Supreme Court of Kentucky

ORDER

Pursuant to KRS 533.250, signed into law in May, 1998, the Pretrial Diversion Program for Class D Felons submitted by the 50th Judicial Circuit (Boyle and Mercer Counties) is hereby approved by the Kentucky Supreme Court and added to the Circuit's local rules.

Chief Justice

Entered: May 30, 2000

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COMMONWEALTH OF KENTUCKY
50TH JUDICIAL CIRCUIT
MERCER CIRCUIT COURT
BOYLE CIRCUIT COURT
CLASS D FELONY PRETRIAL DIVERSION PROTOCOL

I. *Definition*

Pretrial diversion is the postponement of imposition of sentence upon any person who qualifies for this program, subject to certain conditions, for a period of time not to exceed five (5) years subject to certain conditions established by the Court.

II. *Persons Eligible*

A. Any person charged with a Class D felony, who has not had a felony conviction in the ten (10) years prior to commission of the current offense, or who has not been on felony probation or parole or released from felony incarceration within the ten (10) years prior to commission of the current offense, shall be eligible for pretrial diversion.

B. The person charged must enter a plea of guilty, or a plea pursuant to North Carolina v. Alford, before becoming eligible for pretrial diversion.

C. Persons ineligible for probation, parole or conditional discharge under KRS 532.045 shall be ineligible for this program.

D. A person convicted of a Class D felony for which early release is disallowed by statute, including KRS 189A.010(8) and KRS 189A.120(2), shall be ineligible for this program.

E. No person shall be eligible for this program more than once in any five (5) year period.

III. *Procedure*

A. After indictment in circuit court, and no later than 30 days before trial, any person eligible for the program may apply to the Circuit Court and the Commonwealth for entry of a pretrial diversion order.

B. In applying for pretrial diversion, counsel for the defendant must state, and the defendant must agree on the record, in the event diversion is

granted, any right to a speedy trial or disposition of the charge against him/her is waived.

C. The Commonwealth shall make a written recommendation to the Court in response to each application. KRS 533.250(2).

D. Before making a recommendation to the Court, the Commonwealth shall:

1. Have a criminal record check made by telephoning Pretrial Services at AOC at 1-800-928-2350, or faxing the request to (502) 573-1669. **[DO NOT** send requests to the local Pretrial Services Officer.]
2. Make a good faith effort to interview and seek input from the victim and/or victim's family and advise them of the time, date and place the motion will be heard by the Court; and
3. When diversion is recommended, the Commonwealth must make written recommendations to the Court of conditions for the pretrial diversion as well as the appropriate sentence to be imposed if the diversion agreement is unsuccessful. KRS 533.252(3).

NOTE: [The Commonwealth will be bound by its recommendation. In the event diversion is unsuccessful, the Commonwealth will not be permitted to argue for a sentence in excess of the original recommendation. Moreover, the Court cannot impose a sentence greater than the recommendation without first allowing the defendant the opportunity to withdraw the plea.]

IV. *Order of Pretrial Diversion*

A. The Court may, in its discretion, order a pre-sentence investigation by the Department of Corrections prior to the granting of an order for pretrial diversion for eligible petitioners upon terms and conditions it deems appropriate. AOC Form 346, styled Order Granting Pretrial Diversion of a Class D Felony may be utilized by the Court.

B. The Order of Diversion **shall** include:

1. Restitution, if applicable. **[Made mandatory by KRS 533.254 where victim has suffered monetary damage].**
2. Whether the diversion shall be supervised or unsupervised (and include supervision fees, if applicable).
3. Duration of the diversion.
4. Require defendant to obey all rules and regulations imposed by Probation & Parole.
5. As required by KRS 533.030(1) [conditions of probation-

restitution], direct the defendant not to commit any offense during the period of the pretrial diversion. Specifically, direct the defendant to comply with any other provision of KRS 533.030 or any other condition the Court deems appropriate.

6. That the petitioner remain drug and alcohol free and be subject to random testing.
7. That the petitioner have no violation of the Penal Code or the Controlled Substances Act.
8. That the petitioner possess no firearm or any other deadly weapon.
9. Such other terms and conditions as the Court shall deem appropriate, including, but not limited to, public service work and touring of a facility.

C. 1. Duration of the pretrial diversion shall not exceed five (5) years without agreement of the petitioner. Duration of the diversion agreement shall not be less than the time required to make restitution in full.

2. The defendant shall remain on bail pending successful completion of the pretrial diversion agreement.

V. ***Voiding a Diversion Order***

A. After a hearing, with notice to the Commonwealth and the defendant, the Court may void a person's participation in pretrial diversion upon a showing of failure to comply with the conditions of diversion or failure to make satisfactory progress. [AOC Form 347, styled Order Voiding Pretrial Diversion of a Class D Felony, is available for this purpose.]

B. If an order of pretrial diversion is voided, the defendant shall be sentenced according to law, based on his or her prior plea of guilt/plea pursuant to North Carolina v. Alford. **[NOTE: When revocation is ordered, a full updated PSI will be ordered and a sentencing hearing must be scheduled].**

C. 1. Under KRS 533.256 (2), the same criteria applicable to a probation revocation hearing applies to a proceeding to void an order granting diversion. Pursuant to KRE 1101(d)(5), the Rules of Evidence are inapplicable in miscellaneous proceedings such as those revoking probation. A proceeding to determine whether an order granting diversion should be voided also constitutes a miscellaneous proceeding and therefore the Rules of Evidence are inapplicable to such hearings.

2. Upon affidavit or other sworn statement from a Probation and Parole Officer or the Commonwealth, the Court may, in its discretion, issue a bench warrant for the arrest and detention of the defendant pending the hearing contemplated in §V(A) above.

VI. *Completion of Diversion Program*

If the defendant successfully completes the provisions of the pretrial diversion agreement, the charges against the defendant shall be dismissed. [**NOTE: The successful completion of a diversion contract does not result in automatic expungement of a criminal charge under KRS 431.076].**

Approved, this the 21st day of April, 2000, by Darren W. Peckler, Circuit Judge, and William Barnett, Commonwealth's Attorney, to be effective immediately.

DARREN W. PECKLER, JUDGE
50TH JUDICIAL CIRCUIT
BOYLE AND MERCER CIRCUIT COURTS

BILL BARNETT
COMMONWEALTH OF ATTORNEY
50TH JUDICIAL CIRCUIT
BOYLE AND MERCER CIRCUIT COURTS