

RENDERED: JANUARY 10, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002008-MR

CHRISTOPHER JOHNSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 03-CR-000193

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; MAZE AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: Christopher Johnson appeals from the Jefferson Circuit Court's September 28, 2012 order denying his motion to designate the charges against him as dismissed-diverted. We reverse and remand.

Johnson entered a plea of guilty to third-degree burglary and theft by unlawful taking. The Commonwealth recommended pretrial diversion and a

sentence of one-year imprisonment in the event Johnson failed to successfully comply with the terms and conditions of the diversion agreement. By order entered October 11, 2006, the circuit court granted pretrial diversion for a period of three years with the condition that, “[a]s required by KRS^[1] 533.030(1), [Johnson] shall not commit another offense during the period of Pretrial Diversion.”

Johnson successfully completed the pretrial diversion program on October 12, 2009.² Thereafter, in 2010, Johnson was convicted of two drug-related offenses.

In July 2012, Johnson filed a motion requesting that the circuit court designate the burglary/theft indictment as dismissed-diverted pursuant to KRS 533.258(1), which states that “[i]f the defendant successfully completes the provisions of the pretrial diversion agreement, the charges against the defendant shall be listed as ‘dismissed-diverted’ and shall not constitute a criminal conviction.” The Commonwealth opposed the motion, arguing Johnson’s 2010 drug convictions represented a blatant violation of the pretrial diversion condition that Johnson not commit another offense during the diversion period. In response, Johnson argued that he in fact did not commit another offense *during the period of diversion*. Instead, Johnson asserted, the drug convictions occurred in 2010, well

¹ Kentucky Revised Statutes.

² The parties agree that at no point did the Commonwealth file a motion to revoke or remove Johnson from the pretrial diversion program before the diversion period expired on October 12, 2009.

after the diversion period ended. The circuit court disagreed with Johnson and denied his motion. This appeal by Johnson followed.

Johnson argues that the circuit court erred by denying his motion to dismiss the indictment as diverted. The Commonwealth agrees. Accordingly, we reverse the circuit court's September 28, 2012 order, and remand for entry of an order listing the charges against Johnson as "dismissed-diverted" in accordance with KRS 533.258. *Commonwealth v. Derringer*, 386 S.W.3d 123, 130 (Ky. 2012) ("If the defendant successfully completes diversion . . . the conviction will be dismissed-diverted.").

ALL CONCUR.

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