

RENDERED: JANUARY 27, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001679-MR
AND
NO. 2010-CA-001680-MR

DONNA MAGGARD

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NOS. 05-CR-00003 AND 05-CR-00164

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

TAYLOR, CHIEF JUDGE: Donna Maggard brings these appeals from August 13, 2010, judgments of the Perry Circuit Court voiding Maggard's pretrial diversions in Action Nos. 05-CR-00003 and 05-CR-00164. We reverse and remand Appeal Nos. 2010-CA-001679-MR and 2010-CA-001680-MR with directions.

To dispose of this appeal, a recitation of the relevant procedural history is warranted. Maggard was indicted in two separate criminal actions. In Action No. 05-CR-00003, Maggard was indicted upon possession of a controlled substance (first degree), two counts of possession of controlled substance (third degree) and possessing prescription drugs not in proper container. In Action No. 05-CR-00164, Maggard was indicted upon possession of controlled substance (first degree) and possession of controlled substance (third degree).

By agreement with the Commonwealth, Maggard entered a guilty plea to possession of a controlled substance (first degree) in Action No. 05-CR-00003 and to possession of a controlled substance (first degree) and possession of a controlled substance (third degree) in Action No. 05-CR-00164. In both actions, the circuit court rendered separate orders accepting the guilty pleas and placing Maggard on pretrial diversion for three years. The diversions were specifically contingent upon Maggard's successful completion of drug court. These orders were entered of record on July 21, 2005. Thereafter, Maggard was found in contempt of court for violations of drug court rules, and she entered various inpatient drug treatment programs, apparently to no avail. Subsequently, by order entered March 18, 2009, Maggard was "terminated" from the drug court program in both actions, and one day later, by March 2009 orders, the circuit court ordered Maggard to attend another inpatient drug treatment program. She failed to successfully complete the treatment program.

Eventually, the circuit court rendered two separate judgments determining that Maggard had violated the terms of her pretrial diversions and sentencing her to a total of three-years' imprisonment. Yet, the circuit court did not void Maggard's diversions but rather ordered the pretrial diversions to be extended for a period of three years, starting on July 16, 2009. These judgments were entered of record on August 20, 2009.

Later, the Commonwealth filed motions to void the diversion in both actions on August 25, 2009, but later withdrew the motions. Finally, on June 7, 2010, the Commonwealth again filed motions to void diversion in both actions. The court voided Maggard's diversion in both actions on July 1, 2010, and she was sentenced to a total of three-years' imprisonment on August 13, 2010.¹

Maggard contends that the circuit court lacked jurisdiction to void her diversion in both actions. We agree.

A review of the record plainly demonstrates that Maggard's pretrial diversion in both actions began in July 2005 and was for a period of three years. Simple calculation reveals that Maggard's diversion periods terminated in July 2008, three years from the date of initiation. However, it is equally clear that the Commonwealth did not move to void Maggard's pretrial diversions within the three-year periods and that the circuit court failed to void Maggard's diversions within the diversion periods.

¹ This August 13, 2010, judgment was amended by judgment entered August 25, 2010.

In this Commonwealth, the circuit court only retains jurisdiction to void a defendant's pretrial diversion during the period of diversion or after such period if the Commonwealth filed a motion to void the diversion prior to the expiration of the diversion period.² *Ballard v. Com.*, 320 S.W.3d 69 (Ky. 2010); *Tucker v. Com.*, 295 S.W.3d 455 (Ky. App. 2009); *see also* 9 Leslie W. Abramson, *Kentucky Practice – Criminal Practice and Procedure* § 31:173 (5th ed. 2010-2011).

In this case, the circuit court did not void the pretrial diversions during the three-year diversion periods, and the Commonwealth failed to file a motion to void diversion prior to expiration of the diversion periods. These facts are uncontroverted. Hence, the circuit court was without jurisdiction to void Maggard's pretrial diversions by orders entered July 1, 2010. *See Ballard*, 320 S.W.3d 69; *Tucker*, 295 S.W.3d 455. Upon remand, the circuit court shall dismiss both actions.

For the foregoing reasons, we reverse the judgments of the Perry Circuit Court in Appeal Nos. 2010-CA-001679-MR and 2010-CA-001680-MR and remand with directions to dismiss the indictments in Action Nos. 05-CR-00003 and 05-CR-00164.

ALL CONCUR.

² Kentucky Revised Statutes 533.250 empowers the Commonwealth to file a motion to void pretrial diversion.

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