

AT THE CUTTING EDGE – THERAPEUTIC JURISPRUDENCE IN
MAGISTRATES COURTS
CONFERENCE 6TH MAY 2005
PERTH, WESTERN AUSTRALIA

RESPONSIBILITIES OF TJ TEAM

MEMBERS

V.

RIGHTS OF OFFENDERS

TINA PREVITERA
NORTH QUEENSLAND DRUG COURT PILOT PROGRAM MAGISTRATE
CAIRNS
QUEENSLAND

ABSTRACT

Drug Courts are provided with legislative power to impose penal sanctions for breaches of Drug Rehabilitation orders. Although the Rules of Natural Justice apply, these sanctions are imposed in a court environment where the legal protections afforded to offenders within the state criminal courts are substantially modified and reduced.

It is crucial, therefore, that team members ensure that an offender's consent to participation in the drug court is informed as well as freely and fairly given so that not only are these modified legal protections known to the offender, but that they do not deprive the offender of his/her procedural rights.

This paper examines the Queensland legislation, discusses the writer's experiences in this evolving jurisdiction and suggests certain legislative/policy/procedural protections which ought to be considered with a view to providing a balance between those competing interests

INTRODUCTION

Drug Courts in Queensland commenced with the introduction of the Drug Rehabilitation (Court Diversion) Act 2000 which authorised the operation of pilot program drug courts (Drug Courts) in each of three Magistrate's Courts within the Brisbane Area (Beenleigh, Ipswich and Southport). Those courts commenced accepting referrals in June 2000.

The pilot program drug courts were then further extended by the introduction of the Drug Rehabilitation (North Queensland Court Diversion Initiative) Amendment Act 2002 to include the Magistrate's Courts in each of Townsville and Cairns. These pilot program drug courts (Drug Courts) commenced accepting referrals in November 2002.

An evaluation of the Brisbane Area drug courts was undertaken by the Australian Institute of Criminology, which publicly released its findings in June 2003.¹

The Institute's further evaluation of the Brisbane Area drug courts and its first evaluation of the Townsville and Cairns drug courts are due for public release in May 2005. While the operation of all drug courts has been extended until December 2006, it is thought that the findings in the soon-to-be-released reports may determine the longevity of these courts in Queensland. All courts therefore continue to operate as pilot program drug courts.

THE QUEENSLAND MODEL

The Drug Rehabilitation (Court Diversion) Act 2000 authorises a drug court magistrate to make an Intensive Drug Rehabilitation Order (IDRO) which contains an initial sentence of imprisonment (which is wholly suspended during the operation of the IDRO), requirements of the order and a rehabilitation program.² A sample rehabilitation plan is attached as ANNEXURE A.

The IDRO therefore operates as a post-sentencing disposition, and is clearly designed to apply to the more serious offenders/offending. It remains in force for as long as the offender participates in the rehabilitation program,

A defendant is eligible for referral to a Queensland pilot program drug court if, amongst other criteria,³

- (a) there is evidence that the defendant is drug-dependant and the dependency contributed to the defendant committing the offence/s before the court;⁴
- and
- (b) the person would, if convicted of the offence/s, be sentenced to imprisonment.⁵

Within two (2) to (4) days of referral to the drug court, a representative of QLD Health undertakes a health assessment of the defendant to determine the level of any drug dependency; and within a further period of three (3) to four (4) weeks, a Department of Corrective Services officer commences interviews with the participant and relevant others for preparation of a pre-sentence report to assess the defendant's suitability for and willingness to comply with an IDRO. That report may or may not include a psychiatric/psychological/medical assessment. In the majority of cases such additional reports have only been sought at this preliminary stage where a mental health history/issue is identified. This flows from the requirements of the Act that a pilot program magistrate be satisfied that the offender is not suffering from any mental condition that could prevent the offender's active participation in a rehabilitation program.⁶

The majority of psychiatric/psychological/medical reports have in fact been ordered AFTER the participant has been admitted to an IDRO. This is the result of issues not coming to the attention of Corrective Services and Queensland Health during the pre-sentence/assessment phase, including by reason of :-

- (a) dishonesty/denial on the part of the participant as to any issues which might explain their drug use
- (b) ignorance on the part of the participant as to the existence of any issues which might explain their drug use
- (c) the suppression of issues as a result of trauma/abuse/abandonment/grief/loss/mistrust of authority etc
- (d) the suppression of issues as a result of continued illegal drug use throughout the assessment process
- (e) the suppression of issues as a result of withdrawal from illegal drug use through the assessment process

- (f) the use of lawfully supplied methadone or other prescription drugs throughout the assessment process.

The pre-sentence report writer, nonetheless, is required to assess the prospective participants' rehabilitation needs and, in preparing the rehabilitation plan (Annexure A), includes recommended conditions with which a participant must comply, including participation in programs and the requirement to undergo random urine tests, the results of which are used to determine whether or not the participant abides by a prohibition against the use of illegal or non-prescribed drugs throughout the period of the order.

These assessments/reports and the accompanying rehabilitation plan are considered by the pilot program drug court magistrate in determining the suitability of a defendant for, and the making of an IDRO at a sentencing hearing which occurs usually within four (4) to six (6) weeks from initial referral by a magistrate to the drug court.

Proposed participants may or may not be held in custody during the assessment phase and pending the sentencing hearing in the drug court. Those proposed participants who have been held in custody have usually, by reason of their incarceration, undergone some form of detoxification from illegal drugs by the time of the initial sentencing. The majority of the proposed participants who have been granted bail during the assessment phase, however, have not usually undergone any supervised detoxification with the result that they may still be under the influence of illegal drugs to varying degrees as at the date of sentencing also.

A drug court magistrate has no power or authority to order detoxification of any proposed participant pending the initial sentencing hearing. Those powers exist only at the time of imposition of the initial sentence⁷ (resulting in delay of commencement of the suspended term of imprisonment and operation of the IDRO), or otherwise during the currency of the IDRO.⁸

Once a participant is subject to an IDRO, the participant appears before the drug court magistrate regularly, at which times the magistrate receives reports from each of Queensland Health and the Department of Corrective Services and reviews the participant's progress on the order. A team meeting which also includes the Queensland Police Service as prosecutor and the Legal Aid office as the participant's legal representative occurs in camera prior to the participant's appearance before the court for review.

A drug court magistrate has significant powers of sanction if the magistrate is satisfied that the offender is not satisfactorily complying with the offender's intensive drug rehabilitation order. These sanctions include both non-custodial⁹ and custodial sanctions. The drug court magistrate in fact has the authority to impose a term of imprisonment for up to 14 days for each failure by a participant to comply with the IDRO.¹⁰ Such failures can realistically range from a failure to pay rent as required as part of an agreement with an accommodation provider, to wilfully using drugs on rehabilitation centre premises in the presence of other rehabilitation/drug court participants so as to compromise the rehabilitation progress of all persons concerned.

Furthermore, a drug court magistrate is empowered to terminate the IDRO prior to completion if satisfied that there are no reasonable prospects of the participant satisfactorily completing the program (the power of termination is automatically invoked upon successful completion of the IDRO). In each case, the initial sentence is set aside, the IDRO terminated and a final sentence imposed. If the participant has successfully completed the IDRO, the final sentence will, in the majority of cases, be a community based order. It has certainly never been a term of actual imprisonment. Otherwise, the participant will be ordered to serve a period of imprisonment taking into account the participant's performance on the order to that date.

Significantly, an IDRO can only be made if the offender agrees to the IDRO being made and agrees to comply with it¹¹, and the magistrate is satisfied that there are reasonable prospects the offender would satisfactorily comply with it.¹²

It is this requirement of consent by the defendant (to participation in a court supervised therapeutic intervention by which his/her usual legal protections are modified) and the responsibilities of team members in ensuring that the consent is fully informed as well as freely and fairly given which will be the primary focus of this paper.

INFORMED CONSENT

Informed consent by a participant seeking admission to the drug court is no different to that in a doctor/patient relationship which “contemplates a physician who discloses relevant information to his patient concerning the risks and benefits of a proposed course of treatment and a competent patient who voluntarily makes a decision to accept or refuse the recommendation. The elements of informed consent include disclosure of information, competency, understanding, voluntariness, and decision making.”¹³

Disclosure of information

Given the modifications to a participant's legal protections within the therapeutic jurisprudential framework, it is crucial that they be aware of what those modifications are, for example:-

1. When making any of the many and far-reaching decisions required of the drug court magistrate, including decisions as to a person's eligibility for an IDRO; whether they are satisfactorily complying with the IDRO; whether they require detoxification (resulting in possible incarceration for that purpose); the imposition or otherwise of a sanction, the magistrate need only be satisfied to the civil standard of proof, that is “on the balance of probabilities”.¹⁴ This is a much lesser standard of proof, and therefore much easier to satisfy, than that of proof beyond a reasonable doubt as required in the state criminal courts prior to the imposition of any penalty.

2. The role of the legal representative is a changing role. The legal representative only has an adversarial role, on behalf of the participant, during the referral and assessment phases (to argue their clients' eligibility for an IDRO) and upon initial and final sentencing (in making submissions as to penalty, restitution and compensation). Otherwise, they participate in a forum where, despite the fact that participants could be facing custodial sanctions for breaches, there is no place for "zealous advocacy" on the part of the legal representative as formal adversarial and evidentiary rules do not apply and the legal representative's role is limited to that of an equal team member.
3. The first opportunity for a participant to raise a factual defence to an alleged breach of the IDRO following legal advice is during the court review when the magistrate speaks directly with the participant. This court review takes place after a private meeting of all team members, including the magistrate, at which time team members make submissions in relation to the participant's conduct and recommendations as to any proposed sanction/s. In the state criminal courts, the judicial officer is never privy to, or involved in discussions in the absence of a defendant; opinion evidence of the kind concerned is inadmissible and a defendant has a right to see and hear the entirety of the proceedings against him/her.
4. There is potential for a blurring of roles within each of the Corrective Services and Queensland Health teams. For example, it has occurred that the Department of Corrective Services team member at the court-ordered review of a participant is also that participant's case manager. It is also not uncommon for the Queensland Health team member appearing at the court-ordered review of a participant to be that participant's counsellor or program facilitator. This is purely a resource/funding issue but it nonetheless means that confidentiality of client information and objectivity in relation to its use in team meetings is potentially problematic. In the mainstream criminal courts and indeed in the civil courts, it is a rare occurrence for a therapy/treatment provider for a defendant on a continuing basis to be requested to undertake an independent clinical assessment for consideration by the court. If we accept that confidentiality plays a major role in a therapeutic relationship and that "Breaking confidentiality is a necessary evil that is, at the very least, a hindrance to the development of a therapeutic relationship and, in some cases, destructively anti-therapeutic,"¹⁵ these limits to confidentiality need to be explored with, explained to and accepted by participants.
5. There is potential also for the blurring of boundaries between treatment and punishment given the consideration that is and must be given to the individual differences of and between participants, including an individual's progress on the IDRO as discussed during the private team meetings. This has led to some disparity of sanctions imposed on different participants for similar breaches and a resultant stress experienced by those participants who perceive that the disparities are the result of either prejudice or inconsistency on the part of the court. In the mainstream criminal courts, the defendant has the opportunity in sentencing to address the comparative sentencing options, notice of which is always provided to, if not already known by, the defendant.

6. Whilst it is not argued that there should be predetermined sanctions for particular breaches (as this would undermine the discretion which currently rests with the magistrate and lead to a perception that magistrates have predetermined views) it has been demonstrated that as long as there is uncertainty of outcome in relation to sanctions, there is the potential for significant stress to be added to participants who are already experiencing legal and other problems. They will therefore experience much less satisfaction on the order and this could lead to non-compliance on the IDRO.
7. There is no legislative formula by which periods spent on custodial sanctions are taken into account on final sentence so as to provide certainty to a participant as to how those periods will be treated at the termination of the order; and to ensure that they do not exceed the term of the initial sentence. Again, uncertainty as to outcome places participants under further strain.
8. The only orders/decisions from which participants have a right of appeal are those relating to initial and final sentences imposed by the magistrate and any excess of jurisdiction exercised by the court at either time. There is no right of appeal from the many decisions that can be made by the magistrate during the course of a participant's progress on the IDRO.
9. Participants are also required to adopt specific attitudes, values, and behaviours determined largely by the team and in relation to which their life experiences have ill-equipped them. In the mainstream criminal courts, a defendant's standard of behaviour is governed simply by the legality or illegality of their conduct and views of morality, trust and honesty are likewise restricted to those governed by legislation.

It has been recognised, therefore as crucial and "in the absence of clear results about effectiveness.... That principles of best practice are observed to ensure that offenders involved in drug courts are not disadvantaged; - 'good diversion practice will not compromise the rights the offender would enjoy during the normal course of the criminal justice process, in particular the rights to procedural fairness, the right to appeal and protection from self-incrimination.'"¹⁶

A defendant's legal protections in the normal course of the criminal justice process, together with "core judicial values- certainty, reliability, impartiality and fairness- have been safeguarded over many generations largely through a reliance on tradition and precedent."¹⁷ The evolving nature of the drug courts means that there is no such richness of history and experience upon which to draw. We must charge ourselves with the responsibility therefore to ensure that therapeutic considerations do not override long-standing freedoms and rights.

Suggestions

1. That s.25 of the Drug Rehabilitation (Court Diversion) Act 2000 be amended so as to provide that, in addition to the matters which a magistrate is currently required to have explained to the participant as set out therein, that the

magistrate also be required to have explained to the participant the modification of his/her legal rights as would otherwise apply in the mainstream criminal courts.

2. That the Drug Rehabilitation (Court Diversion) Act 2000 be amended so as to include a right of appeal by a participant in relation to any decision made by a magistrate in relation to which the standard of proof is the civil standard.
3. That the role of the legal representative be itself modified so that they remain forceful advocates on behalf of the participants at both pre and post-adjudication stages.
4. That policy dictate, and funding be provided to give effect to a consideration, that those persons directly involved in the case management/therapy of a participant be excluded from participating as a team member in team meetings prior to court reviews.
5. Alternatively, that there be legislative amendments to require that the test as to whether and if so, when information contrary to an offender's interest should be received be whether it has any probative value or reliability?
6. That the Drug Rehabilitation (Court Diversion) Act 2000 be amended to provide for the manner in which custodial sanctions will be taken into account at final sentence.
7. That the Drug Rehabilitation (Court Diversion) Act 2000 be amended to exclude from those breaches punishable by a custodial sanction the non-payment of a civil accommodation debt.

Competency/Understanding

Competency or capacity to consent, to be effective, must be given by one who "is capable of appreciating the nature, extent and probable consequences of the conduct consented to." ¹⁸ Participants in the drug court, even those not suffering from a mental health issue, commonly suffer from literacy, cognitive, emotional and social problems that inhibit their ability to competently process disclosed information about the drug court program.

In addition to that, there are the large number of participants who continue to use drugs or suffer the effects of withdrawal from drugs throughout the assessment process and indeed right up to the point of initial sentencing in the drug court.

Suggestions

1. That legislative amendments be made to alter the current drug court model so as to require that participants seeking entry to the drug court and requiring detoxification undergo some form of detoxification prior to commencement of the assessment process to enable as comprehensive and accurate assessment of the offender and the relevant issues as possible and to satisfy team members that their consent is given freely and fairly. To impose treatment regimes on participants without knowing the complexity of their problems is paternalism.

2. That the assessment process automatically include as part of the pre-sentence report a psychiatric or psychological assessment of the participant, with particular emphasis on the complexity of the participant's problems and their competency to consent?
3. That legislative amendments be made to the Drug Rehabilitation (Court Diversion) Act to extend the period of time over which the assessment of the offender would occur and the time within the pre-sentence report would be required to be provided to the court for sentencing.

Voluntariness/Decision-making

Many of the participants in the drug court have frequently voiced their view that the making of a choice between going to gaol and agreeing to participate in an IDRO is really no choice at all.

Undeniably, there is a degree of legal coercion experienced by participants when they are called upon to make the choice between imprisonment and rehabilitation/treatment by way of supervision under an IDRO.¹⁹

We would all accept that "the potential for successful treatment...increases when the individual accepts treatment voluntarily rather than through coercion."²⁰

It is important, therefore, that we find solutions which will minimize a participant's feelings that they are being pressured by others and will increase their feeling that they are participating in the program as the result of a clear and conscious choice.

Suggestions

1. That participants be encouraged to take ownership of, and responsibility for, the decision they have made in choosing to become a participant of the drug court.

Winick and Wexler argue that "Individuals opting for a rehabilitative program should be reminded that the choice is entirely up to them, and should be given the opportunity, when practicable, to participate in the negotiation of the behavioural contract and the selection of the reinforcers and sanctions that will be used and the conditions under which they will be applied"²¹ on the basis that "the process through which the behavioural contract is negotiated and entered into can itself provide an important opportunity for minimizing feelings of coercion that might undermine compliance and successful performance."²²

2. That participants be treated in a manner which they consider to be fair to them, even if adverse to them. This requires a clear observation and implementation of their procedural rights. Again, referring to Winick and Wexler,

“According individuals a full measure of procedural justice ... will diminish their perception of coercion in the judicial process, and increase the chances that they will experience the decision to enter into a treatment or rehabilitative program to have been voluntarily made. The resulting perception can itself help to increase the likelihood of genuine participation on the part of the individual, and can increase intrinsic motivation, program compliance, and treatment success.”²³

ENDNOTES

¹ Makkai & Veraar. Australian Institute of Criminology 2003.

² S 20 Drug Rehabilitation (Court Diversion) Act 2000.

³ Ss 6; 7; 7A; and 8 Drug Rehabilitation (Court Diversion) Act 2000 and ss.6; 7; 7A-7D Drug Rehabilitation (North Queensland Court Diversion Initiative) Amendment Act 2002.

⁴ S.6 (1) (b) Drug Rehabilitation (Court Diversion) Act 2000.

⁵ S.6 (1) © Drug Rehabilitation (Court Diversion) Act 2000.

⁶ s.19 (f) Drug Rehabilitation (Court Diversion) Act 2000.

⁷ S.21 Drug Rehabilitation (Court Diversion) Act 2000.

⁸ s.24 (3) Drug Rehabilitation (Court Diversion) Act 2000.

⁹This category includes the withdrawal of stated privileges, the imposition of a fine, an increase in drug testing, an increase in supervision by the court or someone else, a change in the nature and frequency of programs and/or treatment or an increase in community service hours – s.32 (1) (a) – (f) and (h) Drug Rehabilitation (Court Diversion) Act 2000.

¹⁰ s.32 (1) (g) Drug Rehabilitation (Court Diversion) Act 2000.

¹¹ s.26 (1) Drug Rehabilitation (Court Diversion) Act 2000.

¹² s.19 (i) Drug Rehabilitation (Court Diversion) Act 2000.

¹³ Wexler, David B and Winick Bruce J. Essays in Therapeutic Jurisprudence. Carolina Academic Press. Chapter 3- Competency to Consent to Treatment: The Distinction between Assent and Objection Bruce J. Winick. Page 42.

¹⁴ Ss. 19, 21, 31, 32 (1), s.34 (1) (e).35A (3) Drug Rehabilitation (Court Diversion) Act 2000.

¹⁵ Glaser, Bill “Therapeutic Jurisprudence: an Ethical Paradigm for Therapists in Sex Offender Treatment Programs, Western Criminology Review 4(2) 2003 page 143 at page 144.

¹⁶ David Indermaur and Lynne Roberts - “Drug Courts in Australia: The First Generation.” Current Issues for Criminal Justice Journal. Volume 15 No. 2. November 2003 p.136 at p.144.

¹⁷ Winick. Bruce J and Wexler, David.B “Judging in a Therapeutic Key-Therapeutic Jurisprudence and the Courts” Carolina Academic Press at page 81.

¹⁸ Wexler, David B and Winick Bruce J. Essays in Therapeutic Jurisprudence. Carolina Academic Press. Chapter 3- Competency to Consent to Treatment: The Distinction between Assent and Objection Bruce J. Winick at page 45.

¹⁹ Winick. Bruce J and Wexler, David.B “Judging in a Therapeutic Key-Therapeutic Jurisprudence and the Courts” Carolina Academic Press at page 108.

²⁰ Wexler, David B and Winick Bruce J. Essays in Therapeutic Jurisprudence. Carolina Academic Press. Chapter 3- Competency to Consent to Treatment: The Distinction between Assent and Objection Bruce J. Winick at page 73.

²¹ Winick. Bruce J and Wexler, David.B “Judging in a Therapeutic Key-Therapeutic Jurisprudence and the Courts” Carolina Academic Press at page 229.

²² Winick, Bruce J and Wexler, David.B “Judging in a Therapeutic Key-Therapeutic Jurisprudence and the Courts” Carolina Academic Press at page 228.

²³ Winick, Bruce J and Wexler, David.B “Judging in a Therapeutic Key-Therapeutic Jurisprudence and the Courts” Carolina Academic Press at page 129.

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