

LEGAL ISSUES IN TRIBAL HEALING TO WELLNESS COURTS

**Common Challenges for Drug
Courts and Unique Challenges
for Healing to Wellness Courts**



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CHALLENGES: TRIBAL COURT JURISDICTION



JURISDICTIONAL ISSUES

- Participant Eligibility:
Before screening and
assessment
- Can the court exercise
jurisdiction over this
individual?



TRIBAL COURT JURISDICTIONAL FACTORS

- Indian Civil Rights Act
- Tribal Constitution
- Tribal Code and Tribal Policy
- Type of Case: Civil, Family, Juvenile or Criminal
- Ethnicity of participant
- Defendant's history: violent offender issues



INDIAN CIVIL RIGHTS ACT

- 25 USC § 1302
 - Double jeopardy prohibited
 - Prohibition against self-incrimination
 - Speedy trial
 - Sentencing limitations
 - TLOA issues:
 - Required defense counsel – licensure requirements
 - Judges – training requirements
 - VAWA issues



TLOA & VAWA LIMITATIONS

TLOA

- Particular Offenses
 - Previous conviction of same/comparable offense
 - Being prosecuted for a “felony”

VAWA

- Particular Offenses
 - Prosecuted for
 - Domestic Violence
 - Dating Violence
 - Protective Order
- Defendants
 - Sufficient ties to community
 - Residence
 - Employment
 - Relationship w/ member or resident



DUE PROCESS REQUIREMENTS OF BOTH TLOA AND VAWA*

- Effective assistance of counsel
 - Licensed
 - Licensing standards
- Judges
 - Sufficient legal training if seeking enhanced sentencing or non-Indian defendant
 - Licensed
- Law, Rules of Evidence and Procedure available to public
- Record of the proceeding
- *Due process protections required under VAWA **IF** imprisonment may be imposed



MORE ON DUE PROCESS – TLOA ONLY

- Defendants sentenced to more than 1 year in a tribal facility – facility must meet BIA jail standards for long term incarceration



STILL MORE VAWA ONLY

- Right to trial by impartial jury
- Jury pool must reflect a cross section of the community
- Jury source does not systematically exclude any distinctive group (including non-Indians)
- Timely notified of rights & responsibilities
 - Petition of *Habeas Corpus* in District Court
- Rights under US Constitution
- Rights under DV special jurisdiction provided





LOST

CONFUSED

UNSURE

UNCLEAR

PERPLEXED

DISORIENTED

BEWILDERED

TRIBAL CONSTITUTIONS



JUDICIAL AUTHORITY

- Separation of Powers/Independent Judiciary
- Specific Requirements
- Legislatively “granted” authority
- Inconsistent with ICRA
 - Sentencing authority
- Inconsistent with TLOA
 - Requirements to be a judge



TRIBAL DOCUMENTS

Tribal Codes

- Legislative Authorization or Restriction
 - Subject matter
 - Personal jurisdiction
 - Statute of Limitations
- Sentencing Limitations

Policy and Procedure

- Rules of Procedure
- Evidentiary Rules
- Operational Procedures
 - Court
 - Tribal Personnel



TYPE OF CASE

- Jurisdictional reach
- Incarceration as a sanction
- Length of time to get case through system
- Defendant/Participant Rights



DEFENDANT ETHNICITY

- Originally criminal jurisdiction limited to Indian
 - Is Defendant an “Indian”
 - Element of jurisdiction
 - Indian but not enough to be enrolled anywhere
- VAWA
 - Potentially opens the door for non-Indian participants if jurisdiction complies with requirements
- Civil Jurisdiction – family and/or juvenile cases
 - Flexibility but no certainty for non-Indian



DEFENDANT'S HISTORY

- Violent Offender
- Confusing definition
- Grant funding restrictions



COMMON CHALLENGES: MANY JURISDICTIONS



COMMON CHALLENGES: EQUAL PROTECTION AND DUE PROCESS ISSUES

○ Arguments:

- It is a denial of equal protection if a defendant would have been eligible for drug court in another jurisdiction but is denied participation because the local jurisdiction doesn't offer drug court.
- Rejection from drug court participation violates due process

○ Held:

- No drug court in specific local is not a denial of equal protection
- Drug court is a privilege and not a right thus rejection from admission is not a violation of due process



COMMON CHALLENGES: DOUBLE JEOPARDY

- Argument: Conduct resulting in sanctions cannot also be used for termination and/or later sentencing considerations
- Held:
 - Decisions upheld on various grounds
 - Agreement to attend drug court not a sentence – double jeopardy does not apply
 - “Double jeopardy analysis lies in the expectation of finality that a defendant vests in his sentence”
 - New Jersey v. Delcristo (2011)



COMMON CHALLENGES: “TIME SERVED”

- Argument: Time served as a sanctions should be credited toward unimposed jail sentence in underlying criminal matter.
- Held: Mixed - No consensus
 - Denial – Waived credit when signed participation agreement
 - Credit for time served waiting to be admitted and/or following termination but denied credit for time served as participant
 - Credit granted
 - Drug court as part of probation sentence – no credit but drug court as community corrections sentence - credit



COMMON CHALLENGES: TERMINATION

○ Three Emerging Issues

- Adequacy of record of drug court hearings
- Drug court failure/termination as aggravating factor to support enhanced sentence
- Does program termination require a different hearing apart from probation termination



TERMINATION ISSUES: ADEQUACY OF THE RECORD

- Cases being remanded to the trial court
- Create a record
- Need for sound record to provide information on appeal
- What does this mean for you?
 - Create a record
 - Findings and Conclusions



TERMINATION ISSUES: FAILURE AS AGGRAVATING FACTOR

- Challenges of sentences at upper limits imposed on terminated participants
- Sentences usually upheld – not an abuse of discretion if less severe terms were not documented in the plea agreement
- What does this mean for you?
 - Contents of the plea agreement sentencing scheme may be binding



TERMINATION ISSUES: HEARING REQUIRED

- Jurisdictions split but emerging trend is to require a hearing
- What does this mean for you?
 - Court should consider reasons termination is recommended and other issues/recommended services
 - Basing termination solely on recommendation of treatment provider may be relinquishment of judicial authority to someone other than the judge



TERMINATION ISSUES: PROCESS QUESTIONS

- Applicable procedures
- Standard of proof
- Is the participant entitled to the same due process protections as a probation violation?
- Can the plea bargain include a waiver?



COMMON ISSUES: RECUSAL OF JUDGE

- Drug Court Judge recusal from sentencing a participant terminated participant
- Jurisdictions split
- What does this mean for you?
 - You may not have another judge
 - May result in *habeas corpus* petition to District Court



COMMON ISSUES: USE OF INFORMATION REVEALED IN DRUG COURT

- Held: In most instances use of the information was allowed because information was not precluded by federal confidentiality requirements



COMMON ISSUES: STAFFING AN *EX PARTE* COMMUNICATION?



EX PARTE COMMUNICATION

- Direct or indirect communication on the substance of a pending case without the knowledge, presence, or consent of all parties involved in the matter.

<http://definitions.uslegal.com/e/ex-parte/>



STAFFING AN EX PARTE COMMUNICATION?

- Does participant have knowledge?
- Does participant consent?
- Is presence required?
 - Participant
 - Defense counsel
 - Defense counsel generally as Team member
 - Participants individual defense counsel



OTHER JURISDICTIONS

- California – specific waiver
- Alaska – ok if authorized by law (includes therapeutic treatment courts)
- Idaho – Judge can communicate on substantive issues if:
 - party had notice and
 - failed to appear



MORE FROM OTHER JURISDICTIONS

- Maryland – when serving on a problem solving court and within established program operational protocols if the participant consented to the protocols.



ABA MODEL CODE

- Rule 2.9(A)(5): “A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.”
- Comment (4): “A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers and others.”



TRIBAL CODE OF JUDICIAL CONDUCT

- Canon 3(B)(7)(e): “a judge may initiate or consider any ex parte communication when expressly authorized by law to do so.”
- Sample Tribal Code of Judicial Conduct - National Tribal Judicial Center at the National Judicial College



TRIBAL COURT DECISIONS



POLICIES AND PROCEDURES

- Violation of civil rights to impose sanction in violation of your policies and procedures
- Violation of ICRA if you fail to provide notice of intent to revoke
- Policies and procedures not approved by Tribal Council are not valid*
 - *may be a requirement of the Tribal Code or Constitution
- What does this mean for you?
 - If you have policies/procedures ... follow them!
 - If Tribal Council approval is needed ... secure it!



ORDERING PARTICIPATION

- Motion for reconsideration of participant placement in juvenile drug court
- Held: drug court is a blending of traditional, treatment oriented jurisprudence



AUTHORITY TO DISMISS CRIMINAL CASE

- Held: Court has authority to dismiss underlying criminal case upon showing of compliance with peacemaking agreement



EMERGING/ON-GOING ISSUES



SOCIAL MEDIA

- Participant's availability or use of social media
- Admissibility issues
- Reliability issues
- Authentication issues
- Messages should be authenticated on a case-by-case basis
 - State v. Fleck, 23 A.3d 818 (Conn. App. Ct. 2011)



REVISITING THE EX PARTE ISSUE: A NEW ARGUMENT

- Washington v. Sykes
- Issue: Are staffings proceedings that must be “open” to the public as required by the state constitution?



FACTS

- Defendant charged with drug related offenses & opted into drug court
- Waiver as prerequisite and gave up right to jury trial
- Defendant non-compliant
- Defendant terminated
- Motion to rescind and vacate drug court waivers and agreements
- “staffings violated the open court requirement of state constitution”
- State agreed
- Issue: what happens to defendant



ARGUMENTS

- Openness – necessity – deters misconduct, tempers bias and impartiality
- Presumption of openness in all proceedings that can only be overcome by findings that closure is essential to preserve higher values and narrowly tailored
- Staffing – “the integral part”
- Invisible tail wagging the dog
- HIPPA does not apply to Drug Court



AMICUS BRIEF

- Washington State Association of Drug Court Professionals
- Decision has serious implications for future of therapeutic and specialty courts
- Staffing discussions do not involve an actual decision by the court
- Participants knowingly waive their rights to a public trial



- Staffing – critical therapeutic component – issues discussed by counsel involved, judge and therapeutic staff
- Consensus about best therapy for participant
- No decisions made until more formal court proceeding
- Effectiveness of Drug Court will change if staffings are open to the public
- Willingness to share critical and sensitive information “chilled”
- Illogical – settlement discussions, appellate conferences are closed



RESULT



- Amicus brief filed April 21, 2014
- Decision has implications for future of Drug Courts
- Expect similar challenges in other jurisdictions
- Revised procedures may be necessary
- Scheduled for oral argument in May but rescheduled



FOR MORE INFORMATION

- Tribal Law and Policy Institute
- Excerpts from Selection Opinions of Federal, State and Tribal Courts Relevant to Drug Court Programs, Volume II: Decision Summaries by Issue and Jurisdiction, BJA Drug Court Clearinghouse and Technical Assistance Project, American University, January 2014
- Washington State Supreme Court





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TRIBAL LAW AND POLICY INSTITUTE RESOURCES

- www.WellnessCourts.org
- Tribal Healing to Wellness Court Publication Series
 - Tribal 10 Key Components
 - Preliminary Overview
 - Judicial Bench Book
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