

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001633-MR

JOSEPH CASE

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA ADAMS, JUDGE
ACTION NO. 98-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

EMBERTON, JUDGE: Joseph Case entered a guilty plea to one count of possession of a controlled substance conditioned upon his right to appeal the trial court's denial of pretrial diversion as provided for in Kentucky Revised Statutes (KRS) 533.250-262. We affirm.

In August 1998, Case was indicted by the Madison County Grand Jury on one count of first-degree possession of a controlled substance. After entering a plea of not guilty at his September 3rd arraignment, Case subsequently filed a motion in October 1998, for pretrial diversion pursuant to a new section of KRS Chapter 533 which became effective on July 15, 1998. The

Commonwealth opposed the motion, citing Case's record of having four previous driving infractions and of previously having been in possession of a weapon while intoxicated. The trial court denied the motion for diversion because of its belief that assignment of a criminal defendant to a pretrial diversion program over the objection of the Commonwealth constitutes an impermissible infringement upon the Commonwealth's prosecutorial function and violates Section 81 of the Kentucky Constitution. The trial court also noted in its order that the Madison Circuit Court had not yet submitted its pretrial diversion plan to the Kentucky Supreme Court for approval as required by KRS 533.250(1), prior to December 1, 1999.

Although Case argues in this appeal that the trial court erred in concluding that it could not refer a defendant to pretrial diversion over the objection of the Commonwealth and in determining that the statute impermissibly infringes upon the prosecutorial function, we are convinced that the trial court properly denied diversion because, at the time of Case's motion, there was no program in place to which he could have been referred. KRS 533.262 provides in pertinent part:

(1) The pretrial diversion program authorized by KRS 533.250 to 533.260 shall be the sole program utilized in the Circuit Courts of the Commonwealth.

(2) As of July 15, 1998, the only other pretrial diversion programs utilized by the Commonwealth shall be those authorized by the Kentucky Supreme Court and providing for the pretrial diversion of misdemeanants. Programs existing as of July 15, 1998, may continue for the purpose of supervising persons granted pretrial diversion prior to July 15, 1998, however no new persons shall

be admitted to these programs. (Emphasis added).

It thus appears that the circuit court would have been without authority to order diversion even if the Commonwealth had not opposed the motion and its concerns about the statute's constitutionality did not exist. Appellant simply had the misfortune of falling into a time period when pretrial diversion was not authorized for new defendants in Madison County.

Although the trial court's denial of probation was primarily predicated upon an entirely different basis than the rationale underpinning this decision, we must affirm the decision if it is legally correct for any reason.¹ Being of the opinion that Case's entitlement to diversion was proscribed by the plain language of the statute under which he sought relief, we need not address the constitutional concerns of the trial court.²

The judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Matthew D. Nelson
Assistant Attorney General
Frankfort, Kentucky

¹ Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 31 (1998).

² Cf., Commonwealth v. Halsell, Ky., 934 S.W.2d 552, 554-55 (1996), in which the Supreme Court reiterated the long-standing principle that, where possible, statutes should be interpreted and harmonized so as to give effect to the legislative mandate.