

RENDERED: NOVEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002547-MR

KRISTIN MCELROY (NOW GOODLETT)

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
INDICTMENT NO. 99-CR-00163

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, JUDGE; ROSENBLUM,¹ SENIOR JUDGE; MILLER,² SPECIAL JUDGE.

ROSENBLUM, SENIOR JUDGE: Kristin McElroy³ appeals from an order of the Boyle Circuit Court revoking her May 11, 2000, pretrial diversion agreement with the Commonwealth. Finding no error, we affirm.

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

³ In various court documents appellant's name is also spelled "Kriston." She is also referred to as "Krissy." Additionally, her last name became "Goodlett" following marriage. For clarity, we refer to appellant as "McElroy."

On December 17, 1999, McElroy was indicted by a Boyle County grand jury for theft by failure to make required disposition over \$300.00, a violation of KRS⁴ 514.070. On February 16, 2000, McElroy entered a guilty plea to the charge and moved for pretrial diversion. On February 25, 2000, the court accepted and entered judgment on McElroy's guilty plea. On May 17, 2000, the court entered an order granting her motion for pretrial diversion, pursuant to KRS 533.250 et seq. The period of diversion was set for five years and scheduled to expire on May 11, 2005. One of the conditions for pretrial diversion required that McElroy not commit another offense during the period of diversion.

On December 1, 2004, McElroy was arrested on an indictment warrant charging her with thirty-six counts of theft by unlawful taking over \$300.00. On January 31, 2005, the Commonwealth moved to extend the period of McElroy's period of diversion until the new charges were resolved. In the alternative, the Commonwealth also moved to revoke McElroy's diversion and sentence her as recommended in the diversion agreement. At the March 8, 2005 hearing on the motion, the court declined to extend the period of diversion because it would require extending it beyond five years, in violation of KRS 533.020. The court did, however, agree that McElroy's

⁴ Kentucky Revised Statutes.

diversion could be revoked and set a revocation hearing for May 3, 2005. The court concluded that the Commonwealth's motion tolled the diversion period so that the pretrial diversion would not automatically expire on May 11, 2005.

At the May 3, 2005 hearing, the court did not decide the revocation issue. Instead, defense counsel stated that McElroy wished to plead guilty both to the pending new charges as well as violating the terms of the diversion agreement. The court ordered McElroy to return on June 2, 2005 to hear the guilty plea on the pending new charges. At the June 2, 2005 hearing, McElroy entered and later withdrew her guilty plea to the new charges. Also at that hearing, McElroy informed the court that since there had been no ruling on the revocation issue prior to May 11, 2005, the time had expired on the diversion agreement and she could not be sentenced pursuant to its terms. Declining to rule on the issue, the court set a revocation hearing date for July 7, 2005.

At the July 7, 2005 revocation hearing, the court heard testimony regarding the new charges against McElroy to determine whether she had violated the terms of the diversion agreement. McElroy argued that the court no longer had jurisdiction over the matter because the period of diversion had already expired. The court found that McElroy had violated the terms of the agreement, but held the matter in abeyance until

the new charges against her were resolved. On September 8, 2005, the court entered an order voiding McElroy's pretrial diversion. This appeal followed.

McElroy contends that the court erred when it voided her pretrial diversion after the agreement's May 11, 2005 expiration date. We disagree.

McElroy argues that nothing in the statutory language of Chapter 533 "lends to the interpretation that it is permissible for a court to purposely delay" making a revocation decision beyond the expiration date of a pretrial diversion agreement. In addition to the statutory language, McElroy also relies on one Supreme Court opinion, Curtsinger v. Commonwealth, 549 S.W.2d 515 (Ky. 1977), in support of her argument. In Curtsinger, our Supreme Court held that a trial court may not extend a term of probation beyond the maximum five year statutory limitation. Id. at 516. In Curtsinger, the trial court could have revoked the defendant's probation, but instead sought to extend the probationary period and thus lost jurisdiction to revoke it after the five year limit. Id. McElroy argues that, like the defendant in Curtsinger, the trial court lost jurisdiction to revoke her pretrial diversion agreement after its expiration on May 11, 2005. However, Curtsinger is distinguishable from the present case. Unlike the trial court in Curtsinger, here the court denied the

Commonwealth's motion to extend the diversion period. Instead, the court sought to revoke McElroy's diversion agreement, although the actual decision to revoke was not entered until after the May 11, 2005 expiration. Thus, unlike Curtsinger, the court here did not lose jurisdiction to revoke McElroy's pretrial diversion.

The present case is controlled by RCr⁵ 8.04(5), which states:

Termination of the agreement; automatic dismissal. Upon the expiration of the period of suspension of prosecution and upon the completion of the agreement and where there is no motion by the Attorney for the Commonwealth to terminate the agreement the indictment, complaint or charges which are the subject matter of the agreement shall be dismissed with prejudice.

McElroy would have been entitled to a dismissal of the charge underlying the pretrial diversion agreement had, 1) the period of suspension expired on May 11, 2005; 2) she completed the agreement; and, 3) there been no motion from the Commonwealth to revoke the agreement. The use of the conjunctive "and" requires that all three factors be met before the charges underlying a pretrial diversion agreement can be properly dismissed with prejudice. Here, on the May 11, 2005 expiration date, McElroy had not completed the agreement because she had been charged with additional new offenses. Further, and perhaps more

⁵ Rules of Criminal Procedure.

importantly, the Commonwealth filed a motion to revoke the agreement on January 31, 2005, well before the agreement expired. Thus, the charge underlying the diversion agreement could not have been dismissed with prejudice and the court did not err in voiding the pretrial agreement.

For the foregoing reasons, the judgment of the Boyle Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Angela Johnson
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky