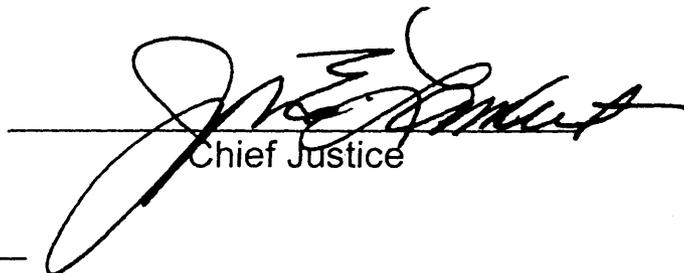


Supreme Court of Kentucky

ORDER

Pursuant to KRS 533.250, signed into law in May, 1998, the Pretrial Diversion Program for Class D Felons submitted by the 54th Judicial Circuit (Boone and Gallatin Counties) is hereby approved by the Kentucky Supreme Court and added to the Circuit's local rules.



Chief Justice

Entered:

May 25, 1999

**CLASS D FELONY DIVERSION PROTOCOL
FOR THE 54TH CIRCUIT**

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 five (5) years, subject to certain conditions established by the Court.

II. PERSONS ELIGIBLE

KRS 533.250

- 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 or the entering of a criminal information in Circuit Court, and no later than sixty (60) 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, that 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 1-800-928-6381, or faxing the request to (502) 573-1669. DO NOT send requests 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.
 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).
 4. The Commonwealth will be bound by its recommendation. In the event that 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 allowing the defendant an opportunity to withdraw his/her plea.
 5. The Court cannot act on a request for diversion absent a recommendation from the prosecutor and diversion is unavailable absent a favorable recommendation from the Commonwealth.

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, was designed for this purpose.
- B. The Order of Diversion **shall** include:
1. Restitution, if applicable. Restitution is mandatory where victim has suffered monetary damage per KRS 533.254.
 2. Whether the diversion shall be supervised or unsupervised and include supervision fees, which are to be no less than \$25.00 per month.
 3. Duration of the diversion.
 4. Require defendant to obey all rules and regulations imposed by Probation and Parole.
 5. As required by KRS 533.303(1) [conditions of probation-restitution], direct the defendant not to commit any offense during the period of 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:
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.
- 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.
- E. The Court will thereafter advise the parties whether it will accept the diversion agreement. If it is accepted, a specific finding shall be made on the record that the defendant entered the plea and entered into the diversion agreement voluntarily, freely, intelligently and understandingly.
- F. If the plea agreement and the diversion agreement are rejected, the Court shall notify the parties and advise the defendant that he/she has the option of 1) withdrawing the plea and proceeding to trial; or 2) maintaining the plea with the knowledge that the Court will not order diversion but instead will impose a sentence within the penalty range permitted by law.

V. **VOIDING A DIVERSION ORDER**

KRS 533.256

- A. After a hearing, with notice to the Commonwealth and 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 law, based on his or her prior plea of guilt/plea pursuant to North Carolina v. Alford. A full PSI shall be ordered and a sentencing hearing shall 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 and the case shall be closed out as DISMISSED-DIVERTED. However, the successful completion of a diversion contract does not result in automatic expungement of a criminal charge under KRS 431.076.

Approved, this the 4 day of MAY, 1999, by Joseph F. Bantjes
Chief circuit Judge, and Willie Mathis, Commonwealth's Attorney, to be effective
immediately.

Joseph F. Bantjes
JUDGE, Boone- CIRCUIT COURT
GAYLARD
Willie Mathis
COMMONWEALTH'S ATTORNEY