COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2009-SC-000314-DG

BRANDON BALLARD — APPELLANT

ON REVIEW FROM COURT OF APPEALS
NO. 2008-CA-000791-MR

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
DIVISION ELEVEN
CASE NO. 04-CR-3138

COMMONWEALTH OF KENTUCKY — APPELLEE

# BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY

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## CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of this Brief for Appellee, Commonwealth of Kentucky, were mailed this 16th day of March, 2010, to the Honorable Judge Brian Edwards, Jefferson Circuit Court, Division Eleven, 700 West Jefferson Street, Louisville, KY 40202, and to the honorable David Niehaus, Counsel for Appellant, Office of the Public Defender, Louisville, KY 40202. I further certify that the record on review has been returned to the Supreme Court.

Dorislee Gilbert by sjs
DORISLEE GILBERT

## STATEMENT CONCERNING ORAL ARGUMENT

Appellee believes the questions presented are questions of law and that oral argument is not necessary nor would it be helpful to the Court in deciding this matter.

## COUNTERSTATEMENT OF POINTS AND AUTHORITIES

## COUNTERSTATEMENT OF THE CASE

Appellant's brief generally presents an accurate statement of the case. However, certain relevant facts are omitted or given too little attention. The following is a more complete and accurate rendition of the facts for the Court to know and consider in deciding this case.

On November 10, 2004, Appellant Brandon Ballard, was indicted for Illegal Possession of a Controlled Substance in the First Degree (Cocaine), Failure to be in Possession of an Operator's License, Criminal Trespass in the Third Degree, and Loitering (TR 1-2). On January 13, 2005, he pled guilty to all of these offenses and pursuant to an agreement he reached with the Commonwealth, Appellant was sentenced to the felony pretrial diversion program with a one year prison sentence diverted for a period of three years (TR 16-20, 26-28). The court ordered a number of conditions as part of Appellant's pretrial diversion, including a provision which directed that "[t]he defendant shall not commit another offense during the pendency of pre-trial diversion" (TR 27-28). The court also ordered, as follows: "If the defendant successfully completes pre-trial diversion the charge(s) will be designated Dismissed-Diverted, and he/she may petition the Court for expungement of the record" (TR 28).

On December 21, 2006, less than two years into his three year diversionary period, Appellant was arrested for misdemeanor offenses and on March 22, 2007, pled guilty to Possession of Marijuana. He received a sentence of 90 days, which was

conditionally discharged (TR 21).[1] Approximately five months after that conviction, on August 28, 2007, Appellant was arrested for various misdemeanor offenses, including Possession of Marijuana (TR 22).[2] Just a few months later, on November 10, 2007, Appellant was again arrested for misdemeanor offenses, and on December 10, 2007, he pled guilty to Theft by Unlawful Taking under $300. His sentence was 90 days, also conditionally discharged (TR 22).[3]

On January 3, 2008, more than one week before Appellant's diversion was set to expire, the Commonwealth moved to remove Appellant from the pretrial diversion program and to impose the agreed upon one year sentence (TR 21-22). The Circuit Court set the matter for a hearing on the Commonwealth's motion on February 14, 2008 (TR 32). Neither the Commonwealth nor defense counsel appeared at that hearing (VCR No. 30-11-08VCR010, 015; 02/14/08; 01:53:27). The Assistant Commonwealth Attorney assigned to the case was in trial in another division of the Jefferson Circuit Court (TR 32). Appellant was present and the Court called his case without any attorneys present. The court recognized that under normal circumstances it would pass the case to a new date, but because it had reviewed the file and some case law, the court decided to dismiss the motion due to a lack of jurisdiction (VCR No. 30-1108VCR010, 015; 2/14/08; 01:53:31). On February 29, 2008, the circuit court entered its order denying the

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[1]Jefferson District Court 06-M-028590.

[2]Jefferson District Court 07-M-022897; these charges had not been resolved at the time the Commonwealth filed its Motion to Remove Appellant from Diversion.

[3]Jefferson District Court 07-M-031203.

Commonwealth's motion to remove Appellant from diversion based upon its lack of jurisdiction to hear the motion (TR 36). The court based its conclusion on the unpublished opinion in Huffines v. Commonwealth, No. 2005-CA-001033-MR, 2006 WL 1652868 (Ky. App. 2006) (TR 36; see App. 1).

On March 7, 2008, the Commonwealth filed a motion to reconsider arguing that Huffines was not controlling because that case related to revocation of probation rather than pretrial diversion. The Commonwealth urged the court to apply the reasoning of another unpublished opinion, McElroy v. Commonwealth, No. 2005-CA-002547-MR, 2006 WL 3375244 (Ky. App. 2006), in reconsidering its decision (TR 31-35; see App. 2). After taking the motion to reconsider under consideration (VCR No. 1: 03/17/2008; 1:39:39), the court denied the motion on April 3, 2008, again citing Huffines (TR 37-41). The Commonwealth then appealed the circuit court's finding that it lacked jurisdiction and its dismissal of the Commonwealth's motion to remove Appellant from pretrial diversion (TR 50).

In the Court of Appeals, Appellant filed a Motion to Dismiss Appeal claiming that the Court of Appeals lacked jurisdiction to grant the Commonwealth the relief it sought. The Commonwealth responded in writing. The parties also briefed the substantive issues in the appeal, and on April 24, 2009, the Court of Appeals issued its opinion denying Appellant's motion to dismiss and reversing the Jefferson Circuit Court's ruling that it lacked jurisdiction to hear the Commonwealth's motion to remove Appellant from pretrial diversion. Commonwealth v. Ballard, 2008-CA-000791-MR (Ky. App. April 24, 2009); hereinafter Slip Op.

Appellant sought discretionary review of the Court of Appeals' opinion and that motion was granted. Appellant now presents two issues to this Court for review. First, he claims the Court of Appeals lacked jurisdiction to hear the Commonwealth's Appeal. Second, he contends that the Jefferson Circuit Court's order stating that it lacked jurisdiction to hear the Commonwealth's motion was correct and should have been affirmed. Appellant asks this Court to reverse the Court of Appeals' decision and remand the case to the circuit court for issuance of a "dismissed-diverted" order (Brief for Appellant P. 14).

## ARGUMENT

It is generally a question of law to be reviewed *de novo* whether a court is acting within its jurisdiction. Hisle v. Lexington-Fayette Urban Co. Gov., 258 S.W.3d 422, 428 (Ky. App. 2008). And even if the question of jurisdiction is not raised by the parties, a reviewing court may raise the issue on its own motion. Francis v. Crounse Corp., 98 S.W.3d 62, 64 (Ky. App. 2002). Both of the issues before this Court are questions concerning jurisdiction. The first question concerns the Court of Appeals' authority to decide the Commonwealth's appeal on its merits. The second question concerns the Jefferson Circuit Court's jurisdiction over felony pretrial diversion. As is discussed below, the Court of Appeals properly held that it had jurisdiction to hear the Commonwealth's appeal, and that the circuit court had authority to hear the Commonwealth's motion to remove Appellant from diversion. Hence, the Court of Appeals' decision should be affirmed.

## I. THE COURT OF APPEALS PROPERLY EXERCISED ITS JURISDICTION IN REVERSING THE CIRCUIT COURT.

Appellant's first argument is that the Court of Appeals lacked jurisdiction to consider the Commonwealth's appeal on its merits because the appealed-from order was not final and appealable, and that KRS 22A.020(4)–which might otherwise allow the appeal–is unconstitutional. Appellant is wrong in both regards. The order appealed from was final and appealable because the circuit court's ruling that it lacked jurisdiction over diversion prevented the court from adjudicating the case any further. But even if the order is not considered final and appealable, the Court of Appeals had jurisdiction to consider the case under KRS 22A.020(4) because that statute is not unconstitutional.

### A. The Order Appealed from was Final and Appealable.

The Court of Appeals considered Appellant's argument that the appealed-from order was not final and appealable and correctly rejected it. The Court of Appeals found that the circuit court order appealed from was final and appealable (Slip Op. P. 3). That decision is sound and should be affirmed by this Court.

As previously noted, the order appealed from was the Jefferson Circuit Court's order holding that it did not have jurisdiction over diversion to consider the Commonwealth's motion to remove Appellant from diversion. Although this order did not contain language indicating it was "final and appealable," that language is not necessary; nor does that language magically make an order final and appealable. "[A]ttempted compliance with CR 54.02(1) will not necessarily make an otherwise

interlocutory judgment final and appealable." Francis, 98 S.W.3d at 65. Regardless of what the specific language of the order says, "[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding . . . ." CR 54.01. "'[T]here must be a final adjudication upon one or more of the claims in litigation. The judgment must conclusively determine the rights of the parties in regard to that particular phase of the proceeding.'" Francis, 98 S.W.3d 65, quoting Hale v. Deaton, 528 S.W.2d 719, 722 (Ky. 1975). "'A final judgment is one that either terminates the action itself, or decides some matter litigated by the parties, or operates to devest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original condition.'" Wenk v. Ruby, 431 S.W.2d 302, 304 (Ky. App. 1968), quoting Mergenthal v. S. Covington & Cincinnati Street R.R., 104 Ky. 424, 47 S.W. 257, 258 (Ky. App. 1898). In this case, the Jefferson Circuit Court's order holding that it had no jurisdiction to consider the Commonwealth's motion was a final and appealable order.

"Jurisdiction, broadly defined, is the power of the court to decide an issue in controversy." Black's Law Dictionary 867 (8th ed. 2004). The court's power to inquire into facts, apply the law, make decisions, and declare judgment between parties is both constrained by and a function of their jurisdiction." Nordike v. Nordike, 231 S.W.3d 733, 737 (Ky. 2007). Moreover, "'[i]t 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.'" Id., quoting Wilson v. Russell, 162 S.W.3d 911, 913 (Ky. 2005).

There are three types of jurisdiction, "all of which must be met before a court may hear a case." Id. These are personal jurisdiction, subject-matter jurisdiction, and jurisdiction over the particular case at issue. Id. at 737-38. Subject-matter jurisdiction and jurisdiction over the particular case are related but different concepts. Subject-matter jurisdiction concerns the general authority of a court to hear a particular type of case; "[p]articular case jurisdiction generally involves more specific so-called "jurisdictional facts," also sometimes thought of as factual prerequisites that are often established by rule or statute. Hisle, 258 S.W.3d at 430. A judgment rendered by a court lacking jurisdiction over the particular case is voidable. Id. at 431.

In this case, the circuit court found that it did not have jurisdiction to hear the Commonwealth's motion to remove Appellant from diversion based on the particular facts of the case, namely, the dates of the pretrial diversion period. Through this finding the circuit court declared that it lacked authority to hear the particular facts of the case before it. This finding of lack of jurisdiction over the particular case before it (if correct) means the circuit court lacks authority to entertain any further motions, claims, or remedies for the parties. Thus, the finding of lack of jurisdiction adjudicates all the rights of the parties in this action and is final and appealable because the parties have no further available remedies in a court lacking jurisdiction over their case.

Appellant asks this Court to take notice of his pending motion to dismiss the indictment, asserting that because this motion is pending, no final order has been entered and the appealed-from order cannot be final or appealable (Brief for Appellant. P. 3). This pending motion does not establish that the appealed from order is not final and

appealable. In fact, it supports the finality of the court's order. As noted above, once a court has lost jurisdiction over a case, it lacks power to adjudicate claims involved in that case. By finding that it lacked jurisdiction over the particular case at issue, the Jefferson Circuit Court foreclosed the possibility that it could rule on any remaining issues, and the court's failure to act on Appellant's motion in the 20 months since the motion was filed points to the finality of the circuit court's order stating that it lacked jurisdiction.

**B. Even if it is Assumed that the Order of the Jefferson Circuit Court is not Final and Appealable, KRS 22A.020(4) is Constitutional and Grants Jurisdiction to the Court of Appeals.**

Even if it is assumed–solely for the sake of argument–that the Jefferson Circuit Court's order is not final and appealable, the Court of Appeals still had jurisdiction under KRS 22A.020(4) to hear and decide the appeal on its merits. Appellant essentially concedes that the Commonwealth's appeal is appropriate under KRS 22A.020(4); however, he urges this Court to find that the provision of the statute allowing the Commonwealth to appeal circuit court rulings is unconstitutional under Sections 2, 28, and 110 of the Kentucky Constitution (Brief for Appellant P. 8). It is not. Rather, KRS 22A.020(4) has been repeatedly recognized as an appropriate exercise of the Legislature's authority and has not been found unconstitutional to the extent that it allows the Commonwealth to appeal from interlocutory orders under certain conditions.[4]

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[4]*But see* Commonwealth v. Schumacher, 566 S.W.2d 762 (Ky. App. 1978) (holding that the portion of KRS 22A.020(4) requiring the Attorney General's approval for bringing an appeal was an unconstitutional attempt by the legislature to establish appellate procedure).

Appellant first contends that KRS 22A.020(4) is unconstitutional because it is arbitrary and grants the Commonwealth's Attorney "special privileges" in that the Commonwealth is entitled to appeal under circumstances in which a criminal defendant such as himself may not (Brief for Appellant P. 8). However, a law is arbitrary if it is "contrary to democratic ideals, customs and maxims" or if it is "essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people." Kentucky Milk Mktg. and Antimonopoly Comm'n v. Kroger Co., 691 S.W.2d 893, 899 (Ky. 1985). Under this well-established standard, KRS 22A.020(4), allowing the Commonwealth to pursue interlocutory appeals, is not arbitrary.

Courts in this jurisdiction have long recognized the benefits to the people of the Commonwealth and the interests of justice served in allowing the Commonwealth to pursue interlocutory appeals and have additionally noted that a defendant is not prejudiced by not being allowed appeals by the same procedure. In Commonwealth v. Bailey, 71 S.W.3d 73, 79 (Ky. 2002), wherein the Court considered issues related to the Commonwealth's right to appeal under KRS 22A.020(4), this Court observed: "The wisdom of allowing the Commonwealth to appeal from interlocutory orders has been recognized in this jurisdiction for more than a century." This Court went on to quote Commonwealth v. Matthews, 89 Ky. 287, 12 S.W. 333, 333-334 (Ky. 1889), as follows:

> "'If a defendant be tried and acquitted, he cannot, of course, be again tried, although his release may free a guilty man, and be the result of erroneous decisions of legal questions by the trial court. The injury to the state and the public is then beyond cure as to that particular case. Owing to this

> fact, doubtless, the legislature saw proper to give to the commonwealth the right to an appeal from a decision of the trial court, although not final in character. It gives no advantage to the state over the accused. He is amply protected, as we have already seen, by the right to appeal from a final judgment. It is, indeed, only fair to the public, and proper for its protection, because otherwise the guilty might escape by an acquittal resulting from legal errors . . . The legislature doubtless supposed, and with reason, that the same questions would arise upon a future trial, and that it was necessary to a fair administration of justice to allow the state to at once correct any error by an appeal.'"

Bailey, 71 S.W.3d at 79. See also Commonwealth v. Littrell, 677 S.W.2d 881, 884 (Ky. 1984), overruled in part on other grounds by Bailey, 71 S.W.3d at 80, quoting Matthews, 89 Ky. 287, 12 S.W. at 333 ("'When a final judgment is rendered against a defendant, he may, upon appeal, get the benefit of any error which has at any time during the progress of the case been committed against him . . .'").

Even more recently, this Court pointed out that KRS 22A.020(4) allows the Commonwealth to appeal even when a defendant does not have the same right. Despite this, the Court approved of KRS 22A.020(4). In Commonwealth v. Nichols, 280 S.W.3d 39, 41 (Ky. 2009), the Commonwealth filed an interlocutory appeal pursuant to KRS 22A.020(4) from a circuit court order ruling that the defendant's expert witness was not required to generate a report for reciprocal discovery purposes. The defendant filed a cross-appeal, objecting to the circuit court's ruling that he must provide the name and

address of the expert to the Commonwealth. The Court of Appeals affirmed in part and reversed in part, finding that the circuit court did not abuse its discretion in holding that the defense expert was not required to generate a report but that it did abuse its discretion by requiring the defendant to provide the name and address of the expert. Id. The Commonwealth sought discretionary review of the Court of Appeals' decision, and review was granted. The first issue addressed by this Court was the fact that "the posture of [the] case [was] procedurally flawed." Id. at 42. The Court explained:

> "Nichols cannot file an interlocutory cross-appeal. Rather, KRS 22A.020(4) is uniquely for the benefit of the Commonwealth. Therefore, the Court of Appeals did not have jurisdiction over the issue of the trial court's order requiring disclosure of the name and address of the defense expert. Evans v. Commonwealth, 645 S.W.2d 346-47 (Ky. 1982). Accordingly that portion of the Court of Appeals' opinion must be vacated and the order of the trial court reinstated."

Id. Notably, a sizable amount of the Court's discussions in Nichols dealt with fairness regarding obligations and rights of the Commonwealth and criminal defendants. Yet, the Court was not particularly disturbed by the fact that KRS 22A.020(4) permits the Commonwealth to appeal when a defendant cannot. This is because, as noted above, KRS 22A.020(4) is not arbitrary. It does not deprive the defendant, who may properly redress any perceived errors through direct appeal, of any significant rights, and it serves the legitimate interests of the people of the Commonwealth.

Appellant claims, however, that KRS 22A.020(4) is unconstitutional because it somehow violates the separation of powers doctrine. Specifically, he points to the "all

writs" language of Constitution Section 110(2) (Brief for Appellant P. 9). This section of the Constitution, however, deals with the power of the Kentucky Supreme Court to issue writs "necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice." Ky. Const. § 110(2). This section does not concern the jurisdiction of the Court of Appeals at all. In fact, the section of the Constitution that concerns the jurisdiction of the Court of Appeals provides in relevant part that "[i]n all other cases, it shall exercise appellate jurisdiction as provided by law." Ky. Const. § 111(2). Thus, even the Constitution itself provides that the Court of Appeals' jurisdiction, at least to the degree not otherwise in conflict with Section 111(2), may be prescribed by the Legislature. Moore v. Commonwealth, 199 S.W.3d 132, 138 (Ky. 2006) (". . . the Judicial Amendment authorized the General Assembly to prescribe the appellate *jurisdiction* of the newly created Court of Appeals.").

Additionally, in Commonwealth v. Evans, 645 S.W.2d 350, 352 (Ky. App. 1982), the Court of Appeals analyzed the Commonwealth's right to appeal under KRS 22A.020(4) where the defendant claimed that the Commonwealth was not entitled to appeal and that the order appealed from was interlocutory and not final or appealable. The court properly pointed out that KRS 22A.020(4) "gives the Commonwealth the authority to appeal from interlocutory orders under certain conditions." Id. The court rejected the defendant's claim that KRS 22A.020(4) was unconstitutional and had already been declared such by the court in Commonwealth v. Schumacher, 566 S.W.2d 762 (Ky. App. 1978)(holding that the provision of KRS 22A.020 requiring the Attorney General's approval for interlocutory appeals was unconstitutional). The Evans court noted that in Schumacher it "did not say nor did [it] intend to suggest that the Legislature could not

give the Commonwealth the right to appeal under certain conditions." Evans, 645 S.W.2d at 352. In fact, the court further affirmed that "the Legislature may and has" given the Commonwealth the right to appeal under certain conditions. Id. Moreover, the court held that the Commonwealth's appeal was proper, "even assuming the order entered by the trial courts [was] interlocutory." Id.

Nevertheless, Appellant insists that KRS 22A.020(4) denies to the Court of Appeals, "the discretion otherwise afforded it by SCR 1.030(3)" (Brief for Appellant. P. 10). Appellant cites Hidalgo v. Commonwealth, 290 S.W.3d 56 (Ky. 2009). That case appropriately recognizes that the Court of Appeals "has broad discretion in the issuance of writs of prohibition, and each case must be considered on its own merits" and goes on to discuss when a writ is considered appropriate. Id. at 58. Nothing in the opinion discusses appeals under KRS 22A.020(4). Nor does anything in the opinion allude to any impropriety or unconstitutionality of KRS 22A.020(4). Consequently, contrary to what appellant asserts, KRS 22A.020(4) does not deny the Court of Appeals any discretion afforded by SCR 1.030(3).

In sum, because KRS 22A.020(4) is an appropriate exercise of the Legislature's authority and does not undermine the Constitution, the Commonwealth's appeal, even if determined to be interlocutory, was properly before the Court of Appeals. However, because the circuit court's order found that the court lacked jurisdiction over Appellant's pretrial diversion, the appeal was not interlocutory. Instead, as the Court of Appeals recognized, it was an appeal from a final and appealable order. Accordingly, the Court of Appeals had jurisdiction to hear and decide the appeal, and its decision in that regard should be affirmed.

## II. THE COURT OF APPEALS RULED CORRECTLY WHEN IT HELD THAT THE CIRCUIT COURT ERRED IN FINDING IT DID NOT HAVE JURISDICTION TO HEAR THE COMMONWEALTH'S MOTION.

The circuit court based its finding that it lacked jurisdiction to hear the Commonwealth's Motion to Remove the Defendant from Diversion on Huffines v. Commonwealth, No. 2005-CA-001033-MR, 2006 WL 1652868 (Ky. App. 2006). In that case, the defendant was on felony probation for forgery of a prescription when the Commonwealth filed a motion to revoke her probation. Id. at *1. The motion was not heard by the court until several months after the expiration of the five year period of probation. Id. Nevertheless, the court revoked the defendant's probation. The defendant argued and this Court agreed that KRS 533.020(1) required that "probation must be revoked, if at all, before the probationary period expires." Id.

In both the circuit court and the Court of Appeals, the Commonwealth argued that the unpublished opinion of McElroy v. Commonwealth, No. 2005-CA-002547-MR, 2006 WL 3375244 (Ky. App. 2006), was more persuasive than Huffines. In McElroy, the defendant was placed on felony pretrial diversion for Theft by Failure to Make Required Disposition of Property over $300. Id. at *1. Before her diversion expired, the Commonwealth sought to extend the defendant's diversion or alternatively to revoke her diversion and sentence her. Id. Several months after the defendant's period of pretrial diversion should have expired, the court revoked the defendant's pretrial diversion based upon the Commonwealth's motion. Id. The defendant argued on appeal that the court lacked authority to grant the motion because the period of pretrial diversion expired

before the motion was heard. Id. at *2. In affirming the circuit court's revocation of the defendant's diversion, the court relied upon RCr 8.04(5) and noted that the defendant would have been entitled to dismissal of her charge if the following three conditions had been met (1) the period of supervision had expired; (2) she completed the agreement; and (3) there had been no motion by the Commonwealth to revoke the agreement. Id. The court held that the defendant had not completed the agreement because she was charged with new offenses before expiration of the diversion period and because the Commonwealth filed a motion to revoke on those grounds before the agreement expired, and, therefore, the court did not err in voiding the pretrial agreement. Id.

In Appellant's case, the Court of Appeals reversed the circuit court's holding, relying upon another unpublished opinion, Wentworth v. Commonwealth, No. 2004-CA-0008885-MR, 2005 WL 1415367 (Ky. App. 2005) (App. 3). In that case, the defendant was put on felony pretrial diversion for one year for Receiving Stolen Property over $100. Id. at *1. Approximately 16 months after he entered the diversion agreement, the Commonwealth filed a motion to revoke the diversion agreement based on the fact that the defendant had not completed his GED classes or reported as directed. Id. The court held a revocation hearing and sentenced the defendant to one year probated for five years for his violations of the pretrial diversion agreement. Id. On appeal the defendant argued that the court lacked jurisdiction to revoke the pretrial diversion agreement. Id. He relied upon KRS 533.020(4). Id. at *2. That statute provides in relevant part: "Upon completion of the probationary period . . . the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation . . . has not been revoked." KRS 533.020(4). The court, however, held that KRS 533.020

did not apply to pretrial diversion agreements. Wentworth, 2005 WL 1415367 at *2. The court further acknowledged that the pretrial diversion order was not a final order disposing of the case and that unless the defendant complied with the agreement in the time provided, the court would not lose jurisdiction. Id.

The Court of Appeals likened Appellant's circumstances to the defendant's in Wentworth:

> "If Ballard had completed the terms of diversion at the end of the period, then he would have been entitled to dismissal. If he did not complete the terms of the agreement, then he would be subject to further prosecution. Ballard clearly did not complete the terms of the pretrial diversion agreement because he was arrested three times during the diversionary period. The trial court had not finally disposed of the charge. Therefore, the trial court retained jurisdiction."

Slip Op. P. 5.

Since the time of the appellate court opinion in this case, the Court of Appeals has rendered a published opinion in Tucker v. Commonwealth, 295 S.W.3d 455 (Ky. App. 2009). Appellant claims that case is determinative of the issue of whether the circuit court had jurisdiction to consider the Commonwealth's motion to remove Appellant from diversion. While the Commonwealth believes that McElroy and Wentworth both offer wisdom for the Court in determining the issues in this case, the Commonwealth recognizes that neither of these cases carries the same authority as the published opinion in Tucker. Further, the Commonwealth agrees with Appellant that Tucker resolves the issue before the Court, but not in the manner urged by Appellant.

In Tucker, the defendant pled guilty to one count of Flagrant Non-support and was placed on felony pretrial diversion for 3 years beginning on April 1, 2004. Tucker, 295 S.W.3d at 456. His diversion was set to end on March 31, 2007. Id. The court set the matter for April 5, 2007, for "final disposition." Id. During the pendency of the defendant's pretrial diversion, the Commonwealth did not file any motions to revoke or to void his pretrial diversion. Id. at 457. At an April 12, 2007, hearing defense counsel advised the court that the defendant was incarcerated on other charges and objected to the court considering any motions to revoke diversion that might yet be filed by the Commonwealth because the period of diversion had already expired. Id. The circuit court set the matter for July 5, 2007, although no motion regarding the diversion had been filed by the Commonwealth. Id. On July 5, 2007, the circuit court revoked the defendant's pretrial diversion and sentenced him to prison. Id. It did not appear that the Commonwealth ever filed any motion seeking revocation of the diversion agreement. Id.

The Court of Appeals reversed the circuit court's decision stating: "While we note that counsel have set forth a number of arguments, we believe 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. . . The fact is that it did not do so." Id. The court went on to recognize the uniqueness of the felony pretrial diversion program and many of the legislative provisions surrounding the program. The court wrote:

> "Given the unique nature of Class D Felony Pretrial Diversion, and the profound significance to a defendant placed on Class D Felony Pretrial

> Diversion of possibly losing his opportunity to avoid a felony conviction, it is not illogical that the General Assembly opted to provide a specific method by which the Commonwealth can seek to have Class D Felony Pretrial Diversion voided. Nor is it illogical that *any such effort* by the Commonwealth be required to be made before expiration of the pretrial diversion period."

Id. at 458 (emphasis added).

Tucker is very instructive in this case, but not in the manner Appellant claims. Appellant claims that the Commonwealth's motion, which was filed 11 days before his period of pretrial diversion expired was tantamount to the Commonwealth's failure in Tucker to file any motion at all because the Commonwealth did not file the motion "in time to conduct a hearing on the motion before the diversion period expired." (Brief for Appellant P. 11). Appellant's interpretation of Tucker is inconsistent with the very essence of the opinion, which Appellant himself recognizes as a holding that the Commonwealth's "failure to *file* a motion to revoke a diversion agreement before expiration of the agreed-upon time period divested the circuit court of jurisdiction to consider the issue" (Brief for Appellant P. 11; emphasis added).

Importantly, Appellant's view of Tucker and its application in this case is impracticable and inconsistent with the purposes and policies behind the pretrial diversion program. Essentially, Appellant's view would put upon the Commonwealth the duty and obligation to know particular courts' dockets and scheduling availability in order to properly anticipate how long before the expiration of the diversion period a motion would have to be filed in order to seek revocation. This policy would also undermine the

purpose behind the particular length of pretrial diversion granted each defendant. Rather than successfully completing the entire period of diversion, the defendant would be required only to complete that portion up to the point that a motion to revoke could be heard in the circuit court. This would grant defendants a "free pass" to act however they want, disregarding any and all conditions of their pretrial diversion, in the last days, weeks, and even months of their pretrial diversion. Defendants whose pretrial diversion was issued in courts with light dockets would be held more strictly to the legislative mandates and judicially imposed conditions of the pretrial diversion program than those whose diversion was granted in courts with busier, more crowded dockets.

The only alternative, under Appellant's interpretation, would be for the Commonwealth to file an anticipatory motion to revoke in each and every diversion case that could be scheduled to be heard the last day of the defendant's diversion in the event that he failed to successfully complete the program in his last days. Even that wouldn't be very effective if the defendant left court after the hearing and purposely the very day his diversion was set to expire violated any condition of his diversion agreement, such as a no contact order or requirement that he not use drugs or alcohol. The interpretation suggested by Appellant is unwieldy and unworkable. It would undermine the purposes and goals behind pretrial felony diversion, which specifically grants a huge benefit to defendants who are able to successfully complete the period of pretrial diversion. KRS 533.258. Because of their lack of criminal history and demonstrated willingness to change their criminal behavior, these defendants are able to avoid a felony conviction even when the act they committed was a felony.

This Court should recognize that under Tucker and under all applicable law, the obligation of the Commonwealth is merely that the motion be *filed* before expiration of the diversionary period and that the filing of the motion is sufficient for the court to have authority to hear the motion as expeditiously as possible, recognizing that under some circumstances it will be impossible for the court to hear the motion prior to the expiration of the diversion period.

In this case, the Commonwealth filed its motion more than one week before the diversion period expired. For whatever reason (likely calendaring issues), the Court did not set the matter for a hearing until February 14, 2008. At that time, the Court ruled it had no jurisdiction to hear the motion.[5] This ruling was improper because the Commonwealth's motion was filed before Appellant's period of pretrial diversion expired as required by the court in Tucker. Moreover, as noted in Wentworth and McElroy, Appellant had not completed the terms of the pretrial diversion agreement on the date the agreement was set to expire. Thus, the Circuit Court retained jurisdiction. Wentworth, 2005 WL 1415367 at *2; McElroy, 2006 WL 3375244 at *2. Felony pretrial diversion is a unique opportunity granted to criminal defendants. Because of the benefits granted them, strict compliance with the conditions of the diversion should be expected

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[5]Appellant may claim that the Commonwealth's failure to appear should render its filing of the motion insufficient to preserve the court's jurisdiction. However, as noted previously, neither the defendant's attorney nor the Commonwealth appeared, and the Commonwealth was legitimately otherwise occupied in trial of another matter. The Circuit Court recognized that had it not already decided to dismiss the motion for lack of jurisdiction it would have simply rescheduled the hearing. VCR No. 30-1108VCR010, 015; 02/14/08; 01:53:31. In a judicial system that is overcrowded and overworked, this far from unusual occurrence should not allow the defendant, who obviously violated the conditions of his diversion agreement by committing other crimes, to reap unwarranted benefits.

and enforced when doing so is the fair and just thing to do. In this case, the Commonwealth timely filed a motion to remove the defendant from diversion prior to the expiration of the diversion period, and Appellant–who knew the terms of his pretrial diversion included not committing new crimes–should not be heard to complain because the court was unable to schedule his hearing before the diversion period expired. Thus, the Court of Appeals' decision should be affirmed and the case remanded to the Jefferson Circuit Court for a hearing on the Commonwealth's Motion to Remove the Defendant from Diversion.

## CONCLUSION

The Court of Appeals correctly found it had jurisdiction to hear the Commonwealth's appeal because the circuit court's holding that it lacked jurisdiction over diversion was a final and appealable order. Even if this Court disagrees as to the finality of the order, the Court of Appeals still had jurisdiction to hear the appeal as an interlocutory appeal under KRS 22A.020(4). That statute is a constitutional exercise of the Legislature's authority, and it is not arbitrary. The Court of Appeals also correctly found that the circuit court had jurisdiction to hear the Commonwealth's motion to remove the defendant from diversion because the Commonwealth timely filed its motion before the period of pretrial diversion expired. Thus, the Court of Appeals' decision should be affirmed and this case remanded to the circuit court for a hearing on the Commonwealth's Motion to Remove the Defendant from Diversion.

In any event, the relief requested by defendant is not appropriate. Even were this Court to agree that the circuit court lacked jurisdiction to hear the Commonwealth's motion to remove Appellant from diversion, it does not necessarily follow that the case

must be remanded for entry of an order of "dismissed-diverted." KRS 533.258 provides that if a defendant "successfully completes the provisions of the pretrial diversion agreement," the charges against him shall be listed as "dismissed-diverted." Importantly, the statute does not say, "if a defendant's pretrial diversion is not revoked," it shall be listed as "dismissed-diverted." Certainly RCr 8.04(5) might be construed to require dismissal of the case upon the circuit court's denial of the motion to remove Appellant from diversion, but this is not necessarily so, and the Commonwealth would urge this Court to adopt the reading of RCr 8.04(5) taken by the court in McElroy, 2006 Wl 3375244 at *2, requiring that a defendant meet all three conditions of RCr 8.04(5) before being entitled to automatic dismissal. If this Court takes that reading, Appellant will not be entitled to automatic dismissal even if the Court affirms the denial of the Commonwealth's motion because Appellant clearly did not complete the terms of the diversion agreement.

Respectfully submitted,

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