

RENDERED: FEBRUARY 18, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2001-CA-000090-MR

MICHAEL SHAWN JAMESON

APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT  
2003-SC-0913-D

v. APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE JOHN T. DAUGHADAY, JUDGE  
ACTION NO. 00-CR-00167

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: DYCHE, JUDGE; MILLER AND EMBERTON, SENIOR JUDGES.<sup>1</sup>

MILLER, SENIOR JUDGE: This matter is before us on remand by the Kentucky Supreme Court by opinion and order dated December 8, 2004. The Court vacated our opinion rendered October 17, 2003, and ordered us to reconsider it in light of Cosby v. Commonwealth, 147 S.W.3d 56 (Ky. 2004). Upon reconsideration, we affirm.

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<sup>1</sup> Senior Judges John D. Miller and Thomas D. Emberton sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The sole issue on appeal is whether Kentucky Revised Statutes (KRS) 533.060 prohibits the concurrent sentencing for offenses committed while on pretrial diversion. In light of Cosby, we think it does.

The facts are as follows. On May 1, 2000, in Commonwealth v. Jameson, Graves Circuit Court, Case 00-CR-00031, Jameson entered a guilty plea to facilitation to manufacture methamphetamine (KRS 506.080 and KRS 218A.1412). In accordance with the plea agreement, the circuit court imposed a five year sentence of imprisonment, but diverted imposition of the sentence for five years pursuant to the pretrial diversion procedures of KRS 533.250, *et. seq.*

With minimal delay Jameson violated his pretrial diversion agreement by continuing his methamphetamine operations, and in June 2000 he was again indicted by the Graves County Grand Jury for manufacturing methamphetamine. Jameson subsequently entered a conditional plea agreement under Kentucky Rules of Criminal Procedure 8.09. The Commonwealth recommended a sentence of ten years. Jameson waived his right to a hearing to determine if there had been a violation of his pretrial diversion agreement. The circuit court subsequently voided his pretrial diversion agreement pursuant to KRS 533.256.

On December 11, 2000, the circuit court sentenced Jameson to ten years imprisonment on the new charges. The court

also imposed the five year diverted sentence from the prior facilitation conviction. The circuit court ordered the two sentences to run consecutively, being of the opinion that KRS 533.060 prohibited the running of any portion of the two prison terms concurrently. The circuit court did, however, indicate that were it not prohibited, it would have considered so doing.

Upon consideration of the trial court's ruling, Jameson prosecutes this appeal testing whether the circuit court was prohibited by KRS 533.060 from running the two sentences concurrently. KRS 533.060(3) provides that

When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.

In any discussion of statutory interpretation, we begin with the principle that "our duty is to ascertain and give effect to the intent" of the Legislature. Beckham v. Board of Education of Jefferson County, 873 S.W.2d 575, 577 (Ky. 1994). In so doing, it is not our function "to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." Id. We are instead directed to follow the clear language of the statute, Lydic v. Lydic, 664 S.W.2d 941, 943 (Ky. App. 1983), and when "plain and

unambiguous" words are employed, we must apply those terms "without resort to any construction or interpretation." Terhune v. Commonwealth, 907 S.W.2d 779, 782 (Ky. App. 1995); Smith v. Commonwealth, 41 S.W.3d 458, 460 (Ky. App. 2001).

KRS 533.060(3) does not directly address pretrial diversion status. The statute, rather, prohibits the concurrent sentencing of a person who commits an offense while "awaiting trial." Jameson was on pretrial diversion, and had he successfully completed his diversion agreement, he would have avoided a felony conviction altogether. See KRS 533.258. However, in the event of Jameson's failure to complete the diversion agreement, the diversion agreement was to be voided, and he was to be sentenced in accordance with the guilty plea entered as a precondition to receiving pretrial diversion. See KRS 533.250(1)(e) and KRS 533.256.<sup>2</sup>

Because a violation of his pretrial diversion would have led to the voiding of his pretrial diversion agreement and sentencing pursuant to his plea agreement with the Commonwealth, we believe that pretrial diversion status must be construed as "awaiting trial" under the Supreme Court's recent holding in Cosby v. Commonwealth, 147 S.W.3d 56 (Ky. 2004).

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<sup>2</sup> KRS 522.250(1)(e) requires a defendant to enter a guilty plea or an Alford plea (see North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)) as a precondition to receiving pretrial diversion.

"It is manifest that the intent of KRS 533.060(3) was to penalize those persons who perpetrated criminal acts while on release or otherwise awaiting additional court proceedings related to other criminal acts." Cosby at 60. "Therefore, we hold that the phrase 'awaiting trial' as set forth in KRS 533.060(3) includes the period of time following the establishment of guilt (whether by conviction or the entering of a guilty plea) and before sentencing." Id.

In the case of pretrial diversion, the committing of a crime by a defendant voids the diversion agreement and requires sentencing under the original plea agreement. As the diversion agreement is void, the ultimate effect is as though during the diversion period the defendant had been awaiting sentencing under the plea agreement. Pursuant to Cosby, "awaiting sentencing" is the equivalent of "awaiting trial." As "awaiting sentencing" is the equivalent of "awaiting trial," KRS 533.060(3) applies to pretrial diversion.

For the foregoing reasons the judgment of the Graves Circuit Court is affirmed.

ALL CONCUR.

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