HB 195

SENATE JUDICIARY
Exhibit No. 2
2/11/95
HB 195

Pretrial Diversion (Enacted by Sec. 129, Ch. 800, Laws of Montana, 1991)

46-16-130. Pretrial diversion. (1) (a) Prior to the filing of a charge, the prosecutor and a defendant who has counsel or who has voluntarily waived counsel may agree to the deferral of a prosecution for a specified period of time based on one or more of the following conditions:

(i) that the defendant may not commit any offense;

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

(iii) that the defendant shall participate in a supervised rehabilitation program, which may include treatment, counseling, training, or education;

(iv) that the defendant shall make restitution in a specified manner for harm or loss caused by the offense; or

(v) any other reasonable conditions.

(b) The agreement must be in writing, must be signed by the parties, and must state that the defendant waives the right to speedy trial for the period of deferral. The agreement may include stipulations concerning the admissibility of evidence, specified testimony, or dispositions if the deferral of the prosecution is terminated and there is a trial on the charge.

(c) The prosecution must be deferred for the period specified in the agreement unless there has been a violation of its terms.

(d) The agreement must be terminated and the prosecution automatically dismissed with prejudice upon expiration and compliance with the terms of the agreement.

(2) A condition of pretrial diversion may be for the court to refer a defendant for evaluation to determine the appropriateness of proceedings pursuant to Title 53, chapter 21.

(3) After a charge has been filed, a deferral of prosecution may be entered into only with the approval of the court.

(4) A prosecution for a violation of 61-8-401, 61-8-406, 61-8-410, or 61-8-411 may not be deferred.

Comments from the 1991 Commission on Criminal Procedure appointed by the Supreme Court:

1991 Comment: A provision regulating pretrial diversion, sometimes called deferred prosecution, is new to Montana, although the practice has been statutorily recognized since at least 1979. See 1987 MCA 44-5-103(10) and (12).

The Commission believed a pretrial diversion provision was necessary because prosecutors have long employed diversion on an informal, individual basis by deferring prosecution if, for example, the accused agreed to undergo rehabilitative treatment. Since the President's Commission on Law Enforcement and Administration of Justice recommended such programs in its 1967 report, many states have formalized diversion by statute or court rule. Pretrial diversionary programs are premised on the belief that it is not always necessary and, in fact, may often be detrimental to pursue formal courtroom prosecution for every criminal violation. In most situations, the criminal prosecution is suspended subject to the defendant's consent to treatment, rehabilitation, restitution, or other noncriminal or nonpunitive alternatives.

The statute contemplates that the decision to divert lies with the prosecutor in an exercise of his powers and is not ordinarily subject to judicial review. This conforms with existing practice in that several Montana County Attorneys conduct formal diversion programs, yet no Montana case has been found that discusses the practice. However, some litigation has occurred in other jurisdictions. These cases are collected in an annotation at 4 ALR 4th 147.