

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-001980-MR

DANIEL FOWLER

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE ANTHONY W. FROHLICH, JUDGE  
ACTION NO. 11-CR-00045

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER  
DISMISSING

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BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Daniel Fowler has appealed from the order of the Boone Circuit Court denying his motion to enter the deferred prosecution program, pursuant to a judgment entered in accordance with his conditional guilty plea on September 28, 2011. Because we have determined that Fowler appealed from a non-final, interlocutory order, we must dismiss his appeal.

On January 18, 2011, the Boone County grand jury indicted Fowler on one count of first-degree possession of a controlled substance, first offense, pursuant to Kentucky Revised Statutes (KRS) 218A.1415, a Class D felony, and on one count of possession of drug paraphernalia, first offense, pursuant to KRS 218A.500(2), a Class A misdemeanor. The charges arose from his arrest on the morning of October 18, 2010, after a car in which he was a passenger was stopped for an equipment offense on the Interstate 75 South off ramp to Richwood Drive in Boone County. The officer who stopped the vehicle obtained consent to search from the driver, Leah Arutoff, who was Fowler's girlfriend. Fowler was asked to exit the front passenger seat, which he did. The officer searched the glove box and found a plastic bag containing syringes, a burnt spoon, a filter suspected of containing heroin, and a paper towel. When asked, Fowler stated that the items belonged to him. The officer noticed that both Fowler and Ms. Arutoff had visible track marks, and they stated that they had used heroin at a party the previous night.

Fowler was arrested on the warrant issued pursuant to the indictment on April 14, 2011. He was placed on a monitored conditional release that included random drug testing and the limitation that he could only leave his house for court, to meet with his attorney, for drug testing, for probation and parole, and for medical appointments. Fowler presented to the Awareness & Discovery Group office in Florence in July 2011 for an assessment based upon his charge for possession of drug paraphernalia. Based upon the assessment, Fowler was to complete the Prime for Life 20 Hour Education Program, which was to begin at the

end of that month. On September 1, 2011, the managing director notified the circuit court that Fowler had not started the program and that his file was being closed.

On September 21, 2011, Fowler filed a motion to enter a guilty plea. In exchange for his plea, the Commonwealth recommended a three-year sentence and \$1,000.00 fine on the possession of a controlled substance charge and a twelve-month sentence on the possession of drug paraphernalia charge, to run concurrently for three years, and one \$1,000.00 fine. The Commonwealth stated that it did “not oppose the Defendant being placed on felony diversion for a period of 3 years, with 1.5 years reporting and 1.5 years non-reporting, on the following conditions: he successfully abide by all standard conditions of felony diversion; and he shall submit to a substance abuse evaluation and successfully complete any and all recommended treatment.” Fowler filed a motion for pretrial diversion the same day, which the circuit court granted. Also on the same day, Fowler applied for deferred prosecution, which was denied.

At the hearing on September 21, 2011, the parties discussed whether the circuit court would have any judicial discretion regarding deferred prosecution and whether Fowler would be able to appeal an adverse decision if he were to enter into the pretrial diversion program. The Commonwealth questioned whether an appeal could be taken, as no final and appealable judgment is entered when pretrial diversion is granted. The court continued with a guilty plea hearing, and it permitted Fowler to enter a conditional guilty plea and enter into the diversion

program. Related to Fowler's application for deferred prosecution, the Commonwealth stated its reasons for denying his application as 1) his failure to include a conviction that he obtained while the case was pending as well as other earlier charges, 2) the drug abuse evaluation only listed the possession of drug paraphernalia charge, which resulted in a recommendation for an education program, and 3) the lack of supervision probation and parole and pretrial services would have, which put him at risk based upon his use of heroin and addiction problems. Therefore, the Commonwealth declined to accept Fowler's application. Fowler addressed the Commonwealth's reasons for declining his application. The court agreed that it did not have any supervisory control over the Commonwealth's discretion but stated it appeared that the Commonwealth had a substantial reason for denying the application.

On September 28, 2011, the circuit court entered a judgment finding Fowler guilty pursuant to his conditional guilty plea and referred him to the felony diversion program pursuant to the earlier order. No sentence was imposed. By separate filing, Fowler indicated that the basis for his conditional plea was the denial of his entry into the deferred prosecution program by the Commonwealth. He stated that the issues were whether a substantial and compelling reason was given for the denial and if the circuit court had the authority to make any determination regarding the substantial and compelling standard. This appeal now follows.<sup>1</sup>

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<sup>1</sup> This Court placed Fowler's appeal in abeyance pending a final decision in *Jones v. Commonwealth*, 2011-CA-001298-MR. That opinion became final on November 20, 2013, upon

Before we may reach the merits of this case, we must determine whether this Court has jurisdiction to decide the appeal.

It is fundamental that a court must have jurisdiction before it has authority to decide a case. Jurisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass prior to having their substance examined. So fundamental is jurisdiction that it is the concept on which first-year law students cut their teeth. Here, jurisdiction in the context of appellate procedure is at issue because no final order or judgment has been entered by the trial court. At the outset we note that an appeal may be properly considered only if perfected according to our rules of practice and procedure. Our rules require that there be a final order or judgment from which an appeal is taken.

We begin with CR 73.02. “The notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04.” CR 77.04(2) mandates that the clerk of the court immediately serve a notice of entry of a judgment or final order, among other things, upon every party to the proceeding who is not in default for failure to appear. CR 54.01 defines a final or appealable judgment as a final order “adjudicating all the rights of all the parties in an action or proceeding.” CR 54.02 does provide a limited exception where there are multiple parties or multiple claims. It allows for an appeal when less than all the rights of all the parties have been adjudicated, but only upon a determination that it is final and that there is no just reason for delay. In the absence of such finality and a recitation thereof, the order is interlocutory and subject to modification and correction before becoming a final and appealable judgment or order.

*Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005) (footnote omitted).

The law in Kentucky provides that a pretrial diversion order is a non-final, interlocutory order:  
the denial of the motion for discretionary review by Supreme Court of Kentucky.

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 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.

*Ballard v. Commonwealth*, 320 S.W.3d 69, 73 (Ky. 2010). *See also*

*Commonwealth v. Derringer*, 386 S.W.3d 123, 130 (Ky. 2012) (footnotes omitted)

(“Unlike sentences of probation or conditional discharge, pretrial diversion is not a sentencing alternative; it is an ‘interruption of prosecution prior to final disposition’ of a case that enables defendants ‘to obtain deferred sentencing for a specified period of time.’ . . . . [A] defendant is granted diversion subject to a guilty plea; but only if the trial court revokes diversion is the defendant sentenced. If the defendant successfully completes diversion, a sentence will never be imposed; and the conviction will be dismissed-diverted.”).

Unlike the Commonwealth, a criminal defendant does not have the right to appeal from an interlocutory order. “The Commonwealth's right to appeal from an interlocutory order is established by KRS 22A.020(4).” *Ballard*, 320 S.W.3d at 71-72. The *Ballard* Court upheld this statute as constitutional. *Id.*, at 73. Because Fowler has not yet been sentenced by the circuit court in a final judgment, we must hold that his appeal from the judgment granting him pretrial

diversion is a non-final, interlocutory order. Accordingly, this Court does not have jurisdiction, and the appeal must be dismissed.

For the foregoing reasons, the above-styled appeal is hereby dismissed as interlocutory.

ALL CONCUR.

/s/ James H. Lambert  
JUDGE, COURT OF APPEALS

ENTERED: January 3, 2014

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