

Supreme Court of Kentucky

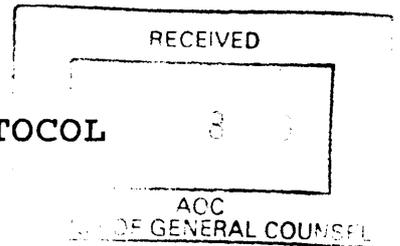
ORDER

Pursuant to KRS 533.250, signed into law in May, 1998, the Pretrial Diversion Program for Class D Felons submitted by the 26th Judicial Circuit (Harlan County) is hereby approved by the Kentucky Supreme Court and added to the Circuit's local rules.

Entered: 12/16/99


Chief Justice

PRETRIAL DIVERSION PLAN and PROTOCOL
FOR THE
26TH JUDICIAL CIRCUIT
HARLAN CIRCUIT COURT



The following plan is submitted pursuant to the mandate established in KRS 533.250 et seq. [sections 89-92 of HB455] and in cooperation with the Office of the Commonwealth's Attorneys for the 26th Judicial Circuit.

I. Persons Eligible

- A. Any person charged with a Class D felony offense, who has not had a felony conviction for the previous ten (10) years from the commission of the current offense or who has not been on probation or parole or released from felony incarceration within the previous ten (10) years from the commission of the current offense shall be eligible for pre-trial diversion. [An individual charged with multiple Class D felonies may be eligible for diversion but will be more stringently considered].
- B. The person charged must enter a plea of guilty, or a plea pursuant to North Carolina v. Alford, before becoming eligible for pre-trial diversion.
- C. Persons not eligible for probation, parole or conditional discharge under KRS 532.045 shall not be eligible for this program.
- D. A person convicted of a felony offense involving driving under the influence shall not be eligible for this program. [This provision is not statutorily required by HB 455, but it is improper to divert a DUI offense under KRS 189A.010(8) and KRS 189A.120(2)].
- E. No person shall be eligible for this program more than once in any five (5) year period.

II. Procedure

- A. An eligible person may petition the circuit court, with notice to the Commonwealth's Attorney, for the entry of a pretrial diversion order not less than seven (7) days before sentencing.
- B. The Commonwealth's Attorney shall make a recommendation to the Court in writing in response to each petition.
- C. Before making a recommendation to the Court, the Commonwealth's Attorney shall:
 - 1. Have a criminal record check made [Pretrial Services

at AOC will fax the criminal history to the Commonwealth's Attorney. Caution! Due to user agreement restrictions, NCIC reports cannot be faxed];

2. Interview and seek input from the victim and/or the victim's family and advise them of the time, date and place of the hearing of the petition by the Court; and
3. Make recommendations to the Court in writing of conditions for pretrial diversion.

[The Commonwealth Attorney is statutorily required to make a recommendation, whether favorable or unfavorable, on every petition. A circuit court cannot act on a request for diversion absent a recommendation. Additionally, the circuit court lacks jurisdiction of the matter until charges have been filed. Nothing in House Bill 455 requires a defendant's request for diversion to be filed simultaneously with the prosecutor and the court; the bill simply says it may be filed with both. The defense attorney shall submit an application/petition to the prosecutor who will request the criminal record check, contact the victim, etc.; then, after charges are filed, a motion for diversion, accompanied by the prosecutor's recommendation, would be filed by the prosecutor with the court clerk. A copy of said application/petition shall be sent simultaneously to the Judge, in order to alert the Court that a pretrial diversion plan is being considered].

III. Order of Pretrial Diversion

- A. The Court may, in its discretion, order pretrial diversion for eligible petitioners upon terms and conditions it deems appropriate:

The Order shall include:

1. Restitution, if applicable.
2. Whether the diversion shall be supervised or unsupervised (and include supervision fees, if applicable).
3. Duration of the diversion.
4. That the petitioner remain drug and alcohol free and be subject to random testing.
5. That the petitioner have no violation of the Penal Code or the Controlled Substances Act.
6. That the petitioner possess no firearm or any other deadly weapon.

7. Any other provisions of KRS 533.030 or any other condition which the Court deems appropriate.
- B. The duration of pretrial diversion shall not exceed five (5) years without agreement of the petitioner. Duration of the diversion shall not be less than the time required to make restitution in full.

IV. REVOCAATION

- A. After a hearing on notice by the Commonwealth's Attorney, the Court may revoke or void a person's pretrial diversion program upon a showing of failure to comply with the conditions of diversion or failure to make satisfactory progress. The standard of proof at such a hearing shall be by preponderance of the evidence.
- B. If a pretrial diversion program is revoked or voided, the defendant shall be sentenced according to law, based on his or her prior plea of guilty.

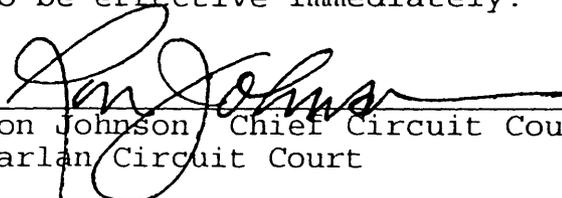
V. Completion of Diversion Program

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 already been assigned for this purpose. The defendants shall 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].

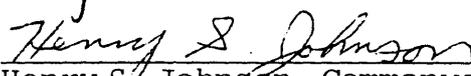
VI INCORPORATION INTO LOCAL RULES OF THE 26TH JUDICIAL CIRCUIT

This protocol and plan shall be incorporated into the Harlan Circuit Court's Rules and referred to as HCPR-235.

Approved, this the 23rd day of November, 1999, by Ron Johnson, Chief Circuit Court Judge, and Henry Johnson, Commonwealth's Attorney, to be effective immediately.



Ron Johnson, Chief Circuit Court Judge,
Harlan Circuit Court



Henry S. Johnson, Commonwealth's Attorney,
Harlan Judicial Circuit