

## LEGAL ADVICE NOTICE



# HM Courts & Tribunals Service

Date: 21 June, 2016

Issued to: Kent Magistrates, District Judges (Magistrates' Courts), Legal Advisers and Court Associates

Issued by: HM Courts Service (Kent) Justices' Clerk

Subject: **Case Management Good Practice – Legal Advice Note 5 of 2016**

### **Always take plea at the first hearing**

Rule 3.9(2)(b) Criminal Procedure Rules 2015 requires the court to take the defendant's plea at the first hearing. The following are not good reasons not to take plea:

**I should have got a caution:** this is no basis for not taking plea. See Legal Advice Note 3 of 2014. The decision in *R (F) v CPS and the Chief Constable of Merseyside (2004)* 168 JP 93, emphasises that if a reprimand, warning, or caution is offered at the police station but the suspect declines to make any admissions at that time, they are not entitled to rethink their position once charged and require the matter to be returned to the police station for diversion. Neither the CPS nor the police are bound to act in that way. This means that it is inappropriate to adjourn an adult or youth offender for consideration of a caution where that youth or adult did not make a clear admission of the offence at the police station. The court should proceed to sentence. Defence advocates will sometimes urge the court to adjourn but such requests such be refused where the youth or adult defendant failed to make a clear admission at the police station whereby a caution could then be considered.

**The defendant has mental health problems and a psychiatric report is needed before plea can be taken:** this is not normally a basis for not taking plea. There is no fitness to plead procedure in the magistrates' court. The court must follow the statutory procedure set out in s11 Powers of Criminal Courts (Sentencing) Act 2000 or in s37(3) Mental Health Act 1983. Seek the advice of your legal adviser.

**For legal aid to be obtained:** this is not a good reason not to take plea. The clear advice from the Senior Presiding Judge and the Chief Magistrate is that plea should be taken even if legal aid has not been sorted out.

**For defence to make representations to the CPS:** any representations should be made at the first hearing and the prosecutor can decide on them. In any event plea should be taken. If a NG plea is entered then a trial should be fixed but with a review hearing before the trial if the representations might make a material difference to whether the trial proceeds or not.

**Because the IDPC is not adequate:** Initial disclosure of the prosecution case (IDPC for short) is governing by the Criminal Procedure Rules. The relevant rule is Rule 8.3 which states:

Initial details of the prosecution case must include—

- (a) where, immediately before the first hearing in the magistrates' court, the defendant was in police custody for the offence charged—
  - (i) a summary of the circumstances of the offence, and
  - (ii) the defendant's criminal record, if any;

(b) where paragraph (a) does not apply—

- (i) a summary of the circumstances of the offence,
- (ii) any account given by the defendant in interview, whether contained in that summary or in another document,
- (iii) any written witness statement or exhibit that the prosecutor then has available and considers material to plea, or to the allocation of the case for trial, or to sentence,**
- (iv) the defendant's criminal record, if any, and
- (v) any available statement of the effect of the offence on a victim, a victim's family or others.

This is further supplemented by the Criminal Practice Direction issued by the Lord Chief Justice which says as paragraph 3A.12

**3A.12** Where the defendant has been released on bail after being charged, and where the prosecutor does not anticipate a guilty plea at the first hearing in a magistrates' court, then it is essential that the initial details of the prosecution case that are provided for that first hearing are sufficient to assist the court, in order to identify the real issues and to give appropriate directions for an effective trial (regardless of whether the trial is to be heard in the magistrates' court or the Crown Court). In these circumstances, unless there is good reason not to do so, the prosecution should make available the following material in advance of the first hearing in the magistrates' court:

- (a) A summary of the circumstances of the offence(s) including a summary of any account given by the defendant in interview;
- (b) Statements and exhibits that the prosecution has identified as being of importance for the purpose of plea or initial case management, including any relevant CCTV that would be relied upon at trial and any Streamlined Forensic Report;
- (c) Details of witness availability, as far as they are known at that hearing;
- (d) Defendant's criminal record;
- (e) Victim Personal Statements if provided;
- (f) An indication of any medical or other expert evidence that the prosecution is likely to adduce in relation to a victim or the defendant;
- (g) Any information as to special measures, bad character or hearsay etc.

Paragraph **3A.14** goes on to say that nothing in the above paragraph shall preclude the court from taking a plea pursuant to CrimPR 3.9(2)(b) at the first hearing and for the court to case manage as far as practicable under Part 3 CrimPR.

### **NGAP Court**

1. Where a case has been listed in an NGAP court, the prosecution should have complied with its duty to provide enough information to satisfy **CPR 8.3(b) and PD 3A.12**.
2. The defence advocate must make it clear as to why they are unable to take their clients instructions and advise as to plea based on what the CPS has provided and complete the Preparation for Trial Form.
3. If there is a failure of the Crown that can be immediately remedied by the service of further evidence in that Court session then the case should be put back to allow this to happen.
4. If the Crown argue that they have complied with their obligations under the CPR and PD and have good reason not to have the information to serve as identified in **PD 3A.12**, then it is for the Defence to demonstrate to the Court that they have not, i.e. that it is impossible without the missing information to advise on plea or case manage.
5. If the Defence then apply for an adjournment, apply the relevant case law on when and when not adjourn the case.
6. If the case is adjourned, advise the defaulting party that the issue of costs of the wasted hearing will be considered at the conclusion of the proceedings.

7. Make the necessary directions for the service of the missing material in preparation for the next hearing.
8. If the Court refuses to adjourn the case then the Defendant must enter his/her plea.
9. If the defence ask for a note to be made on the court file to the effect as suggested in the CLAS protocol, the court should refuse to do so if it has decided that the CPS have complied with their obligations under the Rules in that sufficient information has been provided in the IDPC according to law to advise as to plea.
10. The Chairman should remind the defendant that credit for a guilty plea will reduce thereafter.

### **GAP/Virtual Remand Court**

1. Where a case has been listed in a GAP court or is a first time custody case the prosecution should have complied with its duty to provide enough information to satisfy **CPR 8.3(a)**. This is normally restricted to a summary of the case and of any interview.
2. The defence advocate has a duty to make it clear as to why they are unable to take their clients instructions and advise as to plea. If the CPS have complied with CPR8.3(a) it would be hard to see a situation where a plea could not be taken and either the Court move to sentence or adjourn to a case management hearing after 28 days as per TSJ if the defendant pleads NG.
3. If the Court has not adjourned the proceedings at the request of the defence, then no note should be made on the Court file to preserve the maximum discount for an early guilty plea if the court is satisfied that the obligations set out in CPR8.3(a) have been met and the Defendant should have been able to enter their plea.

### **Notes about preserved discounts for guilty pleas**

1. The only time that a note to preserve the Defendant's credit could be made on the Court file is where all parties to the proceedings agree that a key piece of evidence has not been made available, that would be outside the defendants knowledge and a not guilty plea has been entered.
2. If the complaint of the defence is because of a poorly prepared case summary by the police, then in order to assist the Court in discharging its burden under the **CPR** then this will need to be escalated within in the management level of the police by e-mailing [Julia.Harman@kent.pnn.police.uk](mailto:Julia.Harman@kent.pnn.police.uk). Legal advisers and court associates are asked to e-mail examples of poor IDPC to Julia Harman who will investigate and report back.

### **If sitting on a trial then the following case law guidance is helpful:**

**A prosecution witness is missing and the defendant is denied the opportunity to cross-examine that witness:** this is not a reason not to get on with the trial. See Al-Kazzaz v DPP [2015] EWHC 3016 Admin in which the main prosecution witness failed to attend but the trial was able to proceed because another witness attended who had witnessed the assault. The defendant can draw to the court's attention the absence of the main witness. What may or may not have come out of cross-examination of the missing witness was speculation and did not deprive the defendant of a fair trial.

**CCTV evidence is missing:** where live evidence can be given the absence of CCTV evidence does not deprive the defendant of a fair trial. What is on CCTV may be wholly speculative and the trial can and should proceed on the available evidence (DPP v Spalluto [2015] EWHC 2211 (Admin) and DPP v Petrie [2015] EWHC 48 (Admin) – both cases in which CCTV evidence of the custody suite in which breath specimens were taken was missing but the High Court ruled that trials relating to the breath test procedure should still take place on the basis of evidence from the officers who took the breath samples and of the defendant and without the need to see the CCTV evidence).

Malcolm Dodds (Clerk to the Justices for Kent)