

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000758-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 04-CR-003066

LARRY BURDEN

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MAZE, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: The Commonwealth appeals the order of the Jefferson Circuit Court denying its motion to vacate the court's order granting Larry Burden's motion to dismiss the charges against him as diverted. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Burden was indicted on: one count of Illegal Possession of a Controlled Substance in the First Degree, Schedule II, Cocaine, and one count of Disregarding an Official Traffic Control Device. He moved to enter a guilty plea to the charges. Pursuant to the plea agreement, the Commonwealth agreed to recommend Burden be sentenced to one year of imprisonment for the Illegal Possession of a Controlled Substance charge and to pay a \$100.00 fine for the charge of Disregarding an Official Traffic Control Device. The Commonwealth also agreed to recommend that the sentence be diverted for a period of three years. Burden agreed to forfeit all property seized.

The circuit court accepted Burden's guilty plea and in 2005, the court granted pretrial diversion for a period of three years. In 2012, Burden moved to have the charges against him dismissed as diverted. The court denied his motion on the basis that Burden had been convicted of possession of marijuana after he was placed on diversion. Burden moved again to have the charges dismissed as diverted, but his motion was denied.

Burden moved a third time to have the charges dismissed as diverted. This time, the court found that Burden's motion should be granted pursuant to *Tucker v. Commonwealth*, 295 S.W.3d 455 (Ky. App. 2009). Therefore, the court set aside its prior orders and granted Burden's motion to dismiss the charges as diverted.

The Commonwealth moved to vacate and amend the court's order, citing *Ballard v. Commonwealth*, 320 S.W.3d 69 (Ky. 2010). The circuit court denied the motion. The Commonwealth now appeals, contending that Burden was not entitled to have his case dismissed-diverted because he did not successfully complete diversion.

II. ANALYSIS

The Commonwealth alleges that because Burden did not successfully complete diversion, he was not entitled to have his case dismissed as diverted. See KRS¹ 533.256. However, we agree with the circuit court's citation to *Tucker*, 295 S.W.3d 455 and believe we are compelled to affirm pursuant to it.

In *Tucker*, 295 S.W.3d at 456-58, the defendant was placed on pretrial diversion, and one of the conditions of his diversion was that he had to pay child support. During the period of his diversion, Tucker failed to pay child support, and he was arrested for this failure. He was released on bail and nothing else occurred until after the three-year diversion period ended. At that time, Tucker and his counsel appeared before the court for a final disposition, in which they informed the court that Tucker was presently incarcerated on other charges and that he had not been served anything regarding the revocation of his pretrial diversion. The circuit court revoked Tucker's pretrial diversion and sentenced him to two years of imprisonment. See *Tucker*, 295 S.W.3d at 457. On appeal, this Court reversed, reasoning that Tucker's pretrial diversion should not have been revoked because

¹ Kentucky Revised Statute.

the Commonwealth was required to seek to have the diversion voided before the expiration of the pretrial diversion period. *Id.* at 458. In *Tucker*, we stated that

this case can be resolved merely by noting that the Commonwealth had the means readily at hand to seek to have Tucker’s pretrial diversion revoked if it believed his failure to pay child support, or his assault conviction, or any other alleged violation of his pretrial diversion conditions justified such action. Those means are found in KRS 533.256(1). We need not concern ourselves with why the Commonwealth failed to act to have Tucker’s pretrial diversion revoked before it expired. The fact is that it did not do so.

295 S.W.3d at 457.

This Court therefore remanded Tucker’s case to the circuit court “*with directions to dismiss the indictment with prejudice and list [the] case as ‘Dismissed-Diverted’ pursuant to KRS 533.258.*” *Id.* (Emphasis added).

We regard Burden’s case the same as the one in *Tucker*. In both cases, the Commonwealth failed to timely move to take any action available to it under KRS 533.256.² Given this, we believe we are compelled under *Tucker* to affirm the circuit court’s order allowing the charges against Burden to be dismissed with prejudice as diverted.

Finally, we note that the Commonwealth contends that the circuit court improperly exercised its authority by granting dismiss-divert status to Burden without the Commonwealth’s consent. However, as the Court noted in *Tucker* and as we reiterate here, the Commonwealth had the opportunity to impede this by implementing the procedures available to it under KRS 533.256. Having failed to

² We do not view the Commonwealth’s failure to file a motion to revoke in this case any differently than the untimely motion to revoke by the Commonwealth in *Tucker*.

do so and under the facts of this case, we cannot say that the circuit court erred in determining that KRS 533.258 was satisfied over the Commonwealth's objection.

For the reasons as stated, the order of the Jefferson Circuit Court is affirmed.³

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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³ We need not address Burden's argument regarding the status of his marijuana conviction because: (1) it is moot based on our decision; and (2) it appears from the supplemental record before us that the district court stayed its order voiding that conviction pending a decision in this appeal.