

RENDERED: AUGUST 5, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000288-MR

LEE ANN JOHNSON

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE GEORGE DAVIS, JUDGE  
ACTION NO. 04-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CLAYTON, KELLER AND MOORE, JUDGES.

CLAYTON, JUDGE: Lee Ann Johnson appeals the decision of the Boyd Circuit Court that revoked her pretrial felony diversion and ordered her to serve two years. After our review, we find the time had expired on the diversion agreement and we reverse and remand this matter for further actions consistent with this opinion.

The facts are not in contention and the Commonwealth concedes it was error to revoke the diversion previously granted because the agreed time for the diversionary period had expired. On August 18, 2004, Lee Ann Johnson appeared before the Boyd Circuit Court and entered a plea of guilty pursuant to a diversion agreement offered by the Commonwealth to three counts of possession of a forged instrument in the second degree.

The trial judge signed the judgment on August 25, 2004, that postponed the imposition of the two-year sentence for a period of five years on a plea of guilty subject to the terms of a felony diversion agreement. The judgment itself indicates it was “Entered this the 18<sup>th</sup> day of August, 2004.” Of critical import to this case is the judge’s notation of “*nunc pro tunc*” after that date. The judgment was not however actually entered of record by the clerk until August 26, 2004. Pursuant to the terms of the judgment, the case was set for review on August 19, 2009.

On August 19, 2009, Johnson did not appear for the diversion status hearing. The Commonwealth made an oral motion to revoke the diversion agreement based on allegations that during the unsupervised pretrial diversion period, Johnson had been arrested multiple times, received multiple convictions including at least one felony and that there was currently a bench warrant issued for her arrest in another county. The trial court issued a bench warrant for Johnson’s arrest for her failure to appear at the hearing. She appeared before the

trial court on September 23, 2009, after being arrested and a revocation hearing was scheduled for October 14, 2009.

At the revocation hearing, Johnson's attorney argued the diversion period began on August 18, 2004, when the trial judge signed the judgment and thus, the five-year term of diversion had expired. The Commonwealth acknowledged that if the August 18, 2004, date was the date used to calculate the term of diversion, Johnson had in fact exceeded the five-year period and the diversion could not be revoked. The Commonwealth however argued that the initiation of the diversion period was August 26, 2004, when the judgment was entered by the clerk and thus, the diversion period had not expired when the Commonwealth sought the revocation. The trial court, noting the divergence and confusion regarding the date, ruled the diversion period did not expire until August 19, 2009, which was the date of the review hearing. With that ruling, the trial court found the diversion period had not expired and revoked the diversion, sentencing Johnson to serve two years.

It has long been the law in Kentucky that a judgment or order is not effective until it has been entered by the clerk. Kentucky Rules of Civil Procedure (CR) 58(1). Here however, the trial judge provided the notation "*nunc pro tunc*" next to the date of August 18, 2004. As the Commonwealth concedes, that notation creates an effective date of August 18, 2004.

a judgment *nunc pro tunc* is retrospective, and has the same force and effect, to all intents and purposes, as if it had been entered at the time when the judgment was

originally rendered. It aids and cures proceedings which otherwise would be defective and irregular for want of a proper entry of judgment to sustain them.

*Hoffman v. Shuey*, 223 Ky. 70, 2 S.W.2d 1049, 1052 (1928) (citation omitted).

The period of diversion expired two days before the Commonwealth's motion to revoke. Any effort by the Commonwealth to revoke a pretrial felony diversion agreement must "be made before expiration of the pretrial diversion period." *Tucker v. Com.*, 295 S.W.3d 455, 458 (Ky. App. 2009).

We reverse the judgment and sentence on a plea of guilty entered on August 18, 2004, and remand this case to the Boyd Circuit Court with instructions to dismiss the indictment with prejudice and list this case "Dismissed–Diverted" as required by Kentucky Revised Statute (KRS) § 533.258.

ALL CONCUR.

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