

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL
P. O. BOX 20207
NASHVILLE, TENNESSEE 37202**

April 5, 2005

Opinion No. 05-041

Expungement of a DUI Conviction Pursuant to Either Pretrial or Judicial Diversion

QUESTIONS

1. Are DUI's expungeable offenses for any pretrial diversion program, including but not limited to T.C.A. § 40-35-313?
2. Is a judicial diversion, or a post plea diversion, included in the pretrial diversion program contemplated in T.C.A. § 55-10-403(b)(1) for the purposes of prohibiting utilization of such diversion programs to expunge DUI's from a person's driving record?

OPINIONS

1. No, a DUI cannot be expunged pursuant to any pretrial diversion program or pursuant to judicial diversion.
2. No, judicial diversion is not included within the pretrial diversion program specified in T.C.A. § 55-10-403(b)(1). Nevertheless, judicial diversion cannot be used to expunge a DUI conviction from a person's driving record because T.C.A. § 55-10-403(b)(1) makes a person convicted of DUI ineligible for judicial diversion.

ANALYSIS

1. A DUI Cannot Be Expunged Pursuant to a Pretrial Diversion Program or Judicial Diversion.

Pursuant to Tenn. Code Ann. § 40-15-105(e), a court must dismiss the charges against a person who has completed a pretrial diversion program and send the dismissal to the T.B.I. for entry into its expunged criminal offender and pretrial diversion database. Furthermore, upon the defendant's petition, the court must order the expungement of all the public records in the case. Tenn. Code Ann. § 40-32-101(a)(3). Similarly, a court may defer further proceedings against a "qualified defendant" and place the defendant on probation without entering judgment pursuant to what is commonly referred to as judicial diversion. *See* Tenn. Code Ann. § 40-35-313. Once the

charges have been dismissed upon the defendant's successful completion of probation, the defendant may petition the court for expungement of all official records related to the defendant's arrest, indictment, trial, finding of guilt, dismissal and discharge. Tenn. Code Ann. § 40-35-313(b). Tennessee Code Annotated § 55-10-403(b)(1), however, expressly provides that no one charged with a DUI is eligible for pretrial diversion pursuant to Tenn. Code Ann. § § 40-15-102 to -105 or any other pretrial diversion program. The section also makes the person ineligible for expungement of the charges pursuant to Tenn. Code Ann. § § 40-32-101(a)(3). Though it does not cite Tenn. Code Ann. § 40-35-313 specifically, Tenn. Code Ann. § 55-10-403(b)(1) does make any person convicted of DUI ineligible for suspension of sentence or probation pursuant to "any other provision of law." The Tennessee Court of Criminal Appeals, moreover, has determined that a trial court cannot place a person convicted of DUI on judicial diversion. *State v. Vasser*, 870 S.W.2d 543, 547 (Tenn. Crim. App. 1993). Therefore, a person cannot have a DUI conviction expunged through a pretrial diversion program or through judicial diversion because the person would not be eligible for either.

2. Neither Judicial Diversion Nor Any Other Post-plea Diversion Program Is Included in the Pretrial Diversion Program Specified in Tenn. Code Ann. § 55-10-403(b)(1); Judicial Diversion Can Nevertheless Not Be Used to Expunge a DUI Conviction.

Judicial diversion and pretrial diversion, though similar, are separate and distinct legislative concepts taking place at different points in legal proceedings. Judicial diversion follows a determination of guilt, and the decision to grant judicial diversion is initiated by the trial court, not the prosecutor. *State v. Anderson*, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). The Court of Criminal Appeals "has recognized the very 'fact that a defendant seeking judicial diversion stands before the court having already been found guilty--ready to be sentenced,' places the defendant in a dramatically different posture than that of a person seeking pretrial diversion." *State v. Johnson*, 980 S.W.2d 410, 413 (Tenn. Crim. App. 1998) (citing *State v. Porter*, 885 S.W.2d 93, 94-95 (Tenn. Crim. App. 1994)). Accordingly, the reference to the pretrial diversion statutes in Tenn. Code Ann. § 55-10-403(b)(1) does not include judicial diversion. As discussed above, however, Tenn. Code Ann. § 55-10-403(b)(1) precludes a person convicted of DUI from having the record expunged pursuant to judicial diversion because it renders such a person ineligible for judicial diversion.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

MICHAEL MARKHAM
Assistant Attorney General

Requested by:

Commissioner Fred Phillips
Tennessee Department of Safety
1150 Foster Avenue
Nashville, TN 37249