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TO BE PUBLISHED

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

NO. 2011-CA-001765-MR

WILLIAM MADDIX, JR.

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE ROBERT B. CONLEY, JUDGE  
ACTION NO. 03-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: William Maddix, Jr. brings this appeal from an August 24, 2011, order of the Greenup Circuit Court ordering Maddix to pay \$24,626.27 in restitution. We affirm.

We begin by undertaking a brief review of the relevant procedural facts.

December 14, 2004	Maddix pleaded guilty to theft by failure to make required disposition.
December 17, 2004	Order – Pretrial diversion granted for three years and the amount of restitution to be later determined by civil action (December 17, 2004, diversion order).
December 30, 2004	Motion to Void Pretrial Diversion.
July 7, 2005	Order – Denied Commonwealth’s motion to void diversion.
November 19, 2007	Motion to Extend Period of Pretrial Diversion – Commonwealth pointed out civil action to determine restitution still pending.
December 17, 2007	Original three-year diversion period expires. <sup>1</sup>
December 18, 2007	Order – Diversion period extended for one year.
November 18, 2008	Order – Diversion period extended for one year.
November 16, 2009	Order – Diversion period extended for six months.
May 13, 2010	Agreed Order – Diversion period extended for six months.
November 4, 2010	Order – Maddix agreed to toll time for period of expiration of diversion.
November 4, 2010 alleged	Motion to Void Diversion – Commonwealth that Maddix failed to make restitution payments.
December 10, 2010	Motion to Set Aside Guilty Plea – Maddix alleged diversion order failed to comply with Kentucky Revised Statutes (KRS) 532.033 and was vague.
August 24, 2011	Order – Restitution imposed in amount of \$24,626.27 per civil judgment.

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<sup>1</sup> Maddix contends that the three-year diversion period expires on December 16, 2007, rather than December 17, 2007. The distinction is immaterial to our disposition of the appeal.

In the August 24, 2011, order, the circuit court concluded that Maddix had waived or was estopped from challenging the December 17, 2004, diversion order. In accordance with a civil judgment, the circuit court ordered Maddix to pay \$24,626.27 in restitution. This appeal follows.

Maddix contends that his three-year diversion period expired by its own terms on December 16, 2007, and that the circuit court lacked jurisdiction to render the December 18, 2007, order extending his diversion period. In support thereof, he argues that “the Court did not revoke the pretrial release prior to expiration of diversion [and] [n]o motion [to terminate diversion] was pending on December 16, 2007[,] prior to expiration.” According to Maddix, his diversion period naturally terminated on December 16, 2007; therefore, the circuit court lacked jurisdiction to extend the diversion period on December 18, 2007. For the following reasons, we believe the circuit court had jurisdiction to render the December 18, 2007, order extending Maddix’s diversion period.

In this Commonwealth, a circuit court retains jurisdiction to modify or void a defendant’s pretrial diversion during the period of pretrial diversion or after such period if the Commonwealth filed a motion to modify or void diversion prior to the expiration of the diversion period. *Ballard v. Commonwealth*, 320 S.W.3d 69 (Ky. 2010). In this case, the record shows that the circuit court did not modify or void Maddix’s pretrial diversion during the original three-year diversion period. However, the record further shows that the

Commonwealth filed a motion to extend pretrial diversion on November 19, 2007, which was during the original three-year diversion period. The circuit court granted that motion by order entered December 18, 2007, and extended the diversion period for one year. Because the Commonwealth filed a motion to extend pretrial diversion during the three-year diversion period, the circuit court retained jurisdiction to rule on this motion even after expiration of such diversion period. *Ballard*, 320 S.W.3d at 74. *See also Tucker v. Commonwealth*, 295 S.W.3d 455, 457-58 (Ky. App. 2009) (pretrial diversion period expired since Commonwealth had not filed revocation motion prior to termination date). For these reasons, we reject Maddix's argument that his pretrial diversion terminated on December 16, 2007, and that the circuit court was without jurisdiction to modify the terms of such pretrial diversion by its order entered December 18, 2007.

Maddix also asserts that the December 17, 2004, diversion order violated KRS<sup>2</sup> 532.033 because no specific amount of restitution was set forth therein. We disagree.

As an initial matter, a pretrial diversion order is a non-final, interlocutory order. In *Ballard*, the Court stated

An order of diversion . . . does not fully dispose of any criminal charges. Rather, it simply memorializes an agreement that exists between the Commonwealth and the defendant and halts prosecution between admission of guilt and imposition of sentence. Accordingly, the trial court's jurisdiction over the diverted case is extinguished

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<sup>2</sup> Kentucky Revised Statutes.

in two circumstances: (1) upon the imposition of sentence in an unsuccessful diversion; or (2) upon entry of an order listing the charges as “dismissed-diverted” as required by KRS 533.258(1) after successful completion of the diversion agreement. Neither has occurred in this case.

Accordingly, the trial court retains jurisdiction over Appellant's underlying criminal charges[.]

320 S.W.3d at 73.

“Restitution” is defined as “compensation paid by a convicted person to a victim for . . . property damage and other expenses suffered by a victim because of a criminal act[.]” KRS 532.350(1)(a). A valid order requiring restitution must comply with the statutory mandates set forth in KRS 532.033. *Rollins v. Commonwealth*, 294 S.W.3d 463, 465 (Ky. App. 2009). Whether a restitution order complies with the mandates of KRS 532.033 “is a matter of statutory interpretation and consequently a question of law[.]” *Hardin County Schools v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001). We review questions of law under a *de novo* standard of review. *Brown v. Commonwealth*, 326 S.W.3d 469, 471 (Ky. App. 2010) (citation omitted).

KRS 532.033 provides, in part:

When a judge orders restitution, the judge shall:

- (1) Order the restitution to be paid to a specific person or organization . . . ;
- (2) Be responsible for overseeing the collection of restitution;
- (3) Set the amount of restitution to be paid;

- (4) Set the amount and frequency of each restitution payment or require the payment to be made in a lump sum[.]

A plain reading of KRS 532.033(3) reveals that a trial judge must set forth the amount of restitution to be paid by a defendant in the restitution order. In this case, although the original pretrial diversion order failed to set an amount of restitution, that order was interlocutory and was extended by Maddix's agreement. Maddix, by virtue of his participation in the civil proceeding which set restitution, had every opportunity to contest the amount owed. Once that proceeding was over, the circuit court set the amount of restitution at \$24,626.27 in its August 24, 2011, order. That order complies with KRS 532.033. We fail to discern how Maddix has been prejudiced in this situation.

Cases such as *Brown v. Commonwealth*, 326 S.W.3d 469 (Ky. App. 2010) and *Rollins v. Commonwealth*, 294 S.W.3d 463 (Ky. App. 2009) do not compel a different result because in those cases the attempt to order restitution occurred well after entry of the final judgment of conviction. In *Brown*, the defendant pled guilty to a number of counts of theft by deception. 326 S.W.3d at 470. Although the plea agreement and initial judgment on guilty plea both included a set restitution total, the trial court's final judgment imposing a sentence of eleven years did not contain any reference to restitution. *Id.* at 471. Three years later, after the defendant's release on parole, the Commonwealth moved to make restitution a condition of that parole. *Id.* This court held that the failure to include

restitution in a final order was a substantive error, such that the provisions of RCr<sup>3</sup> 10.10 for correcting clerical errors in judgments were inapplicable. *Id.* at 473. Additionally, since the Commonwealth had failed to file a petition for restitution within ninety days following a judgment imposing a sentence under KRS 431.200, the Commonwealth's petition was untimely. *Id.*

Similarly, in *Rollins*, the defendant received a sentence of ten years, and the judgment indicated restitution in an amount to be determined by hearing. 294 S.W.3d at 464. A restitution hearing, however, was not held. *Id.* Nearly seven years later, after the defendant had “served out” his sentence, the Commonwealth filed a motion to establish damages for restitution. *Id.* On appeal, this court held that the final judgment did not set the amount of restitution to be paid and thus did not create a valid restitution order, and that the Commonwealth failed to file a petition for restitution within ninety days of conviction and sentence as required by KRS 431.200. *Id.* at 466. Further, absent statute or rule, “[a] court loses jurisdiction ten days after the entry of final judgment[;]” in *Rollins*, at the time the Commonwealth filed its motion, the trial court no longer had jurisdiction over the defendant. *Id.* As a result, the trial court's order setting restitution was invalid. *Id.* at 467.

In this case, no final judgment was entered; no sentence had been pronounced. The only order was an interlocutory order of pretrial diversion. Since

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<sup>3</sup> Kentucky Rules of Criminal Procedure.

the circuit court retained jurisdiction over Maddix, it retained jurisdiction to order restitution.

The Greenup Circuit Court's order of August 24, 2011 is affirmed.

NICKELL, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. Respectfully, I concur in part and dissent in part. I agree with the majority that the circuit court retained jurisdiction and had authority to extend Maddix's diversion period in December 2007. However, I must agree with Maddix that the imposition of restitution on August 24, 2011, almost seven years after entry of the order granting diversion in 2004, violated KRS 532.033.

As noted by the majority, a plain reading of KRS 532.033(3) requires that a trial judge must set forth the amount of restitution to be paid by defendant in the restitution order. Our Court has held that the failure of a circuit court to specifically set forth the amount of restitution to be paid renders the restitution order violative of KRS 532.033 and invalid. *Rollins*, 294 S.W.3d 463; *Brown v. Com.*, 326 S.W.3d 469 (Ky. App. 2010).

In this case, the December 17, 2004, diversion order requiring restitution did not specifically set forth an amount of restitution to be paid by Maddix. Instead, the circuit court merely ordered the amount of restitution to be later determined "by a civil proceeding, and the judgment, if any, obtained in the



civil proceeding will be deemed restitution.” Unfortunately, the civil proceeding laid dormant in the Greenup Circuit Court until 2006 and Maddix was not properly served with process in the civil proceeding until 2008, whereupon a summary judgment was entered against him for the amount in question in July 2010. This civil judgment was not converted to a restitution order until 13 months later, in August 2011. A seven year delay in imposing restitution in this case is both inappropriate and a violation of KRS 532.033, in my opinion.

A case cited by the majority with similar facts herein is *Rollins*, 294 S.W.3d 463. Therein, the circuit court ordered a defendant to pay restitution with “the amount of full restitution to be determined” at a later date. *Id.* at 464. The Court of Appeals held that the circuit court possessed a statutory duty under KRS 532.033(3) to affirmatively set forth the amount of restitution, and the court’s failure to do so rendered the restitution order invalid as violative of KRS 532.033(3).

In Maddix’s case, the circuit court failed to carry out its statutory duty under KRS 532.033(3) and set forth a specific amount of restitution in the December 17, 2004, diversion order. I can find no legal authority or precedent to support the deferral of restitution for determination through a civil proceeding. This seems totally contrary to the purpose and intent of imposing restitution as part of a criminal sentence, especially where pretrial diversion is involved. Additionally, the majority’s reliance upon the restitution order being interlocutory as the basis for a seven-year delay is misplaced and without any legal basis, in my

opinion. Under the majority's holding, a trial judge could defer setting restitution indefinitely in all pretrial diversion cases. That clearly violates the plain meaning and intent of KRS 532.022.

Accordingly, I believe the December 17, 2004, diversion order is invalid as to restitution, and the circuit court has erroneously ordered Maddix to pay restitution in the amount of \$24,626.27 through its August 24, 2011, order. I would reverse and remand on the restitution issue and direct that no restitution be paid under the diversion order. Maddix, of course, would still be subject to the civil judgment, which may be collected through appropriate civil proceedings and remedies.

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