

Doing the Due:

Constitutional Issues in Drug Courts



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**Judge William G. Meyer (ret.)
Sr. Fellow Nat. Drug Ct. Institute
Judicial Arbiter Group, Inc.
1601 Blake Street, Suite 400
Denver, Colorado 80202**

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Adult Rights=Juvenile Rights

- *Juvenile proceedings must be in conformity with the essentials of due process and fair treatment as guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. In re Gault, [387 U.S. 1](#), 30, 87 S.Ct. 1428, 1445 (1967); (1977). "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).*
- *State v. Doe, 136 Idaho 427, 34 P.3d 1110 (Ct. App. 2001)*

Give me the info, please!

- bmeyer@jaginc.com

FIRST AMENDMENT

- Working the twelve steps requires:
 - **Confess to God “the nature of our wrongs” (Step 5);**
 - **Appeal to God to “remove our short comings” (Step 7);**
 - **By “prayer and meditation” to make “contact” with God to achieve the “knowledge of his will” (Step 11).**

FIRST AMENDMENT

- “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .” U.S. Constitution Amendment I applied to the states by the XIV Amendment of the U.S. Constitution. See also *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

FIRST AMENDMENT

- *Kerr v. Ferry*, 95 F.3d 472, 479-80 (7th Cir. 1996) (prison violated Establishment Clause by requiring attendance at Narcotics Anonymous meetings which used “God” in its treatment approach);
- *Griffin v. Coughlin*, 88 N.Y. 2d 674 (1996) cert. denied 519 U.S. 1054 (1997) (conditioning desirable privilege – family visitation – on prisoner’s participation in program that incorporated Alcoholics Anonymous doctrine was unconstitutional as violation of the Establishment Clause);
- *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 9-7-2007, amended on 10/3/07) (Parole officer lost qualified immunity by forcing AA on Buddhist).
- *Hanas v. Inner City Christian Outreach*, 542 F. Supp. 2d 683 (E.D. Mich. 2008) (Drug Court program manager and drug court consultant held liable for actions related to referral to faith based program, where they knew of participant’s objections while in the program and when the program denied the participant the opportunity to practice his chosen faith –Catholicism)

Not all is lost

- *O'Conner v. California*, 855 F. Supp. 303, 308 (C. D. Calif.) (no Establishment Clause violation where DUI probationer had choice over program, including self-help programs that are not premised or monotheistic deity)
- *In Re Restraint of Garcia*, 24 P.3d 1091 (Wash. App. 2001) (same)
- *Americans United v. Prison Fellowship*, ___ F.3d ___ (8th Cir. 12/3/07) (state supported non-coercive, non-rewarding faith based program unconstitutional First Amend. establishment clause violation, where alternative not available)
- LifeRing Recovery <http://www.unhooked.com>
- Rational Recovery <http://www.rational.org>
- Secular Organizations for Sobriety (SOS) <http://www.secularhumanism.org/sos>

First Amendment and Area Restrictions

Reasonable when narrowly drawn:

- 1) Whether the defendant has a compelling need to go through/to the area;
- 2) A mechanism for supervised entry into the area;
- 3) The geographic size of the area restricted, and
- 4) The relatedness between the restriction and the rehabilitation needs of the offender.

See People v. Rizzo, 362 Ill. App. 3d 444 (2005).

What information do you need to know for an area restriction?

- A. Where the defendant lives
- B. Where the defendant goes to school/works
- C. Where relatives live
- D. Drug Source area
- E. All the above

open poll, please

Association Restrictions

- Watch who you hang out with
- Not necessarily know that they are druggies or felons, look at what associates are doing and where they are

Jones v. State, 41 P.3d 1247 (Wyo. 2001) (persons of disreputable character); *State v. Hearn*, 128 P.3d 139, 139 (Wash. Ct. App. 2006) (prohibition against associating with drug users or dealers constitutional); *Birzon v. King*, 469 F.2d 1241, 1242 (2nd. Cir. 1972); *Commonwealth v. LaPointe*, 759 N.E.2d 294 (Mass. 2001).

FOURTH AMENDMENT AND RELATED ISSUES

Probation and parolees---Not probable cause
but reasonable suspicion

- Why?
- Reduced expectation of privacy and special
need to control recidivism

Griffin v. Wisconsin, 483 U.S. 868 (1987); *U.S. v. Knights*, 534 U.S. 112
(2001).

Sampson v. California,
___ U.S. ___, 126 S.Ct. 2193 (6/19/06)

- In parole case, mandatory search waiver constitutional and totally suspicionless search is upheld.
- Like *Knights*, but goes further because does not make a finding of reasonableness, but notes cannot be harassment

Search waivers in non-convicted cases

- Compare *State v. Ullring*, 741 A.2d 1065 (Me. 1999) (search waiver as condition of bond constitutional); and *In Re York*, 9 Cal. 4th 1133 (Calif. 1995) (same) **with**
- *Terry v. Superior Court*, 73 Cal. App. 4th 661 (Cal. App. 1999) (4th Amendment waiver improper condition in diversion case, without statutory authority) and *U.S. v. Scott*, 450 F.3d 863 (9th Cir. 2006) (search waiver probably improper when person on bond).

Due Process

- Procedural protections are due under the due process clause when the defendant will **potentially suffer** a loss to a **recognized liberty or property right** under the 14th Amendment.
- If due process applies, the question remains what process is due.

Fuentes v. Shevin, 407 U.S. 67 (1972).

Morrissey v. Brewer, 408 U.S. 471 (1972).

Due Process-Probation Revocation

What is required?

- P/C determination
- Written Notice
- Right to Appear
- Cross-Exam and call witnesses
- Independent magistrate
- Written findings-reasons

Gagnon v. Scarpelli, 411 U.S. 778, 781-782
(1973). (probation)

Due Process

- What about right to counsel?

Due Process

- Revocation=Termination
- *People v. Anderson*, 833 N.E.2d 390 (Ill. App. 2005); *State v. Cassill-Skilton*, 122 Wash. App. 652 (Wash. App. 2004); *Hagar v. State*, 990 P.2d 894 (Ok. 1999). *In Re Miguel*, 63 P.3d 1065, 1074 (Ariz. App. 2003) (juvenile).

**But see *STATE v. ROGERS*, 31264
(Idaho Ct. App. 8/22/2006)**

Due process concerns are therefore sufficiently allayed through the contract-based means commonly used to remedy breaches of agreements between the State and a defendant. By this opinion we do not wish to dissuade a judge from following termination procedures in drug court akin to those employed in a probation revocation process. To the contrary, in order to eliminate uncertainty and the appearance of unfairness, we encourage courts to do so. What is recommended is not, however, the equivalent of what is required.

Rogers Reversed

State v. Rogers, 170 P. 3d 881 (Idaho 2007)

- **As of January 2006, Idaho had forty-four drug courts in operation spread out over approximately twenty-three counties and at differing levels of the judicial system within some counties. From the above discussion, it must be assumed that each drug court in Idaho operates uniquely and, therefore, the analysis in this case might not be applicable to any other particular drug court program in the state.**
- **Not even mention the contract analysis**
- **Key was diversionary program where guilty plea entered**

Due Process

- *Batista v. State*, 951 So.3d 1008 (Fla. 4th Cir. 3/21/07)

Pre-plea/diversion/ deferred prosecution termination—no right to a hearing—statutory program and contract not provide for a hearing. In conflict with *State v. Gorayeb*, 510 So. 2d 1168 (Fla 3rd Cir. 1987)

Termination and Hearing

- People v. Kimmel, 882 N.Y.S.2d 895, 895 (2009) (not selected for official publication)

Contract in MH Court/Drug Court no hearing but right to make unsworn statement and have counsel argue

Defendant failed to appear for 8.5 months

Relying on Torres v. Barbary, 340 F. 3d 63 (2nd Cir. 2003)

New Cases

- **HARRIS v. COMMONWEALTH**, 279 Va. 541 (2010)

Consequently, because Harris had no opportunity to participate in the termination decision, when deciding whether to revoke Harris' liberty and impose the terms of the plea agreement deprived Harris of the opportunity to be heard regarding the propriety of the revocation of his liberty interest.

- **GOSHA v. STATE, Gosha v. State**, 927 N.E.2d 942 (Ind. Ct. App. 2010)

In termination from drug court, due process rights include:

written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing body

- **HUNT v. COMMONWEALTH**, 326 S.W.3d 437 (Ky. 2010) summary probation revocation proceeding when defendant sentenced to probation with drug court as a condition of probation, where no evidence presented, but simple conclusory statements made and counsel appointed immediately prior to hearing violated due process)

In your program do you use confirmation test, if
defendant denies use?

A. Yes

B. No

open poll, please

Drug testing and Due Process

- Urine

instrumented

immunoassay

thin layer chromatography

GC/MS

non-instrumented

cups

sticks

Drug testing and Due Process

- Hair
- Patch
- SCRAM
- People v. Dorcent, 29 Misc.3d 1165, 909 N.Y.S.2d 618 (2010)
(SCRAM meets FRYE standards of reliability)
- Saliva

Due Process & Judicial Impartiality

- Test:

U.S. v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002) (would the facts, as asserted, lead an objective reasonable observer to question the judge's impartiality)

Alexander v. State, 48 P. 3d 110 (Okla. 2002)

- Requiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant's program.
- Therefore, in the future, if an application to terminate a Drug Court participant is filed, and the defendant objects to the Drug Court team judge hearing the matter by filing a Motion to Recuse, the defendant's application for recusal should be granted

New Cases

- *STATE v. BELYEA, 2009-038 (N.H. 5-20-2010)* Defendant failed to show that a reasonable person would entertain significant concern about whether Judge Vaughan prejudged the facts or abandoned or compromised his impartiality in his judicial role on the drug court team. Also, Court did not have extrajudicial facts.
- *Mary E. FORD v. Kentucky, and William E. Flener, v. Kentucky (Ky. Appellate April 30, 2010)*

Having same judge preside over drug court and revocation hearing is not a denial of right to impartial hearing/due process

*STATE v. STEWART, W2009-00980-CCA-R3-CD **** (Tenn. Crim. App. 8-18-2010)(not selected for publication) (drug court judge should not be judicial officer who determines revocation when judge previously observed violations, acted as team member, engaged in the drug court “therapeutic process” received ex parte communications in staffing because to do so would violate due process)

Due Process and Sanctions

- **Hearing vs. non hearing**
- Will defendant **potentially suffer** a loss to a **recognized liberty or property right** under the 14th Amendment.

Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) overruled on other grounds *Sandlin v. Conner*, 515 U.S. 472 (1995) *In Re Miguel*, 63 P.3d 1065, 1074 (Ariz. App. 2003). (juvenile entitled to hearing).

STATE v. STEWART, (Tenn. Crim. App. 8-18-2010) (NSOP)

- Having reviewed the record, we are additionally troubled by the four or five occasions where the defendant in this case was "sanctioned" to significant jail time by the drug court team during the two years he participated in the program.
- Regardless, the net effect of these sanctions appears to be that approximately a half-year has been tacked onto the overall defendant's sentence. In other words, as things stand now, the defendant is appreciably worse off from a punitive perspective than if he had chosen not to participate in the drug court program at all and had simply elected to serve his suspended sentence in full from the outset
- Leaving aside (as we must) the obvious due process concerns attendant to any additional deprivation of the defendant's liberty that has been imposed through a collaborative, non-adversarial, and at times *ex parte* process rather than through a traditional adversarial evidentiary hearing, there is considerable tension between this outcome and the general guidelines under which drug courts should operate. The drug court program explicitly recognizes that alcohol and drug addiction "is a chronic, relapsing condition," that "many participants [will] exhibit a pattern of positive urine tests," and expressly contemplates that many participants will experience periods of relapse "[e]ven after a period of sustained abstinence."

STATE v. STEWART, (Tenn. Crim. App. 8-18-2010) (NSOP)

- The record below does not reveal to us whether the drug court in this case tried some of the more measured sanctions provided for in the guidelines — *viz.*, admonishment from the bench, program demotion, increased testing and court appearances, courtroom confinement, increased monitoring, fines, and community service — without success prior to incarcerating the defendant for significant periods. *See id.* Even assuming it did so, however, the approximately six months, in all, imposed in this case would appear to be in plain tension with the idea that drug courts should adopt a therapeutic, collaborative, and measured response to a participant's noncompliant behavior. In the future, we trust that judges will do their best to ease this tension by ensuring that the drug court program focuses on drug addiction therapy and treatment, and recognizing that, for good reason, punishment with substantial periods of incarceration is bailiwick of the traditional criminal justice system. When necessary, truly recalcitrant participants may be swiftly returned to the traditional system via the drug court expulsion process.

State v. Rogers, 170 P. 3d 881 (Idaho
10/22/07)

- We understand that similar to the ACDCP, many diversionary programs are informal in nature, and we do not want to unnecessarily impede the functioning of diversionary programs. The principles articulated in this opinion apply only when a participant in a diversionary program is facing termination from the program because that is when the participant faces a loss of liberty. **Intermediate sanctions imposed in these programs do not implicate the same due process concerns, and continued use of informal hearings and sanctions need not meet the procedural requirements articulated here.**

NICELY v. COMMONWEALTH,

2007-CA-002109-MR (Ky. App. 4-24-2009)

- Under these circumstances, if a *sentencing court chooses to find a defendant in contempt for violating conditions of probation as opposed to revoking or modifying the conditions of probation, the defendant must be afforded certain due process rights, including a hearing.* *Pace, supra* at 395. There is no evidence from the record presented to us that any hearings were held or that the trial court made a finding of contempt at any time during the course of Nicely's probation. **open poll, please** To the contrary, each time Nicely was incarcerated, the court order clearly recited violations of the terms and conditions of the Drug Court Program. If the record were silent, we would remand this matter back to the trial court for an appropriate evidentiary hearing consistent with the holding in *Cooke, supra*. But, since the court previously found that Nicely violated the conditions of Drug Court, we believe the trial court abused its discretion when, *nunc pro tunc*, it found him in contempt as well.

Do you think that imposing sanctions, where the drug participant denies the underlying conduct and jail is a possible sanction is a due process violation?

- A. yes
- B. no

open poll, please

Record and Due Process

- **IN RE INTEREST OF TYLER T., 279 Neb. 806 (2010)**

Given the therapeutic component of problem-solving-court programs, we are not prepared to say that each and every action taken in such a proceeding must be a matter of record. But we have no difficulty in concluding that when a judge of a problem-solving court conducts a hearing and enters an order affecting the terms of the juvenile's probation, the proceeding must be on the record. We agree with other courts which have held that where a liberty interest is implicated in problem-solving-court proceedings, an individual's due process rights must be respected.

Equal protection

- Discretionary entry or exclusion

Suspect class or fundamental right-strict scrutiny

Semi-suspect class / liberty interest-intermediate scrutiny

No suspect class--rational relationship to legitimate governmental interest

- *State v. Harner* , 103 P. 3d 738 (Wash. 2005)
- *In Re Miguel*, 63 P.3d 1065, 1074 (Ariz. App. 2003).
- *Lomont v. State*, 852 N.E.2d 1002 (Ind. App. 2006)

Equal Protection

- *EVANS v. STATE*, 293 Ga. App. 371 (2008) (Ga. App. 8/22/08)
- Defendant excluded from drug court- was HIV positive
- equal protection—meds
- ADA--major life activity

Equal Protection

No denial of equal protection to refuse to admit defendant to drug court

- State of New Jersey v. Anthony SAXON, (N.J Sup Appellate Div. March 23, 2010)
- State of New York, Respondent, v. Jeffrey J. FORKEY, Appellant. April 8, 2010.
- Darrell W. PHILLIPS, Appellant v. STATE of Mississippi, Appellee. Court of Appeals of Mississippi. Jan. 12, 2010

Double Jeopardy

- No multiple Criminal Prosecutions for same offense
- No multiple punishments for same offense
- UA revocation==deferred and probation violation— consequence for not following original sentence. *Witte v. U.S.*, 515 U.S. 398, 405 (1995) *People v. Lopez*, 97 P. 3d 223, affirmed other issues 113 P. 3d 713 (Colo. 2005) (sentencing for deferred judgment violations including positive UA tests not violate double jeopardy); see also *Doyle v. State*, CA CR 08-530 (Ark. App. 2-18-2009)
- Vehicle forfeiture and license forfeiture not criminal penalties

Double Jeopardy

In re O.F. 773 N.W.2d 206, 206 (N.D. 2009)

- Curfew and mistreating animals—sanctioned in drug court
- 53 days later DA filed new charges

double jeopardy-

1. sanction in JDC like probation revocation

2. Prob. Revo. not a stage of criminal proceeding—not guilty or innocence but compliance with terms of supervision so no double jeopardy

Misc. Cases

In Re Nolan W, 203 P.3d 454 (Calif. 2009)

(In this litigation, California Supreme Court held that non-reunification and termination are the ultimate sanctions not jail; NADCP filed Amicus Brandeis Brief)

- In *Brown v State*, the Maryland Public Defender's Office filed an action attacking the fundamental jurisdiction of the courts to set up and run a drug court program. In addition to the jurisdictional issue, Brown's appeal raised questions about double jeopardy. Ct rejected these arguments. *Brown v. State*, ____ Md. ____ (Md. 5/19/09)

Recommendations

1. Ensure the availability of non-deity based 12-step alternatives to AA/NA in the community
2. Ensure that drug court participants are fully informed of the consequences of drug court enrollment
3. Require re-testing, by instrumented confirmation of any on-site, non-instrumented positive drug test, unless the drug court participant acknowledges use.
4. Provide drug court participants due process rights at drug court termination proceedings

Recommendations

5. Provide a hearing where jail is a potential sanction and where the defendant contests the underlying factual basis for the alleged violation.
6. Give the participant the opportunity to recuse the drug court judge from termination or probation revocation hearings and get a written waiver, if defendant elects to not recuse
7. Do not discriminate against those using medications in drug court access, unless the individual cannot participate.
8. Do not sanction on same offenses that DA intends to prosecute

- The end

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