

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

NO. 2011-CA-000822-MR

BROOKE LINDSEY DEWEESE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA GOODWINE, JUDGE  
ACTION NO. 09-CR-01442

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Appellant, Brooke Lindsey Deweese, appeals from a conditional guilty plea. She argues that the trial court erred by: (1) denying her motion to compel the Commonwealth to comply with pretrial diversion

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

procedures; and (2) ordering her to pay court costs as a condition of probation. We affirm.

On August 18, 2009, Deweese was arrested in Fayette County. After being advised of her *Miranda* rights, Deweese admitted to stealing several blank prescriptions from a doctor's office in Fayette County and using them to obtain controlled substances from a pharmacy in Jessamine County. Deweese was indicted in Fayette County for theft of a prescription blank, first offense, and for possession of a forged prescription in Jessamine County.

On June 1, 2010, the Jessamine Circuit Court entered an order allowing Deweese to enter pretrial diversion. Thereafter, Deweese filed an application for pretrial diversion with the office of the Commonwealth Attorney in Fayette County, which was denied. The Commonwealth Attorney's office sent defense counsel two emails notifying Deweese that the application was denied. On January 19, 2011, Deweese filed a motion to compel the Commonwealth to comply with the written recommendation requirements of Kentucky Revised Statutes (KRS) 533.250 and the Fayette Circuit Court Pretrial Diversion Protocol and to reconsider her application. Following a hearing, the trial court denied the motion. Deweese then entered a conditional guilty plea reserving the right to appeal the ruling of the trial court on the pretrial diversion issue. On April 22,

2011, the trial court sentenced Deweese to one year of imprisonment probated for two years and ordered Deweese to pay \$155 in court costs as a condition of probation. This appeal followed.

Deweese first argues that the trial court erred by failing to require the Commonwealth to provide a written recommendation concerning her application for pretrial diversion.

KRS 533.250(6) states:

The Commonwealth's attorney shall make a recommendation upon each application for pretrial diversion to the Circuit Judge in the court in which the case would be tried. The court may approve or disapprove the diversion.

Fayette Circuit Court Pretrial Diversion Protocol Section III. E. requires the Commonwealth to provide a written recommendation to the court for each application. The Commonwealth concedes that it failed to provide a written recommendation to the trial court as required by the Pretrial Diversion Protocol.

In *Flynt v. Commonwealth*, 105 S.W.3d 415, 426 (Ky. 2003), the Supreme Court of Kentucky held that a circuit court cannot unilaterally approve an application for pretrial diversion over the objection of the Commonwealth.

Kentucky Rules of Criminal Procedure (RCr) 9.24 states:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent

with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

The trial court determined that the Commonwealth had formally reviewed the application for pretrial diversion taking into account the appropriate factors. The Commonwealth notified Deweese on two occasions that it denied her application. The Commonwealth stated on the record that the application was denied because the nature of the charged offense was inconsistent with its diversion policy and because of the repeated nature of the offense. Further, under *Flynt, supra*, the trial court lacked authority to approve pretrial diversion over the Commonwealth's objection. There is no indication whatsoever that the Commonwealth would have approved diversion in this case. Therefore, we conclude that the failure to provide the court with a written recommendation was harmless.

Deweese next argues that the trial court erred by imposing court costs as a condition of her probation. In *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010), our Supreme Court held that it was error for a trial court to impose court costs upon indigent defendants. However, in *Maynes v. Commonwealth*, 361 S.W.3d 922, 933 (Ky. 2012), the Court affirmed the imposition of court costs as a condition of a plea agreement upon a defendant who was entitled to a public defender. The standard for determining whether a defendant is immune from the imposition of court costs as a "poor person" under KRS 23A.205 differs from the

standard for determining whether a defendant qualifies for representation at public expense as a “needy person” under KRS 31.110. *Id.* at 929. The Court further stated:

Although initially deemed “needy” and allowed a public defender, Maynes subsequently entered a plea agreement whereby he was to be released from custody. The restoration of his freedom was also the restoration of his ability to work, and so justified the trial court's order that he pay the statutorily mandated court costs pursuant to KRS 23A.205.

*Id.* at 933.

We conclude that the decision in *Maynes* is dispositive of this issue. The record indicates that Dewese has a steady employment history including full-time employment at the time she applied for diversion. She also possesses an associate’s degree. There is no indication that Dewese was unable to pay the court costs presently or within the foreseeable future without depriving herself of the basic necessities of life.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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