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OPINION COMMITTEE

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RQ-1072-GA

OFFICE OF COURT ADMINISTRATION

DAVID SLAYTON
Administrative Director

July 16, 2012

Sent Certified Mail Return Receipt Requested,
Receipt No. 91 7199 9991 7031 0841 3504

The Honorable Greg Abbott
Attorney General of Texas
Box 12548
Austin, Texas 78711-2548

RE: Whether pre-trial diversion, as allowed under Texas Government Code §76.011, allows a district attorney to require defendants to plead guilty as a condition for pre-trial diversion.

Dear General Abbott:

I respectfully submit this opinion request on behalf of the Presiding Judge of the Fifth Administrative Judicial Region of Texas, one of nine regional presiding judges that are appointed by the governor as provided by §74.005 of the Texas Government Code. We seek an opinion concerning what may be required of a defendant as a condition of pre-trial diversion; specifically may a district attorney require a defendant to plead guilty in order to be placed in a pre-trial diversion program?

Within the Texas Criminal Justice system, district attorneys and defendants are given an opportunity to avoid or expedite criminal matters through pre-trial diversion programs and plea agreements with deferred adjudication, making lengthy trials unnecessary. Pre-trial diversion programs, as provided for in §76.011 of the Texas Government Code, allow for reasonable conditions to be set depending upon the specific programs. Deferred adjudication, as described by Texas Code of Criminal Procedure Art. §42.12, sec. 5, allows the Judge to defer further court proceedings after a plea of guilty or *nolo contendere*, and place the defendant on community supervision; if supervision is completed successfully, further proceedings are dismissed. The

question here is whether a defendant may be required to plead guilty, as is done in deferred adjudication proceedings, in order to be eligible to participate in a pre-trial diversion program. We think not.

Section 76.011

Section 76.011 states, in pertinent part:

- (a) The department may operate programs for: (1) the supervision and rehabilitation of persons in pretrial intervention programs;
- (b) except as otherwise provided by the subsection, programs operated by the department under subsection (a) may include reasonable conditions related to the purpose of the program, including testing for controlled substances...
- (c) a person in a pretrial intervention program operated by the department under subsection (a) may be supervised for a period not to exceed two years.

Art. 42.12, sec. 5

Art. 42.12, sec. 5 states, in pertinent part:

- (a) Except as provided by Subsection (d) of this section, when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision... (c) On expiration of a community supervision period imposed under Subsection (a), if the judge has not proceeded to adjudication of guilt, the judge shall dismiss the proceedings against the defendant and discharge him. The judge may dismiss the proceedings and discharge a defendant, other than a defendant charged with an offense requiring the defendant to register as a sex offender under Chapter 62, prior to the expiration of the term of community supervision if in the judge's opinion the best interest of society and the defendant will be served... Except as provided by Section 12.42(g), Penal Code, a dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense.

Requirements of Texas Government Code §76.011

Under Texas Government Code §76.011, the requirements for a pre-trial diversion program are left up to the group who will be administering and monitoring the program. The conditions to be set upon a defendant must be reasonable and fit the purpose of the program. Unlike the requirements of Texas Code of Criminal Procedure Art. 42.12, sec. 5, a plea of guilty is not required. In *Fisher v. State*, 832 S.W.2d 641, 643-644 (Tex.App.—Corpus Christi 1992, pet. ref'd), the court described pre-trial diversion as follows:

A pre-trial diversion agreement is aptly named. It refers to a written agreement the defendant and State enter into on or before the day of trial. The State agrees to dismiss the case if the defendant performs certain conditions within a specified period of time. Both the State and the defendant request that the trial court continue the present trial setting to a certain date in the future to give the defendant time to comply with the agreed conditions. The agreement is then presented to the trial court for its approval. If the trial court does not approve the agreement, the case proceeds to trial as scheduled on the docket. If the trial court approves the agreement, it grants the joint request for continuance and resets the trial to a certain date in the future. On that date, the defendant must appear before the trial court. If the defendant has complied with the conditions of the agreement, the trial court grants the State's motion to dismiss the pending criminal charges. If the defendant has not complied with the conditions of the agreement, the case proceeds to trial as scheduled.

The court also stated:

If the defendant fails to comply with the pre-trial diversion agreement, the trial court is not asked to find a violation of the agreement. That court, or the jury, is asked to find that the defendant committed the original charged offense.

Fisher v. State, 832 S.W.2d 641 at 644

Pre-trial diversion pushes the time to establish guilt or innocence into the future and enables an individual to complete the program and have the charges dismissed. The program was designed to allow the State to dismiss a case if the defendant complies with the agreed to conditions. Requiring a defendant to plead guilty is inconsistent with this purpose.

Questions

Texas Government Code § 76.011 is silent on how a pre-trial diversion program may be set up, or on specific conditions that may be required of the defendant (other than the requirement that conditions be reasonable, and supervision may not exceed two years).

Our questions are:

1. May a district attorney require that a defendant plead guilty in order to participate in a pre-trial diversion program?
2. We believe the answer to the first question is "no," however, if you find the answer to be "yes," would the proper procedure for bringing the defendant before the judge be to present the case and the guilty plea to the judge and request that the judge adjudicate guilt and sentence the defendant?

We look forward to your response. If you have any questions or require additional information, do not hesitate to contact me at 512-463-1625

Sincerely,



David Slayton
Administrative Director

Cc:

The Honorable J. Rolando Olvera, 5th Administrative Judicial Region