert. denied, ___ U.S. ___, 116 S. Ct. 1555, 134 L. Ed. 2d 657 (1996). We note that this procedure raises no double jeopardy violation upon conviction based on either a new guilty plea or a jury trial. See Haight v. Commonwealth, Ky., 938 S.W.2d 243, 250-53 (1996); Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979); United States v. Podde, 105 F.3d 813 (2nd Cir. 1997).

For the above-stated reasons, we vacate the judgment of the Boyd Circuit Court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathleen Kallaher Schmidt
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Vickie L. Wise
Asst. Attorney General
Frankfort, Kentucky