

# **Constitutional and Other Legal Issues in Drug Treatment Courts**

Oklahoma Statewide Drug Court Conference  
Norman, OK  
September 27-28, 2012  
Valerie Raine, Esq.  
Center for Court Innovation

---

# Eligibility and Equal Protection

---

*14th Amendment –*

*Persons similarly situated will receive like treatment*

- ▶ Strict Scrutiny? – infringes on a fundamental right or categorizes on the basis of race or national origin or suspect class
- ▶ Intermediate Level? – liberty right or semi-suspect class
- ▶ Rational Relationship to a Legitimate Government Purpose?

# Jurisdiction's decision not to develop a drug court is rationally related to a legitimate government purpose

- ▶ Lomont v. State, 852 N.E. 2d 1002 (Ind. App. 2006)- *Indiana did not require all counties to have drug diversion programs*
- ▶ State v. Harner, 103 P. 3d 738 (Wash. 2005) - *drug court available in adjacent county but not where D is arrested*
- ▶ State v. Little, 66 P.3d 1099 (Wash. App. 2003) – *counties can decide how to implement scarce resources*
- ▶ People v. Forkey, 72 A.D.3d 1209 (N.Y.App. Div. 2010) - *no hearing required before being rejected for drug court*

# Refusal to offer drug court to all defendants does not constitute denial of equal protection because there exists no right to enter drug court

---

- ▶ **Jim v. State**, 911 So. 2d 658 (Miss. App. 2005) – *Denial of Motion to transfer case to drug court on first day of trial falls within judge's discretion and statute specifically stated no right to participate in drug court*

# Eligibility

---

## Permissible criteria

- ▶ Severity and type of offense
- ▶ Immigrant status
- ▶ Individuals on methadone maintenance
- ▶ Individuals using medical marijuana

# Conditions of Drug Court Contract

---

## 4th Amendment

Waiver of Probable Cause for Search of Person  
and Property

# Equal Protection (cont.)

▶ ***Evans v. State*, 667 S.E.2d 183 (Ga. Ct. App. 2008)**

D was HIV positive – claimed violation of EP and ADA re: rejection from drug court. Rejection based on onerous medical requirements and ADA not implicated because D could not demonstrate that his disabilities affected major life activities.

But note possible ADA implications – Reasonable modifications vs. fundamental alteration of procedures or undue financial hardship

# Drug Court Participant on Probation or Post-Plea Model

---

- ▶ ***Griffin v. Wisconsin***, 483 U.S. 868 9 (1987), Generally permitted but may need reasonable suspicion
- ▶ ***Samson v. Calif.***, 126 S. Ct. 2193 (2006) Permitted search of parolee based solely on execution of waiver – officer did not suspect criminal activity but relied on provision of CA law authorizing suspicion less searches
- ▶ Cannot use waiver to harass

# Scope of 4th Amendment Waiver

---

- ▶ Co-inhabitant may be able to withhold consent to search of common living areas

***Georgia v. Randolph, 547 U.S. 103 (2006)***

# Drug Court Participant in Diversion Program

---

- ▶ Search based solely on waiver for offenders before conviction is probably unconstitutional

***Terry v. Superior Court***, 73 Cal. App. 4th 661 (Cal. App. 1999)

***U.S. v. Scott***, 450 F3d 863 (9th Cir. 2006)

# Conditions of Drug Court (cont')

---

## 1st Amendment

Area & Association Restrictions

# Area Restrictions

---

## Factors

- ▶ Compelling Need to Go to Location
- ▶ Mechanism for Supervised Entry
- ▶ Size of the Area
- ▶ Relationship to Rehabilitation of Offender

# Area Restrictions

---

## Permissible

- ▶ ***Oyoghok v. Municipality of Anchorage***, 641 P.2d 1267 (Alaska 1982) - *Two block radius*
- ▶ ***Johnson v. State***, 547 So.2d 1048 (Fla. App. 1989) – *Near high drug areas*
- ▶ ***State v. Morgan***, 389 So. 2d 364 (La. 1980) - *Stay out of French Quarter*

# Area Restrictions, cont.'d

---

## Not Permissible

- ▶ ***State v. Wright***, 739 N.E.2d 1172 (Ohio App. 2000) - *Any place where alcohol is sold, served, consumed*

# Association Restrictions

---

Reasonably Related to the Purposes of Probation, the Prevention of Crime, and Protection of the Public

- ▶ ***Andrews v. State***, 623 S.E.2d 247 (Ga. App. 2005) *Drug users and dealers*
- ▶ ***People v. Tungers***, 127 Cal. App. 2005) - *Wife*
- ▶ ***People v. Forsythe***, 43 P.3d 652 (Colo.App. Ct. 2001) – *could only have supervised contact with children*

# Association Restrictions, cont.'d

---

## Other permissible restrictions

- ▶ Motorcycle clubs
- ▶ Any Irish organization
- ▶ Specific gang members
- ▶ Person with criminal records, if individual *knows* of records

# Association Restrictions, cont.'d

---

- ▶ But, Too Broad – ***Dawson v. State***, 894 P.2d 672 (Alaska App. 1995) - Any unsupervised contact with drug using wife

# Establishment Clause

1st Amendment – Establishment Clause and Treatment

---

- ▶ Establishment Clause of the 1st Amendment Prohibits Mandating Participants to Attend AA or NA Meetings

# Establishment Clause, cont.'d

- ▶ Court or treatment provider can make AA and NA available so long as participation is not mandatory and other options are available
- ***Kerr v. Farrey***, 95 F.3d 472 (7th Cir. 1996) - prisoner can't be mandated to treatment w/explicit religious content
- ***Griffin v. Coughlin***, 88 N.Y.2d 674 (1996) - couldn't condition prisoner's visits with wife on AA/NA – must offer alternative program
- ***Destefano v. Emergency Housing Group, Inc.***, 247F.3d397 (2d Cir. 2001)
- ▶ State tax revenues can go to private treatment provider so long as staff don't inculcate patients with AA doctrine

# Establishment Clause, cont.'d

---

- ▶ ***Inouye v. Kemma*, 504 F.3d 705 (9th Cir. 2007)** - parole officer lost immunity because he forced AA on a Buddhist
- ▶ ***Hanas v. Inner City Christian Outreach*, 542 F. Supp.2d 683 (E.D. Mich. 2008)** - program liable for prohibiting patient from practicing Catholicism

# Drug Testing and Due Process

---

To satisfy due process concerns, drug tests should be scientifically reliable

- ▶ ***Daubert v. Merrell Dow Pharmaceuticals***, 509 U.S. 579 (1993)
- ▶ ***Frye v. United States***, 293 F.3d 1013 (1923)

# Types of Drug Tests

- ▶ Urine – Instrumented vs. non-instrumented tests Non-instrumented – cups or dip sticks are screens; GC/MS testing should be used to confirm in cases of denial by participant
- ▶ Sweat Patch – usually attached for one week – subject to environmental contamination
- ▶ Hair – environmental contamination
- ▶ EtG (Ethyl Glucuronide) – metabolite of alcohol found in urine – high risk of incidental exposure

Samhsa advisory about risks of relying solely on EtG results:

<http://etg.weebly.com/uploads/7/4/7/5/74751/etg.samhsa.advisory.pdf>

# Reliability of Drug Tests

- ▶ **EMIT** – Found to be reliable  
*Matter of Lahey v. Kelly*, 518 N.E.2d 924 (N.Y. 1987);  
*Spence v. Furrier*, 807 F.2d 753 (8th Cir. 1986);  
*Jones v. State*, 548 A.2d 35 (D.C. 1998)
- ▶ **Sweat Patch** – Generally found reliable but concerns with environmental contamination  
*U.S. v. Alfonzo*, 284 F.Supp.2d 193 (Mass. 2003)
- ▶ **Hair** – High risk of environmental contamination  
*Wykoff v. Resig*, 613 F. Supp. 1504 (N.D. Ind. 1985);  
*Thomas v. McBride*, 3 F.Supp. 989 (N.D. Ind. 1998)

# Alcohol and Drug Testing Con't

- ▶ Certificates of analysis qualify as testimony – and analysts as witnesses - under the Confrontation Clause of the 6<sup>th</sup> amendment.

*Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009)

- ▶ Because blood-alcohol analysis reports are testimonial, defendants have the right to confront the analyst who certified their sample at trial, unless the analyst is unavailable and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

*Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011).

# Sanctions and Due Process

---

## Factors

- ▶ Pre-plea vs. Post-plea Model
- ▶ Contested vs. Non-Contested Factual Basis
- ▶ Due Process Rights of Parolee or Prison Inmate

# Right to Hearing

---

## Sanctions

- ▶ Participant can prospectively waive right to a hearing on a sanction in drug court contract

***State v. Rogers***, 144 Idaho 738; 170 P.3d 881 (2007) -

Contract rules govern when sanctions are imposed  
(different result with termination)

# Termination from Drug Court and Due Process

---

- ▶ States vary on what process is due
- ▶ Many states analogize drug court participant status to that of a probation violator (assuming participant has entered a plea)
- ▶ If program follows pre-plea diversion model, more due process!

# Termination, cont.'d

## Probation Revocation Hearing Analysis

- ▶ Written Notice
- ▶ Disclosure of Evidence
- ▶ Opportunity to be Present and Testify
- ▶ Right to Confront and Cross-Examine Witnesses
- ▶ Neutral Magistrate
- ▶ Written Findings of Evidence and Decision

***Gagnon v. Scarpelli, U.S. 778 (1973)***

# Termination, cont.'d

Hearing required

- ▶ ***People v. Anderson***, 833 N.E.2d 390 (Ill. App. Ct. 2005) – Drug court termination requires hearing
- ▶ ***State v. Perkins***, 661 S.E.2d 366 (S.C. App. 2008) – Drug court termination required notice and hearing
- ▶ ***State v. Rogers***, 144 Idaho 738; 170 P.3d 881 (2007) – Idaho Supreme Court required same rights as those accorded a probationer facing revocation.

# Termination, cont.'d

- ▶ ***Nebraska v. Shambley*, 795 N.W.2d 884 (Sup. Ct. Neb. 2011)**

Documents containing only hearsay cannot constitute sole basis for termination from drug courts – drug court participant accorded probation/parole violation hearing rights – preponderance of the evidence standard.

- ▶ ***Gosha v. State*, 931 N.E.2d 432 (Ind. Ct. App. 2010) and *Harris v. Commonwealth*, 689 S.E. 2d 713 (Va. 2010) –**  
Drug court participants are entitled to hearings because drug court affects liberty interest.

# But Not Always!!

## New York Standard

---

- ▶ Evidentiary hearing not required
- ▶ Preponderance of evidence not required
- ▶ Court must conduct sufficient inquiry to satisfy itself that there was a legitimate basis for program decision
- ▶ Court must put findings on the record

*People v. Fiammegta, 14 N.Y.3d 90; 923 N.E.2d 1123 (2010)*

# Waiver of Hearing Rights

---

- ▶ ***State v. Rogers***, 144 Idaho 738, (Idaho 2007) – Footnote suggests the rights can be waived but no indication of waiver – leaves open question of when can they be waived
- ▶ ***Staley v. State***, 851 So.2d 805 (Fla. App. 2003) Defendant could not prospectively waive his right to contest future allegations of violations
- State v. LaPlaca*** – Cannot waive right to a hearing prior to that right being implicated

# Scope of Waiver of Right to Appeal

- ▶ Defendant's general waiver of right to appeal did not foreclose review of his contention that he was denied his right to due process

***People v. Kitchens***, 46 A.D.3d 577 (2d Dept.) (2007)

- ▶ Waiver of right to appeal encompassed original sentence of probation, not the sentence following defendant's violation of probation

***People v. Dexter***, 71 A.D.3d 1504 (4<sup>th</sup> Dept.) (2010)

# Judicial Impartiality and Due Process

---

## Termination Hearings

- ▶ Neither Actual nor Apparent Bias
- ▶ Standard – Objective
- ▶ Recusal – Preferred Option where Factual Basis Contested

# Recusal at Termination Hearings

---

*Alexander v. State, 48 P3d 110 (Okla. 2002)*

Oklahoma Supreme Court does not require recusal but saw potential for bias when Drug Court judge presides over termination proceeding – in future cases, judge should recuse if drug court participant makes a motion claiming potential bias

# Double Jeopardy

---

▶ ***Dimeglio v. State, Court of Special Appeals of Maryland (2011)***

Multiple punishments – admissions by drug court participant to new crime in front of drug court judge who then sanctions with jail does not constitute double jeopardy

# Brown v. State of Maryland

---

## Challenge to Maryland's problem-solving courts

- ▶ Question of fundamental jurisdiction
- ▶ Sanctions and double jeopardy

*406 Md. 579, 961 A.2d 553, (2008)*