# 2010 Tennessee Code Title 40 Chapter 15

# Criminal Procedure, Pretrial Diversion 40-15-105 - Memorandum of understanding Suspended prosecution.

**(a) (1) (A)**A qualified defendant may, by a memorandum of understanding with the prosecution, agree that the prosecution will be suspended for a specified period, not to exceed two (2) years from the filing of the memorandum of understanding. As a condition of this suspension, the qualified defendant shall agree to pay ten dollars ($10.00) per month as part payment of expenses incurred by the agency, department, program, group or association in supervising the defendant. The payments shall be made to the agency, department, program, group or association responsible for the supervision of defendant.

**(B) (i)**For purposes of this section, qualified defendant means a defendant who meets each of the following requirements:

**(a)**The defendant has not previously been granted pretrial diversion under the provisions of this chapter or judicial diversion under the provisions of § 40-35-313;

**(b)**The defendant does not have a prior misdemeanor conviction for which a sentence of confinement is served or a prior felony conviction within a five-year period after completing the sentence or probationary program for the prior conviction; and

**(c)**The offense for which the prosecution is being suspended is not a Class A or Class B felony or a Class C felony as defined in subdivision (a)(1)(B)(iii), a sexual offense, driving under the influence of an intoxicant as prohibited by § 55-10-401, or vehicular assault as prohibited by § 39-13-106.

**(ii)**As used in subdivision (a)(1)(B)(i)(c), sexual offense means conduct which constitutes:

**(a)**Aggravated prostitution, as described in § 39-13-516;

**(b)**Aggravated rape, as described in § 39-13-502;

**(c)**Aggravated sexual battery, as described in § 39-13-504;

**(d)**Aggravated sexual exploitation of a minor, as described in § 39-17-1004;

**(e)**Attempt, as described in § 39-12-101, to commit any of the offenses enumerated in this subdivision (a)(1)(B)(ii);

**(f)**Conspiracy, as described in § 39-12-103, to commit any of the  offenses enumerated in this subdivision (a)(1)(B)(ii);

**(g)**Especially aggravated sexual exploitation of a minor, as described in  § 39-17-1005;

**(h)**Rape, as described in § 39-13-503;

**(i)**Rape of a child, as described in § 39-13-522;

**(j)**Sexual battery by an authority figure, as described in § 39-13-527; or

**(k)**Solicitation, as described in § 39-12-102, to commit any of the offenses enumerated in this subdivision (a)(1)(B)(ii).

**(iii)**As used in subdivision (a)(1)(B)(i)(c), Class C felony means conduct which constitutes:

**(a)**Adulteration of foods, liquids or pharmaceuticals, as described in § 39-17-107;

**(b)**Aggravated assault resulting in serious bodily injury, as described in § 39-13-102(a)(1)(A);

**(c)**Aggravated burglary, as described in § 39-14-403;

**(d)**Bribery of a public servant, as described in § 39-16-102;

**(e)**Bribing a juror, as described in § 39-16-108;

**(f)**Bribing a witness, as described in § 39-16-107;

**(g)**Buying and selling in regard to public offices, as described in § 39-16-105;

**(h)**Introduction of weapons, explosives, intoxicants or drugs into a state, county, or municipal institution where prisoners are quartered, as described in § 39-16-201(b)(1);

**(i)**Robbery, as described in § 39-13-401;

**(j)**Voluntary manslaughter, as described in § 39-13-211; or

**(k)**Vehicular homicide, as described in § 39-13-213.

**(C)**Notwithstanding the provisions of subdivision (a)(1)(A) to the contrary, in any county having a population in excess of eight hundred thousand (800,000), according to the 1990 federal census or any subsequent federal census, the defendant shall pay a fee of not less than ten dollars ($10.00) nor more than thirty-five dollars ($35.00) per month, as determined by the court.

**(2)**Prosecution of the defendant shall not be suspended unless the parties in the memorandum of understanding also agree that the defendant observe one (1) or more of the following conditions during the period in which the prosecution is suspended:

**(A)**That the defendant not commit any offense;

**(B)**That the defendant not engage in specified activities, conduct and associations bearing a relationship to the conduct upon which the charge against the defendant is based;

**(C)**That the defendant participate in a supervised rehabilitation program which may include treatment, counseling, training and education;

**(D)**That in the proper case the defendant make restitution in a specified manner for harm or loss caused by the offense, if restitution is within the defendant's capabilities;

**(E)**That the defendant pay court costs in a specified manner;

**(F)**That the defendant pay, in addition to the payment of ten dollars ($10.00) per month required by this section, any or all additional costs of the defendant's supervision, counseling or treatment in a specified manner based upon the defendant's ability to pay;

**(G)**That the defendant reside in a designated place including, but not limited to, a residential facility for persons participating in a particular program of rehabilitation if residence there is necessary in order to participate fully in the program; and

**(H)**That the defendant behave in any specified manner consistent with good citizenship or other terms and conditions as may be agreed upon by the parties.

**(3)**The memorandum of understanding may include stipulations concerning the admissibility in evidence of specified testimony, evidence or depositions if the suspension of the prosecution is terminated and there is a trial on the charge. The memorandum of understanding shall also include a statement of the defendant's version of the facts of the alleged offenses. The defendant's statement of the 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 pursuant to subsection (d). 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 memorandum of understanding shall be in writing signed by the parties and shall state that the defendant waives the right to a speedy trial, and the right to be indicted at any particular term of court and after July 1, 2004, if the individual is charged with a violation of a criminal statute the elements of which constitute abuse, neglect or misappropriation of the property of a vulnerable person as defined in § 68-11-1004(a), the memorandum of understanding or diversion order contains a provision that the individual agrees without contest or any further notice or hearing that the individual's name shall be permanently placed on the registry governed by § 68-11-1004, a copy of which shall be forwarded to the department of health. This filing shall toll any applicable statute of limitations during the pendency of the diversionary period.

**(4)**The pretrial diversion procedures are authorized and a memorandum of understanding may be permitted in the municipal courts of home rule municipalities where the defendant is charged with a misdemeanor and does not have a previous misdemeanor or felony conviction within the five-year period after completing the sentence or probationary program for the prior conviction. The procedures in those municipal courts shall be subject to the same terms and conditions, including those related to expenses and costs, as set forth in this subsection (a), and any expenses and costs paid by the defendants shall be paid to the clerk of the municipal court in which the proceedings were held.

**(b) (1)**Promptly after the memorandum of understanding is made, the prosecuting attorney shall file it with the court, together with a notice stating that pursuant to the memorandum of understanding of the parties under this section and §§ 40-15-102 40-15-104, the prosecution is suspended for a period specified in the notice. Upon this filing, if the defendant is in custody, the defendant may be released on bond or on the defendant's promise to appear if the suspension of prosecution is terminated and there is a trial on the charge. The memorandum of understanding must be approved by the trial court before it is of any force and effect.

**(2)**The trial court shall approve the memorandum of understanding unless the:

**(A)**Prosecution has acted arbitrarily and capriciously;

**(B)**Memorandum of understanding was obtained by fraud;

**(C)**Diversion of the case is unlawful; or

**(D)**Certificate from the Tennessee bureau of investigation required by § 40-15-106 is not attached.

**(3)**The defendant shall have a right to petition for a writ of certiorari to the trial court for an abuse of prosecutorial discretion. If the trial court finds that the prosecuting attorney has committed an abuse of discretion in failing to divert, the trial court may order the prosecuting attorney to place the defendant in a diversion status on the terms and conditions as the trial court may order. A defendant's diversion under such terms and circumstances may be terminated as provided by subsection (d) and shall be subject to all other provisions of this section.

**(c)**The parties by mutual consent may modify the terms of the memorandum of understanding at any time before its termination. Nothing in this section shall prohibit a behavioral contract or agreement setting out behavior or goals expected of and to be achieved by the defendant made between a counselor and defendant, but that agreement need not be filed with the court.

**(d)**The memorandum of understanding shall be terminated and the prosecution may resume as if there had been no memorandum of understanding if either the defendant or prosecuting attorney files a notice that the memorandum of understanding is terminated. If the memorandum of understanding is terminated by the prosecution, the defendant may petition the court to review the action of the prosecution to determine whether the prosecution acted arbitrarily, capriciously or abused its discretion to terminate. If the court so finds, it may order the defendant reinstated under the defendant's memorandum of understanding or order the pending charges dismissed with or without jeopardy attaching.

**(e)**The trial court shall dismiss with prejudice any warrant or charge against the defendant upon the expiration of ninety (90) days after the expiration of the period of suspension specified in the memorandum of understanding is filed; provided, that no termination of the memorandum of understanding has been filed under the provisions of subsection (d). If the prosecution is dismissed with prejudice, jeopardy shall attach and the court shall make a minute entry to that effect. Upon dismissing any warrant or charge against the defendant pursuant to this section, the judge shall send or cause to be sent a copy of the order of dismissal to the Tennessee bureau of investigation for entry into its expunged criminal offender and pretrial diversion database; provided, however, that the court shall not be required to send to the bureau a copy of any dismissal order dated on or after July 1, 1999, if the charge dismissed is classified as a Class B or C misdemeanor. The order of dismissal shall include the name of the defendant, the defendant's date of birth and social security number, the offense for which diversion was granted, the date diversion was granted and the date the charge or warrant was dismissed.

[Acts 1975, ch. 352, § 4; 1976, ch. 643, §§ 1-4; 1979, ch. 376, §§ 1-3; 1980, ch. 746, §§ 1-4; 1981, ch. 439, §§ 1-3; T.C.A. § 40-2108; Acts 1983, ch. 193, §§ 1-3; 1984, ch. 576, § 1; 1990, ch. 980, § 20; 1993, ch. 281, § 1; 1995, ch. 508, § 1; 1997, ch. 456, § 1; 1998, ch. 1099, §§ 1-5; 2000, ch. 645, § 1; 2000, ch. 813, §§ 2-6; 2003, ch. 323, § 1; 2004, ch. 780, § 8; 2007, ch. 471, §§ 1-3.]   