S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
SECOND FLOOR CORDELL HULL BUILDING
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0488

January 10, 2006

Opinion No. 06-008

Availability of Diversion After Entry of Judgment and Service of Sentence

QUESTION

Assuming that a defendant meets all other criteria of the diversion statute, may a defendant who has pleaded guilty and served his or her sentence to completion apply for diversion if, at the time of entering the guilty plea, the defendant had no knowledge or had not been informed of the availability of diversion?

OPINIONS

No. Diversion is only available prior to the entry of judgment. *See* Tenn. Code Ann. §§ 40-35-313 (judicial diversion) and 40-15-105 (pretrial diversion); *State v. William George Soller*, --- S.W.3d ---, No. E2003-02970-SC-R11-CD (Tenn. Nov. 30, 2005) (judicial diversion unavailable after judgment entered); *State v. Bell*, 69 S.W.3d 171 (Tenn. 2002) (pretrial diversion involves suspension of prosecution, which may be resumed upon violation of terms of diversion).

ANALYSIS

In Tennessee, there are two procedures commonly referred to as diversion: pretrial diversion and judicial diversion. The district attorney general has the discretion to grant pretrial diversion pursuant to Tenn. Code Ann. § 40-15-105. Pursuant to that statute, the defendant and the district attorney general may enter into a memorandum of understanding, which suspends the prosecution for up to two years in exchange for the defendant's acceptance of specified conduct regulations and other terms. § 40-15-105(a)(1). The memorandum of understanding becomes effective upon approval of the trial court. § 40-15-105(b). Thereafter, the case is either dismissed upon the defendant's successful completion of the diversionary term or the prosecution is resumed upon the defendant's violation of the agreement. § 40-15-105(d) and (e).

The trial court has the discretion to grant judicial diversion pursuant to Tenn. Code Ann. §40-35-313. Pursuant to that statute, when sentencing a convicted criminal, "[t]he court may defer further proceedings against a qualified defendant and place such defendant on probation . . . *without entering a judgment of guilty* and with the consent of the qualified defendant." §40-35-313(a)(1)(A). Accordingly, after a judgment of guilty has been entered, the trial court loses the authority to grant diversion. *See State v. William George Soller*, --- S.W.3d ---, No. E2003-02970-SC-R11-CD (Tenn.

Nov. 30, 2005); *see also State v. Turco*, 108 S.W.3d 244, 246 (Tenn. 2003) (trial court precluded from granting diversion when reducing a sentence pursuant to Tenn. R. Crim. P. 35(b) because judgment has been entered). Indeed, in *Soller*, the Supreme Court concluded that trial courts are precluded from granting diversion after the entry of a guilty plea pursuant to a negotiated plea agreement. Slip op. at 3-5. Although the *Soller* Court's decision rested in part upon the trial court's inability to alter the terms of a plea agreement, the decision was compelled by the fact that under the plain language of the judicial diversion statute, diversion is only available as a pre-judgment sentencing option. *Id.*

Based upon the foregoing authorities, it is the opinion of this office that pretrial diversion and judicial diversion are available to defendants only as prejudgment procedures. Upon entry of a judgment of guilt, any prospect a defendant has for receiving a diversionary sentence is removed. There is no authority for a post-judgment grant of diversion.[1]

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

MARK A. FULKS
Assistant Attorney General

Requested by:

The Honorable Jerome Cochran, Jr.
State Representative
4th Legislative District
212 War Memorial Building
Nashville, Tennessee 37243

[1] However, this does not mean that a defendant aggrieved by his or her lack of knowledge or advice concerning pretrial diversion and judicial diversion is without a remedy. As the supreme court noted in *Turco* and *Soller*, trial courts have authority to vacate judgments pursuant to Rule 33 of the Rules of Criminal Procedure and the defendant may move to withdraw his guilty plea pursuant to Rule 32(f) of the Rules of Criminal Procedure. *Turco*, 108 S.W.3d at 248; *Soller*, slip op. at 5 n.5; *see* Tenn. R. Crim. P. 32(f) and 33. Aggrieved defendants may raise a claim that they were denied the opportunity to seek diversion through those remedies. A successful defendant will be restored to his pre-judgment status and diversion may then become available.