

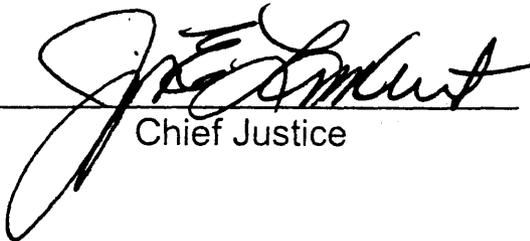
Supreme Court of Kentucky

ORDER

Pursuant to KRS 533.250, signed into law in May, 1998, the Pretrial Diversion Program for Class D Felons submitted by the 46th Judicial Circuit (Breckinridge, Grayson and Meade Counties) is hereby approved by the Kentucky Supreme Court and added to the Circuit's local rules.

Entered:

July 24, 2000



Chief Justice

FILED 5-10-00
[Signature]
CLERK

AMENDED
CLASS D FELONY PRETRIAL DIVERSION PROTOCOL
FOR THE 46TH JUDICIAL CIRCUIT
CONSISTING OF BRECKINRIDGE, GRAYSON & MEADE COUNTIES

INTRODUCTION

During the 1998 legislative session, the legislature extensively modified the Kentucky Penal Code with respect to the incarceration of public offenders. An apparent goal of the legislature was to provide for the extended incarceration of those offenders who constituted a threat to society. The legislature also directed that programs be established throughout Kentucky which would be rehabilitative in nature, by offering an offender incentives to conform to the law in the future. Pursuant to that enabling legislation, the Courts across Kentucky have been directed by the Kentucky Supreme Court to establish a pre-trial diversion program, more appropriately referenced as a pre-incarceration diversion program.

I. DEFINITION

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

II. PERSONS ELIGIBLE

- (A) Any person charged with the 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. It is envisioned that pre-trial diversion in the 46th Judicial District will be limited to non-violent offenders whose offense was against the peace and dignity of the Commonwealth as opposed to an offense against an individual victim. In addition to the victimless crimes, it is contemplated that diversion will be available as a tool which the Commonwealth may use in it's child support collection efforts.
- (B) The person charged with a felony and seeking pre-trial diversion must enter a plea of guilty as a **condition precedent** to being accepted in the pre-trial diversion program.
- (C) Persons ineligible for probation, parole or conditional discharge under KRS 532.045 shall be ineligible for this program.

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- (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 forty-five (45) days prior to the scheduled trial, a 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, that in the event diversion is granted, any right to a speedy trial or final 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 the Administrative Office of the Courts, Pretrial Service Division, at 1-800-928-6381, or faxing the request to (502) 573-1669. The request shall not be sent to the local Pretrial Services Officer.
 - (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, Commonwealth must make a written report to the Court as to the recommended conditions for the pretrial diversion as well as the appropriate sentence to be imposed if the diversion agreement is unsuccessful. (KRS 533.252(3)).
 - (4) Pre-trial diversion is deemed to be a prosecutorial function and the Commonwealth Attorney's recommendation in favor of pre-trial diversion shall be given great deference, but is not binding upon the Court. Notwithstanding, pre-trial diversion shall not be granted by the court in absence of a favorable recommendation by the Commonwealth's Attorney. In the event that pre-trial diversion is not granted, for whatever reason, then the matter shall proceed thereafter as though pre-trial diversion did not exist.



- (5) The movant shall use AOC Form 347 or a form of approved by this Court which shall be styled, "Motion for Pre-trial Diversion of a Class "D" Felony". The above form shall include or be accompanied by the Commonwealth's Attorney's recommendation and shall be signed by the Defendant, Defense Attorney and the Commonwealth's Attorney. As with all other motions, the same shall be filed with the Circuit Court Clerk.

IV. ORDER OF PRETRIAL DIVERSION

- (A) The Court may, in its discretion and upon a favorable recommendation by the Commonwealth's Attorney, order pretrial diversion for eligible Defendants upon terms and conditions it deems appropriate. AOC Form 345 styled "Order Granting Pretrial Diversion of a Class D Felony", was designed for this purpose.
- (B) The Order of Diversion **shall**:
- (1) **Establish the duration of the sentence** being deferred, which shall be of no greater duration than the maximum duration imposed by the legislature for the offense to which the defendant plead guilty in reliance upon the deferral agreement.
 - (2) **State the duration of the diversion**, which shall not exceed the greater of five years or the time necessary to complete restitution.
 - (3) **Require the defendant to pay restitution** to the victim (which may be an entity other than a natural person) in full, if applicable.
 - (4) **Set forth the terms and conditions of the diversion**. The Court may require supervision by the Corrections Cabinet, Division of Probation and Parole and shall determine the intensity of that supervision. The Court may order supervision fees, in its discretion, but not to exceed the maximum amount permitted by law.
 - (5) **Require the defendant to obey all rules and regulations** imposed by the Division of Probation and Parole.
 - (6) **Require that the defendant commit no other offense**.
 - (7) **Require that the defendant not possess or be in control of a firearm or other deadly weapon** (as defined by KRS 500.080(4), which may further include black powder arms and/or instruments capable of propelling a projectile by compressed air or kinetic energy (long bow, cross bow or compound bow).



- (8) **Require that the defendant agree to random drug and alcohol test** as ordered by the court or the defendant's supervising authority or by any law enforcement officer.
- (9) **Require the defendant to give up the protections afforded to him by the Constitution of the United States** with respect to searches, seizures and self-incrimination.
- (10) **Order any other reasonable condition** which in the court's discretion will be in the long term best interest of the defendant and/or the community, so long as that condition is not contrary to existing law or public policy.

(C) The Order of Diversion **may** include:

- (1) A provision requiring the defendant to serve a reasonable period of time in the custody of the jailer of the county in which the offense was committed. The jail time, if required, would be served prior to the commencement of the diversion period. The court may further require a defendant to reimburse the applicable county for any incarceration expense, including medical which may have been incurred by that county. The standard reimbursement rate shall be the rate paid by the State of Kentucky to local jails for holding state prisoners. The Court may deviate from this rate under extraordinary circumstances which shall be set forth in a specific finding of facts.
- (2) A provision requiring a one time contribution of not more than the maximum amount permitted under KRS 533.030(5) to a local DARE program, or its equivalent, payable through the Commonwealth Attorney's Office.
- (3) A provision requiring curfews as the court deems appropriate.
- (4) A provision requiring the defendant to perform community service as recommended by the Commonwealth's Attorney. Any such recommendation shall set forth the service to be performed, the manner in which the defendant's performance will be supervised and reported to the Court.

V. VOIDING A DIVERSION ORDER

- (A) If it is brought to the Commonwealth's Attorney's attention, that the defendant may have violated the terms and conditions of his diversion agreement, the Commonwealth's Attorney shall in his/her discretion move the Court for an order



voiding the diversion. After an evidentiary hearing, with notice to 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 a failure to make satisfactory progress. AOC Form 346, styled, Order Voiding Pretrial Diversion of a Class D Felony, was designed for this purpose.

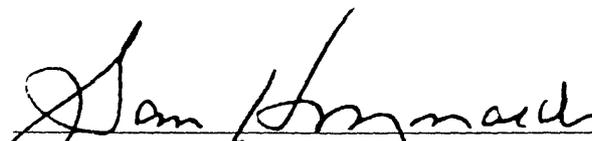
- (B) If an order of pretrial diversion is voided, the defendant shall be sentenced according to the sentence delineated in the original diversion order, based upon his or her prior plea of guilt.
- (C) Under KRS 533.256(2), the same criteria applicable to a probation revocation hearing applies to a 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, then upon motion, with notice to the Commonwealth, and upon payment of any appropriate fee or charge, except for good cause shown, his plea of guilty shall be vacated and expunged from the record, and shall not inculcate the Defendant for any purpose to the extent permitted by law.

Adopted this the 12TH day of April, 2000, by Hon. Sam H. Monarch, Circuit Judge, Division I, Hon. Robert A. Miller, Circuit Judge, Division II, and the Hon. Kenton R. Smith, Commonwealth's Attorney, to be effective immediately.

EXECUTED IN TRIPLICATE ORIGINALS.



SAM H. MONARCH
CIRCUIT JUDGE, DIVISION I
BRECKINRIDGE, GRAYSON & MEADE
CIRCUIT COURTS



ROBERT A. MILLER
CIRCUIT JUDGE, DIVISION II
BRECKINRIDGE, GRAYSON & MEADE
CIRCUIT COURTS



HON. KENTON R. SMITH
COMMONWEALTH'S ATTORNEY
46TH JUDICIAL DISTRICT