

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 16th Judicial Circuit (Kenton County) is hereby approved by the Kentucky Supreme Court and added to the Circuit's local rules.

Entered: November 29, 1999



Chief Justice

**CLASS D FELONY PRETRIAL DIVERSION RULES
FOR THE KENTON CIRCUIT COURT
16TH JUDICIAL CIRCUIT
COMMONWEALTH OF KENTUCKY**

[Comments appearing in **bold** type are not intended to be part of the rules but may provide guidance in applying the rules.]

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 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.

[Diversion is available to non- Kentucky residents who would still be supervised by the Kentucky Department of Corrections].

- B. The person charged must enter a plea of guilty 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.
- F. Additionally, other persons, because of the nature of their prior criminal convictions, are not eligible for diversion hereunder. Those ineligible persons are described in Addendum A attached hereto and incorporated herein.

III. Procedure

- A. As soon as possible after indictment in circuit court, and no later than 14 days after arraignment, except for good cause shown, any person eligible for the program may apply in writing to the Circuit Court and the Commonwealth for entry of a pretrial diversion order.

[Last minute filing of an application for diversion may cause delay in the scheduled trial of a case and should be avoided.]

- 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. The waiver must accompany the written request for diversion.
- C. The Commonwealth shall make a written recommendation to the Court in response to each application within 7 days.
- 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. **[Pretrial Services at AOC will fax the criminal history to the Commonwealth Attorney. Due to user agreement restrictions, NCIC reports cannot be faxed];**
 - 2. 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.

[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.]

[The Commonwealth is statutorily required to make a recommendation, whether favorable or unfavorable, on every application. The circuit court cannot act on a request for diversion absent a recommendation from the prosecutor. DUE TO CONSTITUTIONAL CONSIDERATIONS, IT IS BELIEVED THAT DIVERSION IS UNAVAILABLE ABSENT A FAVORABLE RECOMMENDATION FROM THE COMMONWEALTH.

It is recommended the defense attorney simultaneously submit an application to the Circuit Court and to the prosecutor. The Commonwealth will then request the criminal record check, contact the victim, etc.; after charges are filed, AOC Form 347, styled MOTION FOR PRETRIAL DIVERSION OF A CLASS D FELONY, which contains the Commonwealth's recommendation, will be filed by the Commonwealth with the Circuit Court Clerk].

IV. Order of Pretrial Diversion

- A. The Court may, in its discretion, order pretrial diversion for eligible petitioners upon terms and conditions it deems appropriate. AOC Form 345, styled Order Granting Pretrial Diversion of a Class D Felony, is available for the Court's use.

[The diversion plan should be submitted to the Court as part of a plea agreement. When a defendant who has applied for diversion enters his/her guilty plea, the Court may modify the colloquy to reflect these items on the record:]

1. Is your guilty plea in this case part of an agreement you and your attorney have made with the Commonwealth?
2. In return for your guilty plea the Commonwealth has agreed to recommend a sentence of _____. Is this correct?
3. The Commonwealth has also recommended your case be diverted on the following conditions: _____ . Is this correct?
[At this point the Court should inquire about the absence/inclusion of certain conditions which may seem appropriate/inappropriate].
4. The Commonwealth has tendered to the Court a diversion agreement. Have you read the diversion agreement? Have you discussed it with counsel? Has your attorney answered any questions you have about the diversion agreement?
5. Have you signed the diversion agreement?
6. Did you voluntarily sign the agreement?
7. Do you understand that if you successfully complete the diversion agreement the charge(s) against you will be dismissed?
8. Do you understand that if the Commonwealth alleges you have failed to comply with the terms of the diversion agreement, the Court will schedule a hearing and, upon completion of the hearing, make a finding as to whether you failed to comply with the diversion agreement?
9. Do you understand that if the Court finds you have not complied with the diversion agreement, the Court will schedule a sentencing hearing and at that hearing, the Court may sentence you to the penalty recommended by the Commonwealth?

- 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). [The Corrections Department advises the actual monthly cost of supervision is \$97.00. Probation & Parole requests, and it is recommended, a monthly supervision fee of \$25.00, but no less than \$10.00, be imposed on each divertee].

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.

C. The Order of Diversion may include: **[These items are not statutorily required but they may be considered and imposed depending upon the nature of the particular charge].**

1. That the petitioner remain drug and alcohol free and be subject to random testing.
2. That the petitioner have no violation of the Penal Code or the Controlled Substances Act.
3. That the petitioner possess no firearm or any other deadly weapon. **[For the safety of parole officers who are supervising the divertees, access to handguns be prohibited during the pendency of the diversion contract when home visits are ordered].**

D. 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.

[The Court should then advise the parties as to whether it will accept the diversion agreement. If it is accepted, a specific finding should be made on the record that the defendant entered the plea AND entered into the diversion agreement voluntarily, freely, intelligently and understandingly.]

If the plea agreement AND the diversion agreement are rejected, notify the parties and advise the defendant he/she has the option of withdrawing the plea and proceeding to trial, OR maintaining the plea with the knowledge the Court will not order diversion but instead will impose a sentence within the penalty range permitted by law.

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 346, 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. **[When revocation is ordered, a full PSI must be ordered and a sentencing hearing must be scheduled].**

- C. 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.

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. **[By statute, when a diversion contract is successfully completed, the case is closed out as DISMISSED-DIVERTED. A new SUSTAIN code, "DD," has been assigned for this purpose. It is recommended that defendants be told from the beginning that successful completion of a diversion contract does not result in automatic expungement of a criminal charge under KRS 431.076].**

[Class D Felony cases in which a charge is diverted will be CLOSED by the Circuit Court Clerk which means they will not appear in a judge's pending caseload.]

ADDENDUM A

1. Any individual convicted of a homicide charge or inchoate form of a homicide charge (Facilitation, Attempt, Solicitation, Conspiracy) under KRS Chapter 507.
2. Any individual convicted of a felony charge or inchoate form of a felony charge under KRS Chapter 508 except that individuals convicted of First Degree Wanton Endangerment would be eligible.
3. Any individual convicted of a felony kidnapping charge or inchoate form of a felony kidnapping charge under KRS Chapter 509 except that individuals convicted of either Custodial Interference or First Degree Unlawful Imprisonment would be eligible.
4. Any individual convicted of any felony sex offense or inchoate form of a felony sex offense under KRS Chapter 510.
5. Any individual convicted of a felony burglary charge or inchoate form of a felony burglary charge under KRS Chapter 511 except that individuals convicted of Third Degree Burglary would be eligible.
6. Any individual convicted of a felony arson charge or inchoate form of a felony arson charge under KRS Chapter 513 except that individuals convicted of either Third Degree Arson or Burning Personal Property to Defraud Insurer would be eligible.
7. Any individual convicted of any felony robbery offense or inchoate form of a felony robbery offense under KRS Chapter 515.
8. Any individual convicted of any felony escape offense or inchoate form of a felony escape offense under KRS Chapter 520.
9. Any individual convicted of any felony bribery offense or inchoate form of a felony bribery offense under KRS Chapter 521.
10. Any individual convicted of any felony offense or inchoate form of a felony offense under KRS Chapter 523 (Perjury and related charges).
11. Any individual convicted of any felony offense or inchoate form of a felony offense under KRS Chapter 524 (Interference with Judicial Administration and related charges).
12. Any individual convicted of any felony offense or inchoate form of a felony offense under KRS Chapter 527 (charges relating to firearms and weapons).
13. Any individual convicted of any degree of Promoting Prostitution or inchoate version of Promoting Prostitution under KRS 529.030 or 529.040.
14. Any individual convicted of any degree or any offense or inchoate version of any offense within the range of KRS 531.300 through 531.370 (Sexual Exploitation of a Minor).
15. Any individual convicted of any degree of any drug trafficking offense inchoate version of any drug trafficking offense under KRS Chapter 218A.
16. Any individual convicted of any degree of any form of a felony offense for Driving Under the Influence or felony Driving on a Suspended License when License is suspended for Driving Under the Influence under KRS Chapter 189A.

Approved, this the 4th day of NOVEMBER, 1999, by PATRICIA M. SUMME

Chief Circuit Judge, to be effective immediately.

Patricia M. Summe

Chief Judge
Kenton Circuit Court