

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001133-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 07-CR-000507

MELISSA PAPP

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MAZE, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: The Commonwealth appeals the order of the Jefferson Circuit Court granting Melissa Papp's motion to dismiss the charges against her as diverted. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Papp was indicted on the charges of: Criminal facilitation to first-degree robbery; illegal possession of a controlled substance in the first degree, schedule II cocaine; receiving stolen property over \$300; illegal use or possession of drug paraphernalia; and operating a motor vehicle without an operator's license.

The Commonwealth provided Papp an offer on a plea of guilty, in which it agreed that if Papp entered guilty pleas to all of the charges, the Commonwealth would recommend: five years of imprisonment for the criminal facilitation charge; five years of imprisonment for the first-degree illegal possession of a controlled substance charge; five years of imprisonment for the receiving stolen property charge; twelve months of imprisonment for the illegal use or possession of drug paraphernalia charge; and ninety days of imprisonment for the operating a motor vehicle without an operator's license charge. The Commonwealth agreed to recommend that all sentences run concurrently for a total of five years. Furthermore, the Commonwealth agreed to recommend that Papp be placed in the pretrial diversion program for five years.

Papp moved to enter a guilty plea in accord with the Commonwealth's offer on a plea of guilty. The circuit court entered an order granting pretrial diversion to Papp for five years. The court's order was entered on February 1, 2008, and one of the conditions of the diversion was as follows: "As required by KRS^[1] 533.030(1), the defendant shall not commit another offense during the

¹ Kentucky Revised Statute.

period of the Pretrial Diversion. Specifically, the defendant shall have no violation of the Penal Code or the Controlled Substances Act, or any other criminal law.”

On April 18, 2013, Papp filed in the circuit court a “Motion to Designate the Indictment as Dismissed- Diverted.” A hearing was held, in which the Commonwealth objected to Papp’s indictment being dismissed-diverted because Papp had been charged with theft during her diversion period, although she was not convicted on the theft charge until after the diversion period ended. The Commonwealth had not moved the circuit court to revoke Papp’s pretrial diversion prior to the diversion’s expiration date. The circuit court entered an order stating that the indictment was dismissed and the offenses were designated as dismissed-diverted. The Commonwealth now appeals.

II. ANALYSIS

The Commonwealth alleges that Papp was not entitled to have the charges against her in this case dismissed-diverted because she did not successfully complete diversion. *See* KRS 533.256. Based upon existing precedent, we are compelled to disagree.

We believe this case can be resolved under *Tucker v. Commonwealth*, 295 S.W.3d 455 (Ky. App. 2009). In *Tucker*, the defendant was placed on pretrial diversion. One condition of his diversion was that he had to pay child support. However, Tucker failed to pay child support as required; he was thereafter arrested for this failure. He was released on bail and following a subsequent review, there

was a notation in the record stating “that the matter would be ‘redocket[ed] upon new motion.’” *Id.* at 457. However, nothing occurred until after Tucker’s three-year diversion period expired, when Tucker and his counsel appeared before the court for a final disposition. During the final disposition hearing, Tucker and his counsel 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 nevertheless revoked his pretrial diversion and sentenced him to two years of imprisonment. *Id.* On appeal, this Court reversed, reasoning that the diversion should not have been revoked because the Commonwealth was required to seek to have the diversion voided before the expiration of the pretrial diversion period. *See 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.

Id. at 457. *See also Ballard v. Commonwealth*, 320 S.W.3d 69, 74 (Ky. 2010) (citing the holding in *Tucker*).

This Court accordingly 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.” *Tucker*, 295 S.W.3d at 458 (emphasis added).

We acknowledge that the Commonwealth is not seeking revocation but rather seeks to impede Papp from the benefit of an order of dismissal as diverted because Papp did not fulfill the conditions of her pretrial diversion. Nonetheless, we believe we are compelled under *Tucker* to affirm the circuit court's order allowing the charges against Papp to be dismissed with prejudice as diverted. In both cases, the Commonwealth failed to timely move to take any action available to it under KRS 533.256.² Under these facts in *Tucker*, this Court ordered the circuit court on remand *to dismiss the charges as diverted*. We believe we must afford the same to Papp under *Tucker*.

Finally, the Commonwealth also contends that the circuit court improperly exercised its authority by granting dismiss-divert status to Papp without the Commonwealth's consent. Under the facts of this case and the Court's resolution of a similar case in *Tucker*, we disagree. We again state that the Commonwealth has the tools available to it pursuant to KRS 522.256 to hold criminal defendants accountable for violating the conditions of their pretrial diversion. The Commonwealth's having failed to do so, we do not find error in the circuit court's decision to grant Papp's motion to dismiss as diverted over the Commonwealth's objection.

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

ALL CONCUR.

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*.

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