

**Diversion Case Law
February 2011**

ELIGIBILITY

State v. McKeon, 897 A.2d 1127 (N.J. Super. Ct. 2006)

Issue: Since New Jersey law allows a person to be in the diversion program only one time, is a defendant still eligible if he was in diversion in another state for a matter that is not a criminal offense in New Jersey?

Ruling: The defendant is to be considered eligible for participation.

Court: Superior Court of New Jersey, Appellate Division

In 2002, the defendant, John McKeon, was charged in Pennsylvania with Driving Under the Influence of Alcohol, a misdemeanor under Pennsylvania law, and was admitted to that state's pretrial diversion program – Accelerated Rehabilitative Disposition (ARD). In 2004, McKeon was charged in Burlington County, New Jersey with possession of cocaine. He applied for admission to PTI, but was rejected by the prosecutor on the grounds that he was ineligible due to his earlier participation in ARD. He appealed this decision to a Superior Court judge, who sided with the prosecutor, ruling that “it was the legislative intent to limit defendants to one diversionary program regardless of where that diversionary program occurs.” McKeon then took the issue to the Appellate Division.

Before that court, McKeon argued that N.J.S.A. 2C:43-12 applies only to diversion received in New Jersey. He further argued that he should be eligible since the offense he was charged with in Pennsylvania – DUI – is a traffic, not a criminal, offense in New Jersey.

Noting that the court, in construing the meaning of a statute, should assume that the legislature intended a reasonable approach, the appeals court found McKeon's argument “more consistent with the policies underpinning PTI than that of the State.” The court concluded that the eligibility criteria for PTI “must be applied with the aim of furthering the purposes of PTI, [namely] to divert eligible defendants out of the criminal process to the advantage of the defendant, society, and the criminal justice system, to deter future criminal behavior through the receipt of early rehabilitative services, and to relieve overburdened criminal calendars.” Since Driving Under the Influence of Alcohol is not a criminal offense in New Jersey, if the offense “had occurred in New Jersey rather than in Pennsylvania, the defendant would not have been charged with a misdemeanor, and would have been eligible for PTI.” The court remanded the case with the instruction that McKeon be considered eligible for PTI.

State v. Leisten, 853 N.E.2d 673 (Ohio App. Ct. 2006)

Issue: Is a defendant who failed in Ohio's pretrial diversion program eligible for participation in that state's Intervention in Lieu of Conviction program?

Ruling: Nothing in the statute would make the defendant ineligible.

Court: Court of Appeals of Ohio

The State of Ohio offers two diversionary opportunities. Ohio Revised Code § 2935.36 gives prosecuting attorneys the authority to establish pretrial diversion programs that operate according to standards approved by the court. Revised Code 2951.0141 relates to Intervention in Lieu of Conviction, in which the court is authorized to identify eligible defendants who, “in the trial court’s sound discretion” would benefit from substance abuse treatment and send those defendants to the probation department for treatment. If successful, the charges may be dropped.

In this case, Deborah Ann Leisten was placed in the prosecutor’s pretrial diversion program. When she failed to comply with the requirements of that program, her diversion agreement was terminated and her case was sent back to the court for prosecution. Leisten then moved to be admitted to Intervention in Lieu of Conviction. The court denied this motion, stating that she was ineligible because “she has had one diversion-like opportunity and therefore she is not eligible for Intervention in Lieu of Conviction.” Leisten entered a guilty plea and then appealed the trial court’s denial of her motion.

At the Court of Appeals, Leisten argued that the trial court erred in finding that she was not eligible for Intervention in Lieu of Conviction. Among the eligibility requirements are that the person “previously has not been through intervention in lieu of conviction under this section or any similar regimen.” (R.C. § 2951.041(B)(1).) Since Intervention in Lieu of Conviction is geared specifically toward substance abusers and the pretrial diversion program is not, the Court of Appeals concluded that the pretrial diversion program is not a “similar regimen” for the purposes of determining eligibility for Intervention in Lieu of Conviction. “In our judgment, the prosecutor’s diversion program is not a regimen similar to Intervention in Lieu of Conviction,....If the legislature had wished to make participation in any pretrial diversion program a precluding factor, it could have easily included that restriction” in the statute. The court reversed the trial court’s ruling and ordered the trial court to consider whether, in its “sound discretion,” Leisten would benefit from an Intervention in Lieu of Conviction placement.

Federov v. U.S., 600 A.2d 370 (D.C. 1991)

Issue: Is the U.S. Attorneys Office engaging in improper selective prosecution by denying pretrial diversion to persons charged with unlawful entry while exercising First Amendment rights to political speech?

Ruling: The government has the burden of rebutting the appellants’ showing of selective prosecution.

Court: District of Columbia Court of Appeals

The appellants in this case were individuals who were arrested for unlawful entry resulting from their participation in a political demonstration to raise awareness of homeless issues. They

sought, but were denied, admission to the District of Columbia's pretrial diversion program. They claimed that, as political protestors, they were being treated differently by the U.S. Attorneys Office than other similarly situated defendants, whom they defined as all other first offenders charged with unlawful entry. The two trial courts hearing these cases both ruled that the correct comparison group of similarly situated defendants is all defendants participating in the protest who were arrested for unlawful entry that day. Since all those defendants were denied admission to pretrial diversion, the trial courts held, the appellants in this case were treated no differently.

The District of Columbia Court of Appeals noted that a party alleging selective prosecution based on impermissible classifications "must make a prima facie showing that (1) others similarly situated were not prosecuted, and (2) the selective prosecution being complained of was improperly motivated, i.e., it was based on an impermissible consideration such as race or a desire to prevent the exercise of constitutional rights." The court concluded that "we are satisfied that the appellants have made such a showing." In doing so, the court noted that the comparison group of similarly situated defendants used by the trial judges was under inclusive. "The trial judges focused their inquiry on whether there was disparate treatment within the class of alleged victims of discrimination, rather than on whether those alleged victims, taken as a group, were treated less favorably than others who were similarly situated except for the exercise of protected rights."

The court held that for the selective prosecution/diversion analysis, the comparison group should be all first-time offenders charged with unlawful entry. The court remanded the cases for further proceedings in which the U.S. Attorneys Office would have the burden of rebutting the appellants' prima facie showing of selective prosecution. The court noted, however, that the U.S. Attorney's Office may have "a straightforward, simple explanation of its diversion policy that would lead to a prompt resolution" of the cases.

ELIGIBILITY – PAYMENT OF FEES

NAPSA DIVERSION STANDARD 2.4: POTENTIAL PARTICIPANTS SHOULD NOT BE DENIED THE PRETRIAL DIVERSION OPTION BASED SOLELY ON THE INABILITY TO PAY RESTITUTION OR PROGRAM FEES.

Mueller v. State, 837 N.E. 2d 198 (Ind. Ct. App. 2005)

Issue: Can a defendant be denied admission to a pretrial diversion program solely due to inability to pay program fees?

Ruling: The prosecutor must make alternatives available, such as community service.

Court: Court of Appeals of Indiana

Jamie Mueller and Vicki Evans were both arrested on misdemeanor charges in Marion County, Indiana. The prosecutor offered both the opportunity to participate in the pretrial diversion program offered through the prosecutor's office, with their charges being dismissed upon

successful completion. Both, after consulting with their attorneys, were interested in participating, but neither could afford the \$230 fee required for participation. Since they could not pay the fee they were denied access to the program. They requested that the trial court intervene to require the prosecutor to allow them to participate, notwithstanding their inability to pay. The trial court declined, stating that payment of a fee for participation in a pretrial diversion program does not violate either the U.S. or the Indiana Constitutions.

On appeal of this ruling, the Indiana Court of Appeals reviewed the state's pretrial diversion statute, which states that a condition of participation in diversion "may" include that the person pay a user's fee. (§ 33-39-1-8.) "The undisputed evidence before us is that at the time of Mueller's and Evan's cases, the prosecutor had implemented a policy of unconditionally requiring the payment of certain fees as a condition of participation in his pretrial diversion program. The question, therefore, is whether this was an unconstitutional application of an otherwise constitutional statute with respect to indigent defendants."

To address this question, the court first acknowledged that the prosecutor has the sole discretion to determine who to prosecute. "However, it is also clear that a prosecutor's charging decisions cannot be made in a way that violates the United States Constitution." It pointed to a U.S. Supreme Court ruling that such discretion cannot be based upon "an unjustifiable standard such as race, religion, or other arbitrary classification." *Bordenkircher v. Hayes*, 434, U.S. 357, 98 S. Ct. (1978). It concluded that the courts "have the authority, and the duty, to assess whether it is constitutional for a prosecutor to decide to prosecute some individuals and not others on the sole distinguishing basis that some are able to pay pretrial diversion fees and others are not."

The court found that "there is nothing in the record to suggest there was any other reason for Mueller and Evans to be excluded from the pretrial diversion program, except for their asserted inability to pay the fees." The court cited a line of cases holding that inability to pay a fee or fine is not a justifiable reason for depriving individuals of their Fourteenth Amendment rights to due process and equal protection, beginning with *Griffin v. Illinois*, (351 U.S. 12, 76 S. Ct. 585 (1956)). In that case, the U.S. Supreme Court held that the State of Illinois was violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment by refusing to allow indigent defendants to obtain free trial transcripts. As Justice Hugo Black wrote in that case, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

Based on its review of the line of cases, the court concluded that "precluding Mueller and Evans from participating in the prosecutor's pretrial diversion program based solely on their asserted inability to pay the \$230 in fees violated their rights under the United States Constitution." The court held that alternatives must be made available to indigent defendants, including waiver of fees, partial waiver, implementation of a reasonable payment schedule, substitution of community service for the fee, or a combination of these.

In conclusion, the court noted that "[t]he concept that our criminal justice system should be operated as far as reasonably possible without regard to a defendant's financial resources is axiomatic and beyond dispute. Allowing some defendants and not others to completely avoid

prosecution and a potential criminal conviction, based solely on their respective abilities to pay certain fees, violates this fundamental principle.”

ELIGIBILITY – ROLE OF PROSECUTOR VS. COURT

NAPSA DIVERSION STANDARD 2.6: WHILE IT IS THE PROSECUTOR’S PEROGATIVE TO INITIATE PRETRIAL DIVERSION CONSIDERATION FOR POTENTIAL PARTICIPANTS, COURTS SHOULD HAVE A ROLE IN MONITORING THE FAIR APPLICATION OF DIVERSION ELIGIBILITY GUIDELINES.

State v. Yancey, 69 S.W.3d 553 (Tenn. 2002)

Issue: What standard of review must the trial court apply in reviewing the prosecutor’s denial of a pretrial diversion application?

Ruling: The court must not re-weigh the evidence considered by the prosecutor but must determine that the prosecutor weighed all the relevant factors.

Court: Supreme Court of Tennessee

This is the latest in a line of cases in which the Tennessee Supreme Court has sought to define the standards that prosecutors must apply in considering applications for pretrial diversion and those that trial courts must apply in reviewing prosecutors’ diversion decisions. Tennessee law allows prosecutors to suspend a prosecution of an eligible defendant for up to two years. (Tenn. Code Ann. § 40-15-105(a) (1)(A)). Eligible defendants are those who have been previously granted pretrial diversion, have no prior misdemeanor convictions for which jail time was served, have no prior felony convictions within five years, and are not charged with a Class A or B felony or certain Class C felonies. (Tenn. Code Ann. § 40-15-105(a)(1)(B)). Beyond these minimum eligibility requirements, the statute does not address what factors the prosecutor is to take into account in making the decision to agree to diversion. The statute does state that the court is to approve the prosecutor’s decision unless it finds that the prosecutor acted arbitrarily or capriciously, that the agreement was obtained by fraud, or that the defendant does not meet the eligibility requirements. (Tenn. Code Ann. § 40-15-105(b)(2)). Moreover, defendants have the right to appeal to the court with the claim that diversion was denied as a result of an abuse of prosecutorial discretion. (Tenn. Code Ann. § 40-15-105(b)(3)).

The court has laid out the factors that the prosecutor is to take into account in deciding whether to admit a defendant into pretrial diversion. “Any factors which tend to accurately reflect whether a particular defendant will or will not become a repeat offender should be considered....Among the factors to be considered in addition to the circumstances of the offense are the defendant’s criminal record, social history, the physical and mental condition of a defendant where appropriate, and the likelihood that pretrial diversion will serve the ends of justice and the best interest of both the public and the defendant.” *State v. Hammersly*, 650 S.W.2d 352, 355 (Tenn. 1983). If the prosecutor denies pretrial diversion, reasons for the denial must be in writing and must include “an enumeration of the evidence that was considered and a

discussion of the factors considered and weight accorded each.” *State v. Pinkham*, 955 S.W. 2d 956 (Tenn. 1997).

The “failure of the prosecutor to consider and articulate all of the relevant factors constitutes an abuse of discretion.” *State v. Curry*, 988 S.W. 2d 153 (Tenn. 1999). The correct remedy for abuse of discretion is for the trial court to reverse the prosecutor’s decision and remand to the prosecutor “for further consideration of all of the relevant factors in a manner consistent with this Court’s decisions.” *State v. Bell*, ____ S.W.3d. ____ (Tenn. 2002).

In the present case, prosecutors denied admission to pretrial diversion to Jerry Yancey after he was arrested for aggravated assault and reckless endangerment. In the denial statement, the prosecutor cited the facts and circumstances of the offense, including grave danger created to the victims. The statement also indicated that the defendant’s social history and criminal history were “neutral.” Also cited as reasons for the denial were the defendant’s prior conviction, his failure to take complete responsibility for his actions, and his efforts to conceal the facts of the incident. Upon review of this decision, the trial court noted that “[t]his does seem to be a case where the circumstances of the crime and the need for deterrence outweigh any other relative factors that would justify pretrial diversion. And I find therefore that the State has not abused its discretion in this case...”

On appeal of this decision to the Tennessee Supreme Court, Yancey argued that the trial court failed to weigh and make specific findings regarding each relevant factor considered by the prosecutor. The court ruled that in reviewing the prosecutor’s decision to deny diversion, “the trial court must not re-weigh the evidence, but must consider whether the district attorney general has weighed and considered all of the relevant factors and whether there is substantial evidence in the record to support the district attorney general’s reasons for denying diversion.” The court held that the trial court did not state whether the prosecutor considered all relevant factors or whether the prosecutor’s findings were supported by substantial evidence. The court remanded the case to the trial court to apply the proper standard of review.

State v. Ward, 2006 Tenn. Crim. App. LEXIS (Tenn. Crim. App. 2006)

Issue: Can trial court disapprove a pretrial diversion application based on the charge when the statute lists the charge as eligible for diversion, and the prosecutor has agreed to diversion?

Ruling: Remanded with instructions to approve the diversion application or state the reasons on the record for concluding that the prosecutor acted arbitrarily or capriciously.

Court: Tennessee Court of Criminal Appeals

Under Tennessee law, to be eligible for pretrial diversion a defendant must be charged with an offense lower than a Class C felony – with certain excluded charges, have no prior felony convictions, and have had no prior grants of pretrial diversion. If eligible, the decision to offer pretrial diversion rests with the prosecutor. The court must approve the prosecutor’s decision regarding pretrial diversion unless the court finds that the prosecutor acted arbitrarily or

capriciously, that the diversion agreement was obtained by fraud, or that the defendant is ineligible for diversion. (Tenn. Code Ann. § 40-15-105(a)(1)(B)(i)(a)-(c).)

In this case, prosecutors agreed to pretrial diversion for two co-defendants charged with tax fraud for understating the value of a boat they had purchased. The matter was brought before the trial court for approval, and the court denied the defendants' diversion application. In issuing the denial, the court acknowledged that the two defendants met the statutory eligibility criteria, but "if there ever was an offense that ought not be eligible, it is one based on the allegations of the indictment in each of these cases." The court concluded that the prosecutor did act arbitrarily and capriciously.

On appeal, the defendant, joined by the prosecutor, argued that the trial court did not state any reasons for its ruling that the prosecutor had acted arbitrarily and capriciously. The state's Court of Criminal Appeals agreed, stating that "it appears that the trial court substituted its judgment for that of the District Attorney's, and that of the Tennessee General Assembly. The trial court stated that this crime should not be subject to pretrial diversion, even though the legislature has decided that it is." The court remanded the case to the trial court with instructions to approve the diversion application or state on the record the reasons for concluding that the prosecutor was acting arbitrarily and capriciously.

Flynt v. Commonwealth, 105 S.W.3d 415 (Ky. 2003)

Issue: Can the trial court permit a defendant to participate in a pretrial diversion program over the objections of the Commonwealth?

Ruling: The Commonwealth must give its consent before the court has the authority to approve a pretrial diversion application.

Court: Supreme Court of Kentucky

Two cases were consolidated to address the issue of the court's authority to approve pretrial diversion over the objections of the Commonwealth. In one of the cases, Flynt, the trial court held that it had no authority, and in the other, Elliott, a different judge from the same trial court held that it did. In addressing the issue, the Court first turned to the statute governing pretrial diversion, KRS 533.250. A provision of that statute reads: "The Commonwealth's attorney shall make a recommendation upon each application for pretrial diversion to the Circuit Judge in the court in which the case would be tried. The court may approve or disapprove the diversion." The statute is silent on how the court is to respond when the Commonwealth's attorney objects to diversion.

The court noted that the language of the statute "is susceptible to reasonable alternative interpretations." It must be interpreted, however, in light separation of powers. The court concluded that to interpret the language "as permitting a trial court to approve pretrial diversion applications over the Commonwealth's objection – and thus conferring upon circuit courts the discretionary authority that we have previously held to be within the exclusive province of the executive branch – would construe it in a manner inconsistent with Kentucky's constitutional

separation of powers provisions.” The court ruled that the trial court can only approve a pretrial diversion application when the Commonwealth Attorney has recommended approval.

State v. Tootle, 500 S.E.2d 481 (S.C. 1998)

Issue: Does the chief administrative judge have the authority to admit an applicant to the Pre-Trial Intervention Program over the objections of the prosecutor.

Ruling: Under separation of powers, the judge has no such authority

Court: Supreme Court of South Carolina.

When Kenneth Tootle, an attorney, was charged with failure to file state income taxes for eight years he applied to the chief administrative judge of Beaufort County for admission to the Pre-Trial Intervention (PTI) Program. The Attorney General objected on three grounds: that the chief administrative judge has no authority to admit a defendant to PTI; that since Tootle is an attorney, admission to the program is not appropriate; and that the South Carolina Department of Revenue opposes PTI for persons charged with tax violations. The chief administrative judge rejected these arguments and ordered that Tootle be admitted to the program. The Attorney General appealed to the state Supreme Court.

That court began its discussion of the issue by noting that the statute authorizing PTI (S.C. Code Ann. § 17-22-100 (Supp. 1997)) provides that “[a]pplications received by the chief administrative judge of the court of general sessions under this section may be preliminarily approved by the judge pending a determination by the pretrial office that the offender is eligible to participate in a pretrial program pursuant to sections 17-22-50 and 17-22-60. Applications received by the chief administrative judge of the court of general sessions must be forwarded to the pretrial office.”

This language makes it clear, the court noted, that while the court can grant preliminary approval, final determination is “left to the ‘pretrial office,’ which is under the direct supervision of the circuit solicitor.” Invoking separation of powers, the court concluded that “a determination of PTI ineligibility is a completely discretionary executive decision and is not reviewable by the judicial department.”

Clayton v. Lacy, 589 N.W. 2d 529 (Neb. 1999)

Issue: Does a court have jurisdiction over a prosecutor’s decision to deny admission to a pretrial diversion program.

Ruling: The pretrial diversion decision is an exercise of prosecutorial discretion and is not a judicial function.

Court: Supreme Court of Nebraska

When Zachary Clayton was denied admission to the Lancaster County, Nebraska pretrial diversion program he filed an appeal. Under Nebraska law (Section 29-3603(7), defendants who are denied admission to diversion have a right to administrative review of that decision, which in Lancaster County are held by attorneys in private practice who have been appointed as hearing officers by the local bar association. The decision of the hearing officer is not binding on the county attorney and is limited to determining whether the county attorney's decision was arbitrary and capricious. The hearing officer presiding over Clayton's appeal concluded that the prosecutor did act arbitrarily and capriciously in denying Clayton admission. The prosecutor still refused to admit Clayton and Clayton then filed a petition with the district court seeking the court's review of the prosecutor's decision. The court rejected the petition on the grounds that it had no jurisdiction over the prosecutor's diversion decisions.

On appeal to the Nebraska Supreme Court, that court concluded that a pretrial diversion decision "is an exercise of prosecutorial discretion," and the courts lack jurisdiction in intervening in that decision.

Cleveland v. State, 417 So. 2d 653 (Fla. 1982)

Issue: Can court review prosecutor's decision to deny admission to pretrial diversion program to a defendant who meets the program criteria?

Ruling: Pretrial diversion is a prosecutorial function, not subject to judicial review.

Court: Supreme Court of Florida

After Ophelia Johnson was arrested for welfare fraud she applied for admission to the pretrial diversion program. Despite the fact that Johnson met all the statutory requirements for participation in the program, the state attorney denied her admission, citing its policy against admitting persons charged with welfare fraud. The trial court ordered that Johnson be admitted to the program over the objections of the prosecutor. The Fourth District Court of Appeals quashed that order. The case then went to the Florida Supreme Court.

The Supreme Court accepted the case to address the question of whether the trial court can review a refusal by the state attorney to consent to a qualified defendant's admission to a pretrial diversion program. "The answer to this question primarily depends on whether the pretrial diversion decision is a judicial or prosecutorial function." The court concluded that "pretrial diversion is essentially a conditional decision not to prosecute....The pretrial intervention program is merely an alternative to prosecution and should remain in the prosecutor's discretion." Thus the court ruled that the prosecutor's pretrial diversion decision is not subject to judicial review.

City of Cleveland v. Kilbane, 2000 Ohio App. LEXIS 923 (Ohio Ct. App. 2000)

Issue: Can the court place a defendant in a pretrial diversion program over the objections of the prosecutor?

Ruling: Since the defendant had already completed the pretrial diversion program and the charge was dismissed, the appeals court could offer no relief to the prosecutor due to double jeopardy.

Court: Court of Appeals of Ohio, Eighth District

Prosecutors objected when the trial court ordered Timothy Kilbane to be enrolled in a pretrial diversion program known as the Selective Intervention Program. As part of that program, Kilbane was ordered to attend Alcoholics Anonymous meetings and participate in a batterer's intervention program. When Kilbane completed the requirements of the program and the court entered a nolle in the case, prosecutors again objected.

On appeal, prosecutors argued that the trial court erred when it placed the defendant in the pretrial diversion program over their objections. The Court of Appeals held that, since Kilbane had completed the requirements of diversion and the case was dismissed, "[t]his court can no longer afford any relief to the prosecution. Double jeopardy prohibits further prosecution." The appeal was dismissed as moot.

ENROLLMENT – ADMISSION OF RESPONSIBILITY

NAPSA DIVERSION STANDARD 3.3: ENROLLMENT IN THE PRETRIAL DIVERSION PROGRAM SHOULD NOT BE CONDITIONED ON A FORMAL PLEA OF GUILTY. AN INFORMAL ADMISSION OF RESPONSIBILITY MAY BE ACCEPTABLE AS PART OF A SERVICE PLAN. PARTICIPANTS WHO MAINTAIN INNOCENCE SHOULD NOT AUTOMATICALLY BE DENIED THE DIVERSION OPTION.

State v. Porter, 123 P.3d 325 (Or. Ct. App. 2005)

Issue: When a defendant stipulates to the elements of a crime as a condition of enrollment in pretrial diversion, can that defendant, once diversion has been terminated and the charge re-instated, offer any evidence at trial that contradicts the stipulations already made?

Ruling: Once facts are stipulated they are conclusively proven.

Court: Oregon Court of Appeals

As part of the standard admission process to the pretrial diversion program, Monte Porter stipulated to the elements of DUI. When Porter failed to comply with the terms of pretrial diversion the charge was re-instated and a jury trial ensued. At the trial, the prosecution introduced as evidence the statement that Porter signed upon enrolling in diversion, stipulating to the elements of DUI. Porter argued that, notwithstanding the stipulation, he should have the right to present evidence to the jury that he was not impaired by alcohol at the time of his DUI arrest. The prosecutor countered that Porter was precluded from presenting any evidence that was contrary to his signed statement. The trial court agreed with the prosecutor and the jury found Porter guilty. The Oregon Court of Appeals also rejected Porter's argument, noting that "[a] stipulation...is a statement by which one party waives the right to require the other party to prove a particular fact....Once stipulated, a fact is conclusively proven." The court affirmed the defendant's conviction.

Neshewat v. Salem, 173 F.3d 357 (6th Cir. 1999)

Issue: Can a defendant who enrolls in a pretrial diversion program later charge the complaining witness in a civil suit with injurious falsehood?

Ruling: The defendant's participation in the pretrial diversion program was an implicit acknowledgment of guilt, and under the principles of collateral estoppel, a guilty plea bars a subsequent civil action.

Court: U.S. Court of Appeals for the Sixth Circuit

This case arose over a bitter dispute between Michael Neshewat and his brother Maurice over the ownership of a car. Michael loaned Maurice money to purchase the car, which he registered in his name. The dispute began when Maurice failed to pay back the loan. When the car was stolen, Michael filed a claim with his insurance company. During a police investigation of this

claim, Maurice stated that he never gave Michael permission to re-title the car in Michael's name. Based on that statement, Michael was arrested and charged with intent to pass false title on an automobile and false pretenses with intent to defraud. After his arrest, Neshewat participated in a pretrial diversion program. Part of the agreement was that he was to pay restitution to the insurance company he was accused of defrauding. He made the payments and the charges were dismissed. He then filed a civil suit against Maurice in U.S. District Court charging injurious falsehood. That court ruled that Neshewat's claim was barred by collateral estoppel, reasoning that Neshewat's participation in the pretrial diversion program operated as a guilty plea, and Neshewat appealed.

The U.S. Court of Appeals agreed with the District Court. "While it is true that, in accordance with the terms of Michigan's Pretrial Diversion Program, upon his full payment of the \$40,000 restitution and his successful completion of the conditions of supervision while he was on diversion status, the case against Plaintiff was dismissed, the fact remains that Plaintiff's agreement to pay \$40,000 acts as an implicit, if not an express, acknowledgement of guilt no less than a plea of *nolo contendere* operates," the court held. "It is well settled in this Circuit that, under principles of collateral estoppel, a plea of guilty or *nolo contendere*, or a conviction, bars a subsequent civil action for damages for malicious prosecution, false arrest, false imprisonment or defamation claim."

Jordan v. Deese, 452 S.E.2d 838 (S.C. 1995)

Issue: Can a defendant who enrolls in a pretrial intervention program later file suit against the complaining witnesses for malicious prosecution?

Ruling: Dismissal of criminal charges as a result of successful completion of pretrial intervention is not a result that is in the defendant's favor, so the defendant's suit may not go forward.

Court: Supreme Court of South Carolina

Thomas Jordan was placed in the Pre-Trial Intervention Program after being charged with making harassing telephone calls. He successfully completed the program and the charge was dismissed. Jordan then filed a suit against the victims alleging malicious prosecution. The trial court granted summary judgment in the victims' favor. Jordan appealed to the Supreme Court of South Carolina. That court noted that among the elements that must be proven in a malicious prosecution action is that the charges against the person bringing the malicious prosecution action must have been resolved in that person's favor. The court held that "dismissal of criminal charges as the result of the accused's voluntary entry into, and successful completion of a Pre-Trial Intervention Program is not, as a matter of law, a termination of the action in his favor."

SERVICES

RELATED NAPSA DIVERSION STANDARDS:

STANDARD 4.2: SERVICE PLANS SHOULD ADDRESS THE SPECIFIC NEEDS OF THE PARTICIPANT AND NOT BE DESIGNED MERELY TO RESPOND TO THE CRIME CHARGED.

STANDARD 4.3: SERVICE PLAN REQUIREMENTS SHOULD BE THE LEAST RESTRICTIVE POSSIBLE TO ACHIEVE AGREED-UPON GOALS AND SHOULD BE STRUCTURED TO HELP THE PARTICIPANT TO AVOID BEHAVIOR LIKELY TO LEAD TO FUTURE ARRESTS.

Polikov v. Neth, 699 N.W. 2d 802 (Neb. 2005)

Issue: Does it interfere with the prosecutor's authority under separation of powers for the Legislature to establish minimum conditions for the completion of pretrial diversion.

Ruling: While the prosecutor has authority over the charging decision, the Legislature has the responsibility, under separation of powers, to define crimes and punishment.

Court: Supreme Court of Nebraska

In 1979, the Nebraska legislature enacted a statute (Neb. Rev. Stat. §§ 29-3601 through 29-3609) that specifies that county attorneys (as prosecutors are called in that state) have the authority to establish pretrial diversion programs, and have wide discretion in the operation of those programs. To assure fair treatment of the accused, however, the legislature placed some limits on that discretion, including: county attorneys must have written eligibility guidelines; defendants and their attorneys must have the opportunity to review program requirements before agreeing to participate in diversion; once in diversion, defendants must have the option of withdrawing from the program and returning to the court process; enrollment must not be conditioned upon a plea of guilty; and charges must be dismissed upon successful completion.

In 2002, the legislature amended this statute, creating a dichotomy between "minor traffic violations" and "criminal offenses." The amendment addressed only those charged with the former and excluded from the definition of minor traffic offenses a number of traffic violations. It laid out several requirements if the county attorney decided to set up a diversion program for minor traffic offenders, including that the defendant complete an 8-hour driver's safety program and that the fee charged must be approved by the state Department of Motor Vehicles. It also required the county attorneys to submit to the Department the names of all persons enrolled in the diversion program to assure that no person in the state be allowed to participate more than once in a three-year period.

The County Attorney from Sary County, Kenneth Polikov, challenged this amendment, arguing that it violated the separation of powers clause of the Nebraska Constitution. The trial court agreed and granted a permanent injunction forbidding the enforcement of the amendment. The Department of Motor Vehicles appealed to the state Supreme Court.

Before that court, Polikov argued that he is a member of the executive branch and that he, as county attorney, has the authority to design a pretrial diversion program as he sees fit. He argued that the restrictions placed on him by the amendment have prevented him from doing so. Specifically, he noted that prior to the amendment he was requiring defendants to complete four hours of driver training, as opposed to the eight hours required by the amendment. He also felt that there were times when, on a case-by-case basis, he might decide to let a defendant participate in the program more than once in a three-year period, and the amendment took that discretion away.

In addressing these arguments, the court acknowledged that prosecutorial discretion is an inherent executive power, and that prosecutors have the power “to choose to charge any crime that probable cause will support or, if the prosecutor chooses, not to charge the accused at all.” Included in that authority is the discretion to decide who should be offered the opportunity of diversion and who should be prosecuted. The court concluded, however, that “formal pretrial diversion does not represent a natural outgrowth of the charging function, but, rather, a substantial change in the way that society responds to the challenge of crime. It is the legislative branch of government that is charged with defining crimes and punishments.” The court reversed the trial court decision, holding that the amendment was not an unconstitutional violation of the separation of powers clause.

Petty v. City of El Dorado, 19 P.3d 167 (Kan. 2001);

Issue: Can a defendant be required to serve a short jail term as part of a pretrial diversion contract?

Ruling: Requiring a jail term violates the intent of the Kansas Legislature in authorizing the pretrial diversion program.

Court: Supreme Court of Kansas

The city of El Dorado, Kansas established a pretrial diversion program for first time DUI offenders. Those participating in the program have several requirements authorized by state statute (K.S.A. 12-4416(a)). The city later added an additional requirement not addressed in the statute – that participants serve either 48 or 72 hours in the county jail, with the number of hours dependent upon the person’s blood alcohol level at the time of arrest.

When Melissa Petty was arrested and charged with DUI, as a first offender she was offered the opportunity to participate in the pretrial diversion program. She agreed and signed a contract requiring her to perform community service, enroll in an alcohol safety program, and pay a fee – all of which are statutorily-authorized conditions. She was also required to serve 48 hours in jail, to be served within 120 days of the diversion agreement. Petty successfully completed all the other requirements, but then challenged the requirement that she serve the jail term. In doing so, she argued that requiring a jail term violates the Legislature’s intent for pretrial diversion, which is rehabilitation rather than punishment.

The trial court agreed, and ordered that Petty did not need to serve the term. The court also, however, declared the entire diversion agreement void – relying on equitable estoppel and general principles of contract law, which holds that no party to an illegal agreement can continue to enjoy the benefits of the agreement. The city appealed the ruling pertaining to the jail term and Petty counter-appealed the ruling pertaining to the voiding of the diversion agreement.

As to the legality of the jail term requirement, the Kansas Supreme Court held that it did violate the Legislative intent. After reviewing the legislative history of the diversion statute, the court concluded: “A diversion agreement is the specification of formal terms and conditions which a defendant must fulfill in order to have the charges against such a defendant dismissed. Diversion is, therefore, a means to avoid a judgment of criminal guilt. Inasmuch as no judgment of guilt is entered when diversion is granted, the district court was correct in finding that the municipal court judge had no authority to order Petty to a period of jail confinement as a condition of diversion.”

As to the second issue, the voiding of the diversion agreement, the Supreme Court, citing contract law, stated that “it is the duty of the courts to sustain the legality of contracts in whole or in part when possible.” The court concluded that the trial court erred in voiding the diversion agreement.

DISMISSAL

State v. Curry, 730 N.E.2d 435 (Ohio Ct. App. 1999)

Issue: Can the court dismiss the charges upon completion of pretrial diversion without the consent of the prosecutor?

Ruling: The trial court violated separation of powers when it dismissed the case without the prosecutor's consent.

Court: Court of Appeals of Ohio, Ninth District

When Samuel Curry failed to complete restitution payments to the victim of a theft, as required as part of his pretrial diversion agreement, the prosecutor terminated the diversion. Curry, who had entered a guilty plea when entering diversion, was scheduled for sentencing. At the sentencing hearing, Curry told the court that he would resume making restitution payments. The court continued the sentencing hearing for a month to give Curry more time to pay. At that second sentencing hearing Curry asked for more time, which was granted. Finally, five months after the original sentencing date, Curry appeared at sentencing with proof that he had completed his restitution payments. Rather than sentencing Curry, the court concluded that, since the restitution requirement was now fulfilled, Curry had completed diversion. The court vacated Curry's guilty plea and – over the objections of the prosecutor – dismissed the case. The state appealed.

The court of appeals cited Ohio Revised Code § 2935.36(D), which states: “If the accused satisfactorily completes the diversion program, the prosecuting attorney shall recommend to the trial court that the charges against the accused be dismissed, and the court, upon the recommendation of the prosecuting attorney, shall dismiss the charges.” The court concluded that this wording “appears to condition the court’s right to dismiss the charges on a recommendation by the prosecutor.” Furthermore, the court noted that the sole matter before the trial court was the sentencing of the defendant on his guilty plea. The court ruled that “[t]he trial court violated the constitutional concept of separation of powers when it took the administrative and executive decision of whether to prosecute the defendant away from the prosecuting attorney and terminated the prosecution without the consent of the prosecutor.” The court reversed the decision of the trial court and ordered that court to sentence Curry on the theft charge.

State v. Dempsey, 916 So. 2d 856 (Fla. Dist. Ct. App. 2005)

Issue: Can a defendant who has successfully completed pretrial diversion and had the charges dismissed have the dismissal vacated and the charges reinstated, based on her misunderstanding of how her dismissal would be interpreted by potential employers?

Ruling: There is no legal basis on which the courts can vacate a dismissal after completion of pretrial diversion.

Court: Court of Appeals of Florida, Second District

In 1995, Twanna Dempsey was charged with exploitation of the elderly, abuse of the elderly, and grand theft. She entered a pretrial intervention program, successfully completed the program, and the charges were dismissed. Afterwards, Dempsey went back to school, completing a degree in education and becoming certified as a school teacher. She was rejected for employment by several school districts, which viewed her participation in the pretrial intervention program as an admission of guilt. As a result, in 2004 Dempsey moved the court to set aside the pretrial intervention agreement, vacate the dismissal, and reinstate the charges against her. In her motion, she claimed that she misunderstood her pretrial intervention contract with the prosecutor, and the dismissal of her charges was “ambiguous” and should be deemed void because third parties did not recognize the dismissal. Prosecutors opposed this motion arguing that they could not be returned to its precontract status since they did not have a victim and after such a long interlude their ability to prosecute the case was severely hampered. The trial court sided with Dempsey and ordered the dismissal vacated.

While it noted that it sympathized with Dempsey’s plight, the Florida Court of Appeals ruled that “there is no legal basis upon which the trial court’s ruling may be upheld.” The court referred to the pretrial intervention agreement that Dempsey had signed years earlier. That agreement stated: “The person who is the subject of a criminal history record that is expunged may lawfully deny or fail to acknowledge the arrests covered by the expunged record, except when the subject of the record is seeking to be employed or licensed by the Office of Teacher Education, Certification, Staff Development, and Professional Practices of the Department of Education, any district school board, or any local governmental entity that licenses child care facilities.” Thus, the court concluded that Dempsey “cannot maintain that she mistakenly thought her record would be wiped clean.” As to her claim that third parties do not recognize the dismissal, the court held that that has no bearing on the validity of the pretrial intervention agreement she signed since those parties were not parties to the agreement. The appeals court reversed the trial court’s order.

DISMISSAL – EXPUNGING RECORD

RELATED NAPSA DIVERSION STANDARD

STANDARD 5.3: UPON SUCCESSFUL COMPLETION OF A PRETRIAL DIVERSION PROGRAM, A PARTICIPANT MAY HAVE HIS/HER RECORD SEALED OR EXPUNGED IN COMPLIANCE WITH STATE LAW OR AGREED UPON POLICIES.

Commonwealth v. Shouse, 183 S.W. 3d 204 (Ky. Ct. App. 2006)

Issue: Should a defendant who has successfully completed a pretrial diversion program have the arrest record expunged?

Ruling: It is clear that the Legislature intended to allow persons who have successfully completed diversion to have their records expunged.

Court: Kentucky Court of Appeals

Under Kentucky law (KRS 431.076), a defendant who successfully completes a pretrial diversion program may file a motion with the court to have the arrest record expunged. Following the filing of such a motion, the court is to set a hearing and allow the Commonwealth Attorney the opportunity to respond to the expungement request. In this case, the Kentucky Court of Appeals rejected an attempt by Commonwealth Attorneys to prevent a defendant who had successfully completed a pretrial diversion program from having his arrest record expunged.

After his arrest on a Class D felony, Orville Shouse entered a pretrial diversion program. The agreement he signed upon entering the program stated in part: “I understand that upon successful completion of the terms and conditions of the Pretrial Diversion Program I may petition the court for expungement of the dismissed-diverted charge.” Shouse did successfully complete the program and the charge was dismissed. Three years later, Shouse moved to have the record expunged, which the court granted over the objections of Commonwealth Attorneys.

On appeal, Commonwealth Attorneys argued that allowing Shouse’s record to be expunged would undermine enforcement of the diversion statute, which allows a person to apply for pretrial diversion only once in every five years. If the record was expunged, they argued, there would be no way of knowing if Shouse were to apply for diversion a second time within the five year period. The court found no merit to this argument, noting that it is clear that the legislature, in passing KRS 431.076, intended that successful participants in pretrial diversion should have the ability to “wipe the slate clean.” “This legislative goal would be thwarted to a significant degree if a successful participant’s record were readily available to the public through court records.”

State v. J.Y.M., 711 N.W. 2d 139 (Minn. Ct. App. 2006)

Issue: Can a person who entered a plea of guilty to a criminal charge and successfully completed a pretrial diversion program have his record expunged?

Ruling: Expungement of the record is not available.

Court: Minnesota Court of Appeals

The respondent in this case, J.Y.M., was charged with aiding and abetting theft and was admitted to the pretrial diversion program. As part of the admission process, J.Y.M. entered a plea of guilty. The trial court deferred acceptance of the plea while J.Y.M. was in the diversion program. Five months after J.Y.M. successfully completed the diversion program and the charge was dismissed he petitioned for expungement of the record under Minn. Stat § 609A.03 (2004) for “employment and license” purposes. The state opposed expungement on the ground that the case was not resolved in the respondent’s favor, a requirement under the statute. The district court concluded that the case was resolved in the respondent’s favor and that the interests of public safety did not outweigh the disadvantages to the respondent of not expunging the records. The state appealed.

On appeal, the respondent argued that since the district court deferred acceptance of the plea and the charge was ultimately dismissed, the case was resolved in his favor. In taking up this issue, the Minnesota Court of Appeals noted that “the critical distinction in our analysis...turns on whether there has been an admission or finding of guilt.” Noting that it was indisputable that the respondent pled guilty, the court concluded that “the district court’s deferred acceptance of a valid guilty plea is not equivalent to a defendant not admitting guilt or pleading guilty to a criminal charge for purposes of the expungement statute.

Hyatt v. Commonwealth, 17 S.W. 3d 121 (Ky. Ct. App. 2000)

Issue: Is a defendant whose case is dismissed after successful completion of pretrial diversion eligible to have his record segregated?

Ruling: It is clear that it was the intent of the Legislature in establishing pretrial diversion that participants would have the opportunity to “wipe the slate clean.”

Court: Kentucky Court of Appeals

After William Hyatt successfully completed two years of a pretrial diversion program and his charges were dismissed, he moved to have the record of his arrest segregated, pursuant to KRS 17.142. That statute provides that law enforcement and public agencies in possession of arrest records shall segregate those records from records of convicted persons if the person: (1) is found innocent of the offense; (2) has had all charges relating to the offense dismissed; or (3) has had all charges relating to the offense withdrawn. Prosecutors objected, arguing that this statute was not intended to apply to charges dismissed as a result of participation in pretrial diversion. Rather, it applied only to cases where charges were dismissed due to innocence or insufficiency of evidence. The trial court agreed, refusing to order Hyatt’s arrest record segregated.

The Kentucky Court of Appeals, in addressing the issue, reviewed the pretrial diversion statute. KRS 533.258 explains the effects of successful completion of diversion: “(1) If the defendant successfully completes the provisions of the pretrial diversion agreement, the charges against the defendant shall be listed as ‘dismissed-diverted’ and shall not constitute a criminal conviction. (2) The defendant shall not be required to list this disposition on any application for employment, licensure, or otherwise unless required to do so by federal law. (3) Pretrial diversion records shall not be introduced as evidence in any court in a civil, criminal, or other matter without the consent of the defendant.” The court concluded, based on this wording that “it is clear that the Legislature intends for a successful pretrial diversion to, in effect, wipe the slate clean as to these charges...[I]n the absence of an express legislative directive to the contrary, we see no reason why a successful pretrial diversion participant is not entitled to qualify under KRS 17.142(1)(b).”

State v. Andrasek, 2003 Ohio App. LEXIS 38 (Ohio Ct. App. 2003)

Issue: Was the trial court correct in denying a defendant’s motion to have her record sealed after successfully completing pretrial diversion?

Ruling: Absent an overriding governmental need to maintain the record, the court must grant the request to have it sealed.

Court: Court of Appeals of Ohio, Eighth District

After her arrest for a fifth-degree felony, Rose Marie Andrasek was accepted into a pretrial diversion program. She successfully completed the program and her charge was dismissed. Shortly thereafter, Andrasek filed an application to have the record of her arrest sealed. The state declined to file an objection to this request. The trial court, in considering the request, asked the probation department to prepare a report on Ms. Andrasek. That report indicated that Andrasek had two misdemeanor convictions that had occurred prior to her enrollment in the pretrial diversion program. At a hearing on her application, the trial court noted that it had not been aware of those two prior misdemeanor convictions, and had it been aware, it would never have referred the case to the diversion program. The court denied Andrasek's application, saying that "in the interest of society and the State of Ohio the government does have a legitimate governmental need to maintain these records and the court is not going to issue an order sealing these records." Andrasek appealed this ruling.

The Ohio Court of Appeals began its analysis by noting that it could only reverse the trial court's ruling if it determined that the trial court abused its discretion. "An abuse of discretion," stated the court, "implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable." Furthermore, the court noted that the burden of demonstrating that the interests in having the record sealed is equal to or greater than the government's interests in maintaining it. The court pointed out that Andrasek demonstrated a strong interest in having the record sealed – that as a single mother who has struggled with alcoholism but been gainfully employed, she hoped to better her employment prospects and advance her career. The court concluded that the presence of two prior misdemeanor convictions was "outweighed by Andrasek's demonstrated economic and career interest in having the felony record sealed....Absent a demonstration of an overriding governmental need to maintain the felony record, we conclude that the trial court abused its discretion in not sealing the record."

NON-COMPLETION

State v. Maisey, 600 S.E. 2d 294 (W.Va. 2004)

Issue: When the pretrial diversion agreement is silent on how a client is to demonstrate completion of the community service requirement, how is it to be determined how that requirement is met?

Ruling: The trial court needs to inform the client exactly what evidence is needed.

Court: Supreme Court of West Virginia

Brian Maisey was required to perform 50 hours of community service as part of his pretrial diversion agreement for a charge of carrying a concealed deadly weapon. Prosecutors filed a motion with the court to terminate the agreement and reinstate the charge because Maisey failed to provide proof of completion of the community service. The pretrial diversion order did not require any affidavits proving that Maisey had completed his community service, and the court refused to accept Maisey's evidence that he had. The charges were reinstated, Maisey was found guilty at a bench trial, and sentenced to complete 50 hours of community service. Maisey appealed, claiming that he had completed his community service and thus his conviction and sentence constituted double jeopardy.

The West Virginia Supreme Court agreed that if Maisey had completed his community service he would have been exposed to double jeopardy. The question was, the court noted, whether Maisey had met this requirement. In oral argument, Maisey's attorney claimed that Maisey and his family lacked the sophistication to obtain notarized statements from every person for whom Maisey had worked. Recognizing that the pretrial diversion agreement did not require affidavits as proof that Maisey had completed the community service, the court noted that "it is not unreasonable for the State to require some proof that Maisey actually did what he said he did." The court concluded that the trial court abused its discretion in not accepting Maisey's evidence that he had completed community service, or giving him more time to do so. The court remanded the case back to the trial court with the instruction that Maisey be told exactly what evidence is needed and that he be given 30 days to provide that evidence.

Christmas v. State, 812 N.E.2d 174 (Ind. Ct App. 2004)

Issue: Is a defendant who has been granted a "withhold prosecution" disposition on pretrial release for the purposes of sentence enhancements for violating the terms of the "withhold prosecution" agreement?

Ruling: A defendant on "withhold prosecution" status is on pretrial release.

Court: Court of Appeals of Indiana

Ricki Christmas was arrested for trespassing and entered into an agreement in the Franklin City Court to withhold prosecution. Under the terms of that agreement, the trespassing charge would

be dismissed if Christmas did not commit any new offense during the next two years. Christmas was rearrested, for resisting law enforcement, during the two-year period. He was subsequently found guilty of both the trespassing and the resisting law enforcement charges.

The trial court ordered that the sentence for the resisting law enforcement charge be served consecutively to the sentence for the trespassing charge. In doing so, the court relied upon Indiana Code, Section 35-50-1-2(d), which reads: “[i]f, after being arrested for one crime, a person commits another crime (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or (2) while the person is released (A) upon the person’s own recognizance; or (B) on bond; the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences imposed.” Christmas appealed, claiming that his “withhold prosecution” status was not the same as being released on personal recognizance or bond.

The Indiana Court of Appeals, in rejecting this argument, noted that “the General Assembly has determined that a person’s criminal actions merit enhanced punishment when the person commits a criminal act during a time when that person has another criminal matter which remains ongoing.” Since the terms of the “withhold prosecution” agreement require the resumption of prosecution if the agreement is violated, the charge remains open. Therefore, the court ruled, Christmas was on either personal recognizance or bond when arrested on the new charge, and the consecutive sentence was appropriate.

Deurloo v. State, 690 N.E. 1210 (Ind. Ct. App. 1998)

Issue: Does a defendant in a pretrial diversion program have the right to evidentiary hearing when being terminated from the program for non-compliance?

Ruling: Since the defendant’s liberty interests were not at stake in the termination decision, the defendant had no right to a hearing.

Court: Court of Appeals of Indiana, Fifth District

Prosecutors filed a notice with the court stating their intent to terminate the pretrial diversion agreement with Debra Deurloo for non-compliance. Deurloo moved the court for an evidentiary hearing on the violation. The court denied the motion, stating that is “has no responsibility or authority over the prosecutor’s pretrial diversion program.” Deurloo was subsequently convicted of public indecency. She challenged this conviction on the basis that she was denied due process when she was not given a hearing on her termination from the pretrial diversion program.

Before the Indiana Court of Appeals, Fifth District, Deurloo argued that the prosecutor’s discretion in administering the pretrial diversion program is restrained by the principles of due process, which require a hearing before a court to determine if a violation had occurred. In addressing this question, the court noted that “[w]hether an individual is entitled to procedural due process is dependent upon whether she is being deprived of property or liberty interest.” In its analysis, the court cited two U.S. Supreme Court cases, *Gagnon v. Scarpelli* (411 U.S. 778),

which applied due process requirements to probation violation proceedings, and *Morrissey v. Brewer*, which applied such requirements to parole violations.

In the instant case, the court distinguished pretrial diversion status from that of a parolee or probationer. In doing so, the court stated that Deurloo “had not yet come before the court to answer the charge against her prior to her entry into the pretrial diversion program and was not under court supervision. The consequence of her termination from the program was not that a suspended or deferred sentence would be imposed upon her by the court, depriving her of liberty, but only that she would be required to re-enter the formal criminal process.” Thus, the court concluded that Deurloo’s liberty was not directly at stake, and thus she did not have a due process right to an evidentiary hearing.

State v. Marino, 674 P.2d 171 (Wash. 1984)

Issue: Does a defendant in pretrial diversion have a due process right to a hearing to review a prosecutor’s decision to terminate pretrial diversion?

Ruling: The defendant has a right to a hearing at which the court must find the decision reasonable based on the preponderance of the evidence of a violation.

Court: Supreme Court of Washington

Mark Marino was charged with assaulting the four-year-old daughter of his fiancée, and was placed in a pretrial diversion program. Prosecutors notified Marino that his diversion was being revoked and prosecution recommenced due to his non-compliance with program requirements. Marino moved the trial court to set aside the diversion termination. The trial court held an evidentiary hearing on the revocation decision and concluded that there were reasonable grounds for the prosecutor’s decision. The court, however, did not state on the record what those reasons were.

On appeal to the Washington Supreme Court, Marino relied upon a probation revocation case (*State v. Lawrence*, 28 Wn. App. 435, 624 P.2d 201), which held that the revoking court must determine (1) whether the conditions were violated and (2), if so, whether the violation warrants termination. The Supreme Court rejected the analogy of probation to pretrial diversion for two reasons: “First, the court has direct supervisory powers over a convicted person’s probation, including its conditions and length. It follows, therefore, that the court must have primary control over reimposition of sentence. But under a diversion agreement, the prosecutor establishes the conditions and supervises the program. The court’s role is less direct, consisting primarily of assuring procedural regularity throughout the criminal justice process. Second, the consequences of probation revocation are more serious to a defendant than termination of deferred prosecution to an accused. Following diversion termination, the accused still has the opportunity to clear him or herself of the charges at trial.”

Still, the court concluded that a defendant facing revocation of pretrial diversion has a due process right to a hearing. At that hearing, “the court’s review of a prosecutor’s termination decision should consist of assessing its reasonableness in light of the facts the trial court

determines at hearing,” and should be based on the preponderance of the evidence. In this case, the court found that while the trial court did not state the reasons for concluding that the prosecutor had reasonable grounds to terminate, it was clear from the record of the hearing that such reasons existed. The court affirmed the decision to terminate diversion.

State v. Stafford, 2001 Ohio App. LEXIS 3663 (Ohio Ct. App. 2001)

Issue: Does a defendant facing revocation of pretrial diversion have a right to discovery?

Ruling: Since the defendant waived his right to a probable cause hearing and since a pretrial diversion revocation hearing is a civil procedure, the defendant's due process rights were not violated.

Court: Court of Appeals of Ohio, Fifth District

Prosecutors filed a motion in court seeking to revoke James Stafford's participation in a pretrial diversion program. In the motion, prosecutors claimed that Stafford failed to make restitution payments, failed to complete community service requirements, and failed to remain a law abiding citizen by stealing from his place of employment. Stafford appeared in court, acknowledged receipt of the prosecutor's motion, and waived his right to a probable cause hearing on the violations. A revocation hearing was scheduled. At the hearing, Stafford requested a continuance, arguing that he had not received discovery materials as requested. The court held that Stafford had no right to discovery, proceeded with the hearing, and terminated Stafford's participation in the diversion program. Based on Stafford's guilty plea, entered pursuant to his enrollment in diversion, the court found Stafford guilty and imposed a sentence.

Stafford appealed, arguing that the trial court denied him his rights under the 14th Amendment when it allowed evidence to be presented at the revocation hearing that was not supplied to him beforehand. He argued that a pretrial diversion revocation hearing is similar to a probation revocation hearing, thus giving him rights analogous to those provided to an offender in a probation revocation proceeding. Stafford cited the case of *Gagnon v. Scarpelli*, (1973), 411 U.S. 778, in which the U.S. Supreme Court held that persons facing probation revocation are entitled to written notice of the claimed violations, disclosure of evidence against them, the right to cross-examine adverse witnesses, and an opportunity to present their own witnesses and documents.

The court acknowledged that Stafford is entitled to due process rights analogous to those provided probationers facing revocation, but rejected his argument on two grounds. First, the court held that Stafford had the opportunity to obtain discovery information, i.e., the names of witnesses and a review of documents, if he had not waived his probable cause hearing. Second, the court held that a pretrial diversion revocation proceeding, like a probation revocation hearing, is a civil procedure, and the discovery procedures outlined in Ohio criminal rules do not apply. The court concluded that Stafford's "due process rights were not violated and [he] received a fair hearing."

Alder v. State, 108 S.W.3d 263 (Tenn. Crim. App. 2002)

Issue: Can the court initiate judicial diversion revocation proceedings after the diversionary period is over?

Ruling: The revocation must be initiated during the diversionary period by the filing of a revocation warrant or by the filing of the state's petition to revoke.

Court: Court of Criminal Appeals of Tennessee

On September 29, 1997, Shana Alder pled guilty to vehicular homicide. The court placed her in judicial diversion for three years. On August 23, 2000, a little over a month before Alder's period of judicial diversion was set to expire, court officers filed a violation report with the court, stating that Alder had positive drug test results in June and July 2000. The court set a hearing for September 15, 2000. Alder was sent a letter directing her to appear at the hearing, but the letter did not state that a violation report had been filed. Alder appeared and the case was continued until November 3, 2000. Again, there was no indication in the record that Alder had been informed of alleged violations. On the November 3 hearing, the trial court revoked Alder's judicial diversion, entered a judgment of conviction, and sentenced Alder to three years of probation. Alder did not appeal this decision at the time. However, several months later, when a probation violation warrant was issued for Alder, she filed a motion to dismiss the warrant arguing that the judgment of conviction against her was void because it was entered after the diversionary period had ended. The court denied this motion and Alder appealed.

Before the Court of Appeals, the state argued that the trial court has continuing jurisdiction until it entered an order terminating judicial diversion. The court disagreed, stating that [i]f this were correct, the trial court could retain jurisdiction indefinitely and revoke diversion years after the expiration period, provided the infraction occurred during the diversionary period." The court concluded that revocation must be initiated during the diversionary period by the filing of a revocation warrant or of the state's petition to revoke. The filing of a violation report, the court ruled, is not sufficient. The court voided the trial court's revocation of judicial diversion and resulting sentence.

United States v. Harris, 376 F.3d 1282 (11th Cir. 2004)

Issue: Did the prosecutor violate the terms of pretrial diversion by bringing prosecution after the 12-month diversion period was over?

Ruling: The government could properly prosecute the defendant after the 12-month diversionary period when it did not receive notice of a violation until near the end of the period.

Court: U.S. Court of Appeals for the Eleventh Circuit

Charles Harris was charged in U.S. District Court with fraudulent use of a Social Security number. On February 27, 1997, he was admitted into a 12-month pretrial diversion program.

The first condition listed in his diversion agreement was: “You shall not violate any federal, state, or local law. You shall immediately contact your pretrial diversion supervisor if arrested and/or questioned by any law enforcement officer.”

On February 10, 1998, the U.S. Attorney sent a letter to Harris stating that it had learned that he had been arrested the previous September on numerous drug charges, in violation of his pretrial diversion agreement. He was given 14 days to respond. When he did not respond, the government moved to proceed to trial on March 20, 1998 – 23 days after the 12-month diversion supervision period ended. Harris filed a motion in the trial court to dismiss the charge based on the fact that the diversion period was over. The court denied the motion and Harris was found guilty by a jury. Harris appealed.

Before the U.S. Court of Appeals for the Eleventh Circuit, Harris argued that bringing prosecution after the end of the 12-month diversionary period was a violation of the diversion agreement. As support, he cited a provision of that agreement, which read: “Should you violate the conditions of this supervision, the United States Attorney may revoke or modify any conditions of this pretrial diversion program or change the period of supervision which shall in no case exceed 12 months....The United States Attorney may at any time within the period of your supervision initiate prosecution for these offenses should you violate the conditions of this supervision.”

The court noted that Harris failed to address a second provision of his pretrial diversion agreement, which read: “If, upon completion of your period of supervision, a pretrial diversion report is received to the effect that you have complied with all the rules, regulations and conditions above mentioned, no prosecution for the offenses will be instituted in this District, and any indictment or information will be discharged.”

The court concluded that the second provision “explicitly envisions that the government retains its rights to prosecute Harris if it does not receive a favorable ‘pretrial diversion report’ from his program supervisor ‘upon completion of the period of supervision.’ Accepting Harris’s argument would render meaningless the language of the second provision because the government could not possibly receive such a favorable report of compliance until *after* the 12-month period had concluded.” The court held that the government did not violate the terms of the pretrial diversion agreement, and upheld Harris’s conviction.

State v. Swank, 2002 Ohio 3833 (Ohio Ct. App. 2002)

Issue: Can a defendant who failed to complete a pretrial diversion program withdraw his guilty plea, which was made pursuant to his entry into diversion?

Ruling: Accepting a diversion program with the ultimate result being dismissal of the charge is tantamount to the trial court sentencing the defendant, and Ohio court rules do not permit withdrawal of a plea after sentencing.

Court: Court of Appeals of Ohio, Fifth District

Freeman Swank was indicted on one count of vandalism. He pled no contest to the reduced charge of criminal damaging. The trial court reserved a finding on the plea pending Swank's enrollment in and completion of a pretrial diversion program. Swank soon violated the terms of the diversion agreement and the case was brought back to court for sentencing. Swank filed a motion to withdraw his guilty plea, stating that he felt rushed into entering the plea. The court denied the motion and Swank was sentenced to a suspended jail term, ordered to pay restitution, and was fined. He appealed the trial court's denial of his motion to withdraw his guilty plea.

Citing Ohio Criminal Rule 32.1, the Court of Appeals noted that "a motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed." The court acknowledged that Swank "had not actually been sentenced prior to the motion," but held that accepting the diversion program "with the ultimate result being a dismissal of the charge is tantamount to the trial court sentencing appellant." Accordingly, the court held that the trial court did not abuse its discretion in denying Swank's motion.

CONFIDENTIALITY – USE IN SUBSEQUENT PROCEEDINGS

Estate of Wooden v. Hunnicutt, 2005 Tenn. LEXIS 646 (Tenn. Ct. App. 2005)

Issue: Can information pertaining to a person's prior placement in pretrial diversion be raised in cross-examination to impeach the credibility of the person in a chancery court hearing on a dispute over a signature on a Quitclaim Deed?

Ruling: The person can be properly impeached.

Court: Court of Appeals of Tennessee

When Alfred Wooden died in 2003, three co-executors were named for the estate, including Evelyn Hunnicutt. When the other two co-executors learned that the Robinson County Trustee's Office had a Quitclaim Deed purporting to transfer ownership of Wooden's home to Hunnicutt, they challenged the authenticity of Wooden's signature on the document. At a hearing in chancery court, Hunnicutt was asked on direct examination whether she had ever forged a deed. She replied that she had not. On cross-examination, Hunnicutt admitted that she had been indicted for forging a deed, and was placed on pretrial diversion. Her credibility as a witness was then impeached when it came out that she had lied on her pretrial diversion application by claiming that she had no prior convictions where in fact she had felony convictions for falsifying her tax returns and conspiracy to engage in gambling. The chancery court ultimately ruled that the signature on the Quitclaim Deed was a forgery.

Hunnicutt appealed on the grounds that the chancery court improperly considered her previous pretrial diversion. The Tennessee Court of Appeals cited the statute addressing the use of pretrial diversion information, Tenn.Code Ann § 40-15-105(a)(3), which states: "The defendant's statement of facts relative to the charged offenses shall not be admissible as substantive evidence in any civil or criminal proceeding against the defendant who made the statement. However, evidence of the statement is admissible as impeachment evidence against the defendant who made the statement in any criminal proceeding resulting from the termination of the memorandum of understanding. No other confession or admission of the defendant obtained during the pendency of and relative to the charges contained in the memorandum of understanding shall be admissible in evidence for any purpose, other than cross-examination of the defendant."

The court also referred to its earlier decision in *Pizzillo v. Pizzillo* (884 S.W. 2d 749, 1994), in which it ruled that the statute's "restriction against the later use of an accused's confessions or admissions against interest applies only to criminal trials involving the same charge contained in the memorandum of understanding. It does not apply to later civil proceedings." Thus, the court concluded that "Hunnicutt could properly be impeached with the evidence surrounding the pretrial diversion because this is a civil, not a criminal matter." The court affirmed the decision of the chancery court.

OTHER

Ragard v. United States, 439 F.3d 1378 (Fed. Cir. 2006)

Issue: Can a member of the U.S. Military be court martialled for the same behavior for which he was placed in and successfully completed pretrial diversion in a local court?

Ruling: Nothing in the diversion agreement bars the U.S. Army from bringing court martial proceedings.

Court: U.S. Court of Appeals for the Federal Circuit

Lawrence Ragard was a captain in the U.S. Army when he was arrested in the District of Columbia for indecent exposure. After he was arrested he was placed in the District's pretrial diversion program. He successfully completed the diversion program and the charge was dismissed. While he was still in the diversion program the U.S. Army began court martial proceedings against Ragard, charging him with sodomy, conduct unbecoming an officer, and commission of an indecent act. Ragard moved to have the charges dismissed, claiming that they were barred by the diversion agreement. The motion was denied, and Ragard ultimately pled guilty and was dismissed from the army.

On appeal, the U.S. Court of Appeals for the Federal Circuit rejected Ragard's argument. "Nothing in the diversion agreement even suggests, let alone provides, that performance of the agreement will bar the Army from court martialling Ragard for conduct that violates the Uniform Code of Military Justice," stated the court. "The agreement purports to deal only with the pending District of Columbia criminal proceeding, not with other criminal proceedings that might be brought by some other entity."

United States v. Hutchinson, 49 M.J. 6 (C.A.A.F. 1998)

Issue: Can the U.S. Air Force institute court-martial proceedings against an individual for the same conduct for which he was in a pretrial diversion program in state court?

Ruling: Air Force rules clearly permit court-martial under these circumstances.

Court: U.S. Court of Appeals for the Armed Forces

After his arrest in South Carolina for grand larceny, Senior Airman Shawn Hutchinson, U.S. Air Force, was admitted to that state's pretrial intervention program. Under terms of the intervention agreement, Hutchinson was required to pay restitution, perform community service, and undergo counseling. He was unable to complete the program, however, because the Air Force decided to prosecute him for the grand larceny. At the court-martial, Hutchinson pleaded guilty and was transferred immediately to the Charleston Naval Brig to serve his sentence. As a result of his confinement, he was unable to complete the pretrial intervention program, so the charges against him in South Carolina state court were reinstated. He was later convicted in state court as well.

Hutchinson appealed his court-martial, claiming that he was put in double jeopardy by being prosecuted in two venues for the same conduct. The U.S. Court of Appeals for the Armed

Forces referred to Air Force Instruction 51-201, Paragraph 2.5.1, which states that although there is no legal bar to doing so, “[d]o not court-martial or punish any member of the Air Force for substantially the same act or omission for which a state or foreign court tried the member, regardless of the outcome.... Follow the state or foreign law to determine when jeopardy attaches. At a minimum, jeopardy attaches when the jury is impaneled and sworn, or when the first witness testifies in a judge alone trial.” The court noted that at the time of his court-martial his case in state court was in pretrial intervention status – he “had never been arraigned, much less had a jury been selected or witnesses called.” The court concluded that AFI 51-201 “clearly permits prosecution under the circumstances of this case,” and upheld Hutchinson’s court martial.

Staten v. Dean, 464 S.E. 2d 576 (W. Va. 1995)

Issue: Does West Virginia law bar a former police officer from reinstatement to the police department after successfully completing a pretrial diversion program?

Ruling: Eligibility for reinstatement is governed by events that were extant at the time of the resignation – after the indictment - and not at the time of the reinstatement request – after the completion of pretrial diversion.

Court: Supreme Court of West Virginia

Kenneth Staten was a police officer in Huntington, West Virginia when he was indicted in Federal court for mail fraud. He entered a pretrial diversion program. One of the terms of the diversion agreement was that he resign his position with the Huntington Police Department. Staten did resign and successfully completed the diversion program, leading to the dismissal of his charge. Staten then applied for reinstatement with the police department. Huntington Mayor Jean Dean refused the reinstatement request, and Staten filed suit against the mayor. The West Virginia circuit court ordered Dean to reinstate Staten. Dean appealed this decision to the West Virginia Supreme Court.

That court noted that state law makes it clear that a police officer who resigns in the face of charges of misconduct or misfeasance is ineligible for reinstatement. (W. Va. Code 8-14-12.) Staten had argued that this statute does not contemplate situations like his, where the charge was dismissed based on successful completion of pretrial diversion. The court rejected this argument. “We hold that under W. Va. Code 8-14-12, eligibility for reinstatement to a municipal police department is governed by events that were extant at the time of the resignation and not at the time of the reinstatement.”

Oregon v. McCain, 91 P.3d 760 (Or. Ct. App. 2004)

Issue: For the purposes of determining whether a defendant in diversion can be held responsible for failing to appear in court, is a charge considered “stayed” while a defendant is in diversion?

Ruling: The charge is not stayed, only the process is.

Court: Court of Appeals of Oregon

Under Oregon law (ORS 162.195(1)(a)), a defendant can be charged with failure to appear if the defendant misses court after “having by court order been released from custody or a correctional facility under a release agreement or security release upon the condition that the person will subsequently appear personally in connection with a charge against the person.” The issue in this case is whether the defendant, who was in pretrial diversion at the time, failed to appear in connection with a charge. This question arises because another part of Oregon law, which addresses DUI diversion (ORS 813.230(2), states that “[d]uring the diversion period the court shall stay the driving while under the influence of intoxicants offense proceeding pending completion of the diversion agreement or its termination.”

Allen McCain was placed in the pretrial diversion program after his arrest for DUI. As part of his diversion agreement, McCain was required to appear in court on a specific date. When he failed to appear he was charged with one count of second-degree failure to appear. He was re-scheduled for another date, but failed to appear on that occasion as well – and was charged with another count of second-degree failure to appear. He was tried and convicted of the two failure to appear charges. McCain challenged these convictions on the basis that his status on pretrial diversion meant that the charges against him had been stayed.

The Oregon Court of Appeals stated that then issue revolved around two points: “First, what must be shown to prove second-degree failure to appear is a failure to appear in connection with a ‘charge.’ Second, under the applicable statutes, what was stayed pursuant to a diversion agreement was a DUI ‘offense proceeding.’ Thus, the statutory construction issue reduces to the question whether a stay of the DUI ‘offense proceeding’ occasioned by the diversion agreement means that the DUI ‘charge’ itself has been stayed.” After reviewing the dictionary and legal definitions of these terms, the court concluded that “what was stayed by a diversion agreement was not the charge relating to the offense itself but the *proceeding* by which it was determined whether a defendant was guilty of a charge. The charge remained pending; only the proceeding was stayed.” The court affirmed the failure to appear convictions.

Jameson v. Commonwealth, 2003 Ky. App. LEXIS 258 (Ky. Ct. App. 2003)

Issue: Is a defendant in pretrial diversion “awaiting trial” for the purposes of Kentucky law requiring consecutive sentences for defendants who are rearrested while having a pending case?

Ruling: A defendant in pretrial diversion status is awaiting trial for this purpose.

Court: Court of Appeals of Kentucky

Michael Jameson was on pretrial diversion when he was rearrested for a similar offense. One of the conditions of the pretrial diversion was that he not be rearrested. Prior to his diversion placement for the initial charge, Jameson entered a plea of guilty. When he violated diversion by being rearrested, diversion was terminated and the guilty plea was entered. Before sentencing on the initial charge, Jameson pled guilty to the rearrest charge. At sentencing for both convictions,

the court imposed ten years imprisonment on the second charge and five years on the first, with that sentence to be served consecutively with the first.

In doing so, the trial court relied upon a Kentucky statute (KRS 533.060(3)), which provides that: “When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.”

Jameson appealed, arguing that his with status in pretrial diversion he was not awaiting trial. Considering the argument, the court concluded, “[b]ecause a violation of his pretrial diversion would have led to the voiding of his pretrial diversion agreement and sentencing pursuant to his plea agreement, we believe that pretrial diversion status must be construed as “awaiting trial.” The court affirmed the sentences.

Ky. Bar Ass’n v. Haggard, 160 S.W.3d 352 (Ky. 2005)

Issue: Do Kentucky court rules require the automatic suspension of the law license of a defendant participating in a pretrial diversion program?

Ruling: Since a defendant participating in diversion has pled guilty to the charge, the defendant, at least temporarily, is convicted. Therefore, the defendant should face automatic suspension.

Court: Supreme Court of Kentucky

Kentucky court rules (SCR 3.166(1) provides that: “[a]ny member of the Kentucky Bar Association who pleads guilty or is convicted by a judge or jury of a felony shall be automatically suspended from the practice of law in this Commonwealth. The suspension shall take effect automatically beginning the day following the plea of guilty or finding of guilt by a judge or jury or upon the entry of judgment which ever comes first. The suspension under this rule shall remain in effect until dissolved or superseded by order of the court.” Melissa Haggard, an attorney licensed to practice in Kentucky, pled guilty to three counts of Impersonating a Peace Officer, a Class D felony. She entered an Alford Plea as part of the admission requirements to the Jefferson Circuit Court Pretrial Diversion Program.

Haggard argued that her plea should not result in her automatic suspension from the practice of law because her convictions will be set aside and the charges dismissed if she successfully completes the diversion program. The Kentucky Supreme Court disagreed, stating that “[t]he General Assembly’s pretrial diversion statute does not prevent this Court from acting against Respondent’s license pursuant to Court Rule and SCR 3.166 does not provide any exception for Alford pleas or for diversion agreements.” The court granted the Kentucky Bar Association’s request to enter Haggard’s immediate suspension.

Pinho v. Gonzales, 432 F.3d 193 (3rd Cir. 2005)

Issue: When does a vacated criminal conviction remain a “conviction” for the purposes of determining an immigrant’s eligibility for deportation?

Ruling: The government may draw a distinction between convictions vacated for rehabilitative purposes, i.e., pretrial diversion, and those vacated due to defects in the criminal proceedings.

Court: U.S. Court of Appeals for the Third Circuit

Portugal native Gummersindo Pinho came to the United States, took up residence in New Jersey, and married a U.S. citizen. In 1992, he was arrested and charged with possession with intent to distribute cocaine near school property. He applied for admission into New Jersey’s pretrial intervention program, but was rejected because the local prosecutor had a policy against accepting any defendants charged with distributing drugs near a school. As a result, Pinho pleaded guilty to possession of cocaine and was sentenced to two years probation.

Several years later, after he had completed probation, Pinho, represented by different counsel, applied for post-conviction relief, claiming that he had had ineffective assistance of counsel when he pleaded guilty to cocaine possession. Pinho claimed that the school building that he was charged with selling cocaine near was no longer serving as a school at the time of his offense, and that an effective counsel would have known that fact – and he would then have been eligible for pretrial intervention. Based on the new information about the status of the school building and on Pinho’s successful completion of probation, the prosecutor’s office consented to Pinho’s admission to the pretrial intervention program. Three weeks later, the prosecutor’s office dismissed all charges against Pinho, stating that he had successfully completed pretrial intervention.

Pinho then applied for “permanent resident” status with the Immigration and Naturalization Service (INS). Federal law (8 U.S.C. § 212(a)(2)(A)(i)(II)) barred permanent resident status to any alien convicted of a drug offense. In rejecting Pinho’s application, the Board of Immigration Appeals (BIA) relied heavily on this law and its previous decision in *In re Roldan* (22 I. & N. Dec. 512, B.I.A., 1999) in which the agency held that an alien remains convicted “notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure.” Pinho appealed the BIA decision to the U.S. District Court, which also ruled against him, finding that Pinho’s vacated conviction was still a “conviction” for immigration. He then took the case to the U.S. Court of Appeals for the Third Circuit.

That court noted that Congress has passed a law defining “conviction” for immigration purposes. That law states: “The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contrende or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.” (8 U.S.C. §

101(a)(48)(A)) The court noted that this law does not address convictions that are imposed but subsequently vacated.

As a result, the court announced a test for classifying vacated convictions for immigration purposes. “To determine the basis for a vacatur order, the agency must look first to the order itself. If the order explains the court’s reasons for vacating the conviction, the agency’s inquiry must end there. If the order does not give a clear statement of reasons, the agency may look to the record before the court when the order was issued. No other evidence of reasons may be considered.”

Applying this rule to this case, the court noted that Pinho raised only one claim in his post-conviction relief petition – ineffective assistance of counsel. The state filed no response and the judge’s vacatur order refers to the pretrial intervention agreement, which came about as a result of the ineffective assistance of counsel claim. Since the record is clear that the conviction was vacated as a result of ineffective assistance of counsel, Pinho was no longer “convicted” within the meaning of 8 U.S.C. § 202(a)(48)(A).

Lomont v. State, 852 N.E.2d 1002 (Ind. Ct. App. 2006)

Issue: Does the unavailability of a pretrial diversion program in a particular county deny a defendant of equal protection when other counties in the state have such a program?

Ruling: The statute that enables counties to set up pretrial diversion programs does not create a program to which all citizens of the state have a right of access.

Court: Court of Appeals of Indiana

Daniel Lamont was arrested in Steuben County, Indiana on charges of driving while intoxicated and several other traffic offenses. He initially pled guilty to the drunk driving charge. The court stayed the conviction and ordered Lamont to participate in the Forensic Diversion Program. When the court learned that Steuben County does not have a diversion program it scheduled a hearing to allow Lamont to re-consider his plea. In the meantime, Lamont and his attorney investigated the availability of diversion programs in the state and found that only five counties have implemented such a program, which is authorized by state statute. Without access to a diversion program, Lamont withdrew his guilty plea and was convicted of the drunk driving charge at bench trial. Lamont appealed this conviction, claiming that the unavailability of a diversion program in Steuben County denied him of equal protection under the U.S. Constitution.

In assessing this equal protection claim, the Indiana Court of Appeals noted that “the forensic diversion program reflects a public policy determination by the legislature that when persons with a mental illness or addictive disorder are charged with or convicted of certain offenses and their criminal history is limited in certain ways, the criminal justice system should provide treatment for their illness or disorder as the preferred means of correction. Lamont does not dispute that this is a legitimate state objective. Rather, Lamont appears to contend that by failing to require all of the counties to establish (diversion programs), the statute has created two

classifications: counties with forensic diversion programs and counties without. Thus, the alleged equal protection issue is whether this so-called legislative classification is rationally related to the legislature's policy."

The court concluded that the statute enabling the creation of a diversion program (Ind. Code § 11-12-3.7-7) "does not create a program to which all citizens have a right of access. Rather, the statute specifically states that the program's implementation is not mandatory and merely prescribes the minimal requirements for the program should a county choose to establish one." Because Lamont was treated no differently than any other similarly situated defendant in any of the counties that do not have a diversion program there is no violation of equal protection. The court affirmed Lamont's conviction.

State v. Turco, 108 S.W.3d 244 (Tenn. 2003)

Issue: Is judicial diversion, as permitted under Tennessee law, a sentence.

Ruling: Judicial diversion is not a sentence.

Court: Supreme Court of Tennessee

Tennessee law authorizes courts to place defendants on "judicial diversion." The statute, in pertinent part, reads: "The court may defer further proceedings against a qualified defendant and place such defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty and with the consent of the qualified defendant." (Tenn. Code Ann. § 40-35-313(a)(1)(A).)

Under terms of a plea agreement on a sexual battery charge, the court would consider Marcus Turco's petition for judicial diversion, but was not bound to accept it. Following the guilty plea, the court conducted a hearing on Turco's petition and denied it. The court then imposed a sentence of one year probation. Turco filed a motion to reconsider the sentence under Tennessee Criminal Court Rule 35(b). That rule states, in part: "The trial court may reduce a sentence upon application filed within 120 days after the date the sentence is imposed or probation is revoked." The motion asked the trial court to change Turco's probation sentence to judicial diversion. Approximately 18 months later, six months after Turco successfully completed probation, the trial court entered an order vacating the judgment of conviction and granting Turco judicial diversion for one year.

The state appealed. The Court of Criminal Appeals reversed the trial court, holding that judicial diversion is not a "sentence" and therefore cannot be granted as Rule 35(b) relief, and that the trial court cannot modify a sentence under Rule 35(b) after the sentence has been fully served. Turco then appealed this ruling.

The Tennessee Supreme Court agreed with the court of appeals that judicial diversion is not a sentence. Furthermore, the court noted that judicial diversion is granted "without entering a judgment of guilty" (Tenn. Code Ann. § 40-35-313(a)(1)(A)), and "[n]othing in Rule 35(b)

authorizes the trial court to vacate the judgment of conviction.” The court upheld the decision of the court of appeals.