DUI/DWI Diversion Programs
Suggested Best Practices
With Supportive Reasoning

Introduction

The Florida Impaired Driving Coalition (FIDC) recently published a Whitepaper concerning the implementation and operation of certain non-statutory "de facto", DUI/DWI Diversion programs. These programs operate at the discretion and by virtue of the executive authority of state attorneys in several judicial circuits of Florida. The FIDC does not dispute the executive authority or the discretion that state attorneys have to implement and operate de facto DUI/DWI diversion programs. It is, however, the position of the FIDC that certain changes in implementation and operation could improve the function and effectiveness of such programs. The FIDC respectfully submits that the proposed best practices discussed below would enhance deterrence, address recidivism, and better protect the safety of the all Floridians and visitors to the state.

1. **Support codification of a single statutory DUI/DWI diversion program with statewide application that provides for enhanced penalties for recidivists.**

   At present, there are at least ten DUI/DWI diversion programs in operation. They vary in terms of requirements, costs, duration, and whether DUI/DWI charges are dismissed or reduced to reckless driving. Some programs require donations to charitable or non-profit entities. Some programs tolerate applicants with blood alcohol levels of .20 or even higher. The present programs all shield successful program participants from being subjected to enhanced recidivist penalties should they commit a second DUI/DWI offense. When a successfully diverted defendant commits a second DUI/DWI offense, they are once again only a first-time offender and they escape the mandatory enhanced penalties that would otherwise apply to a second or subsequent offense.

   There are other states with statutory DUI/DWI diversion programs that operate uniformly in all courts that adjudicate impaired driving cases. In those states, a simple statutory provision subjects diversion program participants to enhanced penalties when they commit a second or subsequent DUI/DWI. For example, see Kansas' Driving Under the Influence, K.S.A. 1983 Supp. 8-1567(i). This statute was upheld by the Kansas Supreme Court in *State v. Booze*, 238 Kan. 551, 712 P.2d 1253 (1986), wherein the Court held that entry into a DUI/DWI diversion agreement in lieu of further criminal proceeding constitutes a "conviction" for purposes of second offender sentence enhancement. State attorneys should support statutory provisions that subject previously diverted DUI/DWI

offenders to enhanced penalties when they commit a second or subsequent DUI/DWI offense.

2. **Diversion programs that reduce DUI/DWI offenses to Reckless Driving should not accept applicants who have submitted to a blood or breath test, that discloses a blood or breath alcohol content (BAC) of .15 percent or more.**

   Section 316.656, *Florida Statutes*, prohibits judges from accepting pleas to lesser offenses when a defendant has provided a blood or breath test that registered .15 percent or more. DUI/DWI cases with .15+ blood/breath alcohol contents (BAC), that are reduced to reckless driving, require judges to violate section 316.656, when they are asked to accept a plea to the reduced charge. Judges should not be put in such an untenable position.

   Several Florida DUI/DWI diversion programs accept applicants who have submitted to sobriety testing and have registered a (BAC) of .15 percent or higher. At least one county diversion program further accepts applicants with BAC results up to .24. These diversion program applicants can qualify to have their DUI/DWI charge reduced to reckless driving.

   This practice may present ethical issues to be considered by both judges and the prosecution. Ignoring BAC tests of .15 or higher, or simply reducing BAC test results to less than .15 to facilitate a plea to conform with F.S. 316.656, could similarly present ethical issues for both the judge and counsel. See: Baseless Pleas a Mockery of Justice, Fordham Law Review May 2010, 78 Fordham L. Rev. 2961 and Edward L. Wilkinson, Ethical Plea Bargaining Under the Texas Disciplinary Rules of Professional Conduct, 39 St. Mary's L.J. 717, 728–29 (2008).

3. **In processing a DUI/DWI diversion, do not amend a DUI/DWI uniform traffic citation or an Information charging DUI/DWI to Reckless Driving unless the DUI/DWI charge is first dismissed and a new uniform traffic citation is issued for Reckless Driving.**

   When a DUI/DWI charge is amended to reckless driving, it causes the DUI/DWI charge to be recorded on the on the official records of the Florida Department of Highway Safety and Motor Vehicles (FDHSMV) as a DUI/DWI “withhold of adjudication” by the judge who accepted the reckless driving plea. Section 316.656(1) prohibits judges from suspending, “withholding” or deferring adjudication, or the imposition of sentence for any violation of section 316.193, *Florida Statutes*. Judges should not be placed in the untenable position of having a record that erroneously discloses that he or she violated 316.656(1), because, at the request of the prosecution, he or she accepted a plea to reckless driving in a DUI/DWI diversion program case.

   Issuing a new reckless driving citation, upon dismissal of the underlying DUI/DWI charge, ensures that the FDHSMV official records will accurately reflect the withholding or deferred adjudication of the diverted DUI/DWI charge.

4. **Publish detailed descriptions of the terms and conditions of any formal or informal DUI/DWI diversion program. Include in the publication a full description of the application process including the cost, duration, and whether unrepresented DUI/DWI defendants are permitted to apply.**

   In several jurisdictions, state attorneys operate DUI/DWI diversion programs that are not openly disclosed to the public. These diversion programs generally involve defense attorneys corresponding with assistant state attorneys, and setting forth reasons why their clients should be permitted to enter a plea to a lesser charge, such as reckless driving, and receive probation. Probation conditions may include completion of a Level I alcohol education program, driving for essential purposes only, community service, payment of a fine, and ignition interlock device use.

   Unpublished DUI/DWI diversion programs permit unequal treatment of DUI/DWI defendants, particularly those who do not have an attorney and are therefore unaware of the unpublished programs. They may also discriminate against the unrepresented who are unable to afford an attorney with the connection and expertise to plead the client's suitability for diversion. Published DUI/DWI diversion programs enable defendants and the public to understand the application process, the costs and requirements, as well as the function and effect, of the DUI/DWI diversion programs.

5. **State attorneys should consider the effect on law enforcement in the granting of diversions. They should initially consult with and advise all case-connected law enforcement of the reasons why diversion is being considered and what the diversion program will entail. Law enforcement should be invited to offer their opinions, including whether the proposed diversion would be in the best interests of the public.**

   In the past six years (from 2012 to 2017) the total number of DUI/DWI charges brought by law enforcement has steadily declined 18% from 53,664 to 43,899. In 2017, 9,765 fewer DUI citations were issued by law enforcement than in 2012. In the same time period, convictions (adjudications of guilt) in those DUI cases, declined 25% from 37,003 adjudications to 27,865. The decrease in citations and the decrease in the number of DUI convictions correspond to the increased use of DUI/DWI deferred prosecution diversion programs in which successful participants were spared adjudication through charge amendments to non-DUI offenses or outright dismissal of their DUIs by nolle prosequi. Unfortunately, and tragically, during the same period, fatalities attributable to alcohol-impaired drivers with .08+ BACs have increased 17% from 697 to 839.

   With declining adjudications and increasing fatalities, law enforcement may perceive diversion programs that dismiss DUI/DWI charges, or reduce them to reckless driving, as an unwillingness of prosecutors to hold DUI/DWI defendants responsible for their actions. For every instance in which a DUI/DWI case is to be dismissed or reduced to reckless driving, the reasons for such action should be discussed with all case-connected law enforcement and their opinion be given strong consideration.

6. **Screen all diversion program applicants to determine if they previously were required to complete a "substance abuse education course" conducted by a DUI program or other entity in any state. Such previous attendance or completion may be evidence that the applicant has previously been charged with DUI/DWI or participated in a diversion program, and is therefore not appropriate for diversion.**

   Evidence of previous attendance at a substance abuse or alcohol education course may suggest that an applicant for diversion has previously been convicted of DUI/DWI, or had the benefit of a prior diversion. Records of previous attendance at an alcohol or substance abuse education course are available through the FDHSMV. They can be obtained through the Bureau of Records or Bureau of Driver Improvement in the FDHSMV's Department of Motorist Compliance.

   Diversion applicants who have previously completed a DUI/DWI or similar impaired driving diversion program, or who have previously been convicted of DUI/DWI should not be accepted for diversion. Care must be taken in investigating records of previous driving offenses. Prior records for reckless and careless driving, as well as leaving the scene, should be examined to determine if they involved alcohol or drugs. Offenses, such as reckless driving, that have been "sealed" pursuant to section 943.059, *Florida Statutes*, should be investigated to determine if they reflect that an applicant was previously charged with an alcohol-related driving offense in Florida or elsewhere.

7. **Do not permit any Commercial Driver License (CDL) holder to participate in any DUI/DWI diversion program, regardless of the offense occurring in a personal (non-commercial) vehicle or a commercial motor vehicle (CVM).**

   49 CFR § 384.226 is a federal regulation that has been adopted by every state. This regulation prevents states from deferring imposition of judgment, allowing diversion programs or otherwise acting to prevent a conviction for violating a traffic control law from appearing on a Commercial Driver License (CDL) holder's driving record. This anti-masking provision applies whether the CDL holder was operating a Commercial Motor Vehicle (CMV) or a non-CMV at the time of the offense. Accordingly, it would be a violation of both federal and Florida law to allow a Commercial Driver License holder to participate in a DUI/DWI diversion program, whether that offense occurred in a personal vehicle or a commercial motor vehicle. For further information see: CDL Informational Publication, **Commercial Drivers' Licenses: A Prosecutor's Guide to the Basics of Commercial Motor Vehicle Licensing and Violations (Second Edition)**: http://www.ndaa.org/pdf/CDLMono_REV2017_FinalWeb.pdf

8. **Diversion program participants, whose DUI/DWI charges have been reduced to reckless driving with or without a withhold of adjudication, should be placed on probation for not less than 6 months nor more than 1 year with conditions tailored to protecting the public and preventing recidivism.**

   Section 948.15, *Florida Statutes*, governs misdemeanor probation services. It provides that defendants found guilty of misdemeanors shall be placed on probation not to exceed 6 months, except that "if alcohol is a significant factor" the period of probation may be up to one year. By utilizing probation, diverted defendants can be monitored to ensure that, during the period of supervision, they are complying with conditions related to protecting the public and that discourage recidivism. Such conditions should include the following:

   a. Abstain from the consumption of alcohol and from the consumption of cannabis, unless, for medical purposes, pursuant to a referral from a qualified physician.

   b. Do not enter, remain, or be present on premises where the primary business is the sale or service of alcoholic beverages except for the purposes of employment or with the permission of the probation officer.

   c. Drive only for "business purposes" as defined in Fla. Stat.§ 322.271(1)(c), which means driving that is limited to any driving necessary to maintain livelihood, including driving to and from work, necessary on-the-job driving, driving for educational purposes, and driving for church and for medical purposes.

   d. Complete a Level I substance abuse course and the accompanying psychosocial evaluation to determine if treatment should be recommended or required.

   e. Complete treatment by approved licensed treatment provider where treatment has been determined to be "required" as a result of a psychosocial evaluation.

   f. Provide proof of enhanced financial responsibility for liability and property damage arising out of the use of a motor vehicle as described in Fla. Stat. §324.023 for the duration of the probationary period.

   g. Pay all fines, court costs and the reasonable costs, as determined by the court to reimburse law enforcement for the time and effort expended in the arrest and investigation of the original DUI/DWI offense.

   h. Install and use of an Alcohol Ignition Interlock Device, if ordered by the court.

   i. Comply with other conditions ordered by the court.