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Criminal Law

Specialized Courts: Have They Gone Too Far or Not Far Enough?

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Approximately twenty years ago, the New York State Unified Court System began to establish problem-solving courts. As part of this effort, New York State courts adopted an administrative structure allowing for the differentiation and specialized treatment of specific defendants facing charges in the criminal justice system. New York State created the specialized court parts to address at-risk defendants with increased likelihood of recidivism with intervention, treatment and a tailor made approach to the troubles they face. Two of the many problem-solving courts created were the Adolescent Diversion Part (ADP) and the Mental Health Court (MHC).

The Adolescent Diversion Part

In January 2012, the New York State Unified Court System, in conjunction with the Center for Court Innovation, began a pilot program in

nine counties to implement ADP. ADP addresses individuals who are charged with non-violent offenses in criminal court allegedly committed when the youth was 16 or 17 years old. Currently, New York is one of only two states where 16- and 17-year-olds are treated as adults, even for non-violent offenses such as possession of controlled substances, petit larceny, fare evasion, trespass, graffiti, and criminal mischief.¹

In his 2012 State of the Judiciary Address, Chief Judge Jonathan Lippman astutely noted, “[s]tudy after study has confirmed that older adolescents who are prosecuted and convicted in criminal courts are more likely to re-offend, re-offend sooner, and go on to commit serious crimes at a higher rate than youths who go through the family court system.”² New York State created the ADP pilot program with the goal of recognizing that these offenders are still children who should be afforded an opportunity to turn their lives around by encourag-

ing dispositions that will result in the youthful offender not having a criminal record.

An eligible case can be transferred to the ADP following arraignment, upon motion of the court, the defendant, or the District Attorney. ADP utilizes a full service approach by educating and counselling young offenders and emphasizing court outcomes designed to help these young offenders find support and assistance to pursue “law-abiding, productive futures.”³

Participation in ADP requires the consent of a parent or legal guardian and an initial screening to assess the individual’s home life and educational environment. The individual is usually placed on interim supervisory probation to assist in the monitoring of the youth’s behavior and progress. Participants may also attend specialized treatment programs and perform community service. After completion of the individually tailored program, the participant is released, usually with a reduced charge

and/or a sealed record and with the hope that he or she will not re-offend.

Critically, ADP litigants receive the benefit of a sealed record by operation of law, as they are considered Youthful Offenders (under age 19). This is consistent with provisions of New York law that considers offenders under age 16 as juveniles, with those matters being heard in Family Court and their dispositions usually sealed from public view.

Incredibly, 18 year olds are not automatically granted access to ADP even though they have the same rights to a sealed record as 16 and 17 year olds. Though New York law provides that an 18 year old is considered to be a youthful offender, notwithstanding this designation, the District Attorney’s Office must consent to admission for 18 year olds to ADP. The disparate processing of 18 year olds suggests a lack of uniform access of the ADP program as well as a potential lost opportunity for these teens to receive

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targeted programming addressing their individualized needs.

The Mental Health Court

New York State's Mental Health Courts (MHC) handle matters involving those accused of criminal acts who suffer from a mental illness. In 2002, the first MHC opened in Kings County. New York State originally created MHC for non-violent, adult mentally ill felony or misdemeanor offenders. While some MHCs have also become available to individuals charged with more serious, violent offenses, others do not offer a forum for certain violent criminal charges.⁴

MHC models itself after New York's Drug Treatment Court. MHC has the goal of providing offenders suffering from a mental illness with the support and structure they need in order to avoid further criminal behavior. MHCs also strive to reduce jail or prison time for offenders with mental illness, improve the courts' ability to identify, assess and monitor offenders with mental illness, improve the quality of life for individuals with mental illness, and improve coordination between mental health and criminal justice systems.⁵

MHCs aim to provide long-term, community-based mental health treatment for offenders in lieu of a jail or prison sentence. Access to MHC is granted upon the defendant's application with the consent of the Court and District Attorney. This application must include a detailed history of diagnosis, care and treatment with a waiver of HIPAA privacy rights so the MHC and related staff can obtain clinical information.

Once a mentally ill defendant enters the MHC an individualized treatment

plan is formulated which includes housing, mental health treatment, case management, vocational training and additional treatment for co-occurring substance abuse, and serious health issues, if indicated. Every defendant is required to return to court on a regular basis to meet with case managers and appear before the Judge to report on his/her progress in treatment. At the successful conclusion of the program, the defendant may receive a reduction of charges and avoid incarceration. Most, if not all, participants in MHC are non-incarcerated defendants that have the capacity to follow a court's directive to regularly attend therapeutic services and court appearances.

Criticisms of Specialized Courts

Problem-solving courts have had great success since their inception, as evidenced by the increase in court resources allocated for these specialized courts and plans to implement even more specialized courts (e.g. the "Human-Trafficking Court"). However, they do have their shortcomings.

Specialized courts may not always identify or support the populations they are intended to serve. It is clear that a large portion of alleged criminal offenders have underlying mental health issues, which increases their propensity to be involved in criminal activity. According to data from the New York City Department of Correction, 40% of all inmates at Rikers Island have a diagnosable mental illness.⁶ However, those defendants with a mental illness who do not clearly fall within the guidelines of MHC, or who do not have sufficient insight into their illness to be compliant with treatment, fail either to gain entry to or remain within MHC. As a result, these defendants are deprived of access to resources and the quality of care and attention received through the MHC.

Additionally, given the emergence of Autism Spectrum Disorders (ASD) in the young adult population, individuals with ASD who are accused of criminal acts lack a specialized court to address their specific needs. Quite often a defendant who is on the "high end" of the Autism spectrum (sometimes referred to as High Functioning Asperger's) will have the requisite intellectual ability to understand the trial process but will be completely lacking in the social and emotional skills to competently assist counsel.

This leads to a situation where the criminal justice system cannot fashion a just remedy; the defendant will be deemed competent to stand trial yet cannot have their culpability excused due to mental disease or defect (*i.e.* the "insanity" defense). Those defendants on the lower functioning end of the Autism spectrum face even greater dilemmas as they will never qualify for MHC and are processed through the mainstream criminal justice system. It is clear that there is increasing diagnosis of ASD and this will present a great challenge for the criminal justice system over the next decade.

Can A Court be Over-Specialized?

In a recent case, a firefighter who was a first responder to the September 11th attacks and assisted in the recovery effort at Ground Zero for many months thereafter, and currently suffers from Post-Traumatic Stress Disorder (PTSD) was a denied access to a specialized court.

In this situation, the criminal activity that the defendant was alleged to have engaged in was consistent with the symptoms of PTSD. The defendant attempted to gain access to the Veterans Court, a successfully run specialized court, on the theory that he is a domestic serviceman (arguably, a veteran of 9/11) and has a similar diagnosis to combat veterans. Unfortunately, he was denied entry to the Veterans Court because he did not serve in the military. He was, therefore, not able to avail himself of the existing specialized treatment and programming for those similarly situated.

Herein lies the conundrum of specialized courts: narrow criterion excludes persons who are deserving and would benefit from the specially tailored adjudication and treatment offered only by these courts.

Have the Courts Gone Far Enough in Specializing?

One stark contradiction can be seen in the disparate options offered to those with drug addiction issues in the Drug Treatment Court (DTC), but not to alcohol abusers charged with a DWI offense.

Drug abusers who may gain entry to the DTC are eligible to receive treatment and counseling for their addictions, and then upon graduation from the specialized court program may also receive a non-criminal disposition. Though DWIs are generally funneled through a dedicated court part that only hears DWI-related cases, the DWI part is not designated by OCA as an alternative court offering treatment, counseling or individualized monitoring.

Those accused of DWI face traditional prosecution and are not offered treatment alternatives or any opportunity for a non-criminal disposition upon completion of an alcohol-treatment program. The only possible non-criminal disposition (Driving While Ability Impaired – VTL § 1192.1) is available only when offered upon the prosecutor's discretion. In contrast, the defendant with drug-related issues who is accused of patently illegal conduct, is afforded the opportunity to enter a court program that will

provide support, guidance and a non-criminal disposition for successful completion.

Conclusion

Specialized courts are working, but in order for all criminal defendants whose conduct is the result of a specific condition or mental illness to be appropriately adjudicated, the criminal justice system as a whole must be better equipped to appreciate those differences and dispense justice fairly and equally.

Research on problem-solving courts around the country shows reduced rates of recidivism.⁷ MHC participants generally experience fewer arrests and increased time before re-arrest compared with other individuals with mental illness, and are more likely to engage in treatment and therefore improve their level of functioning compared with other offenders with mental illness.⁸ DTC participants have lower drug use rates and lower re-arrest rates.⁹ It appears that adolescents have a lower rate of recidivism after participating in the ADP.

Court innovation is a welcomed addition to the criminal justice system, but specialized programs should have greater flexibility to include all those who seek to address the issues underlying their criminal conduct.

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1. Adolescent Diversion Program: The Court System Pilots a New Approach to Young Offenders, (Mar. 1, 2012), available at <http://www.courtinnovation.org/research/adolescent-diversion-program-court-system-pilots-new-approach-young-offenders>.
2. Chief Judge Jonathan Lippman, The State of the Judiciary 2012, at 3, available at <https://www.nycourts.gov/admin/stateofjudiciary/SOJ-2012.pdf>.
3. Adolescent Diversion Parts (ADP), New York State Unified Court System, available at http://www.nycourts.gov/courts/problem_solving/adp/index.shtml.
4. New York County, for instance, will not consider defendants charged with crimes involving sex offenses or firearms. Manhattan Mental Health Court, available at <http://www.nycourts.gov/courts/1jd/criminal/mentalhealthcourt.shtml>.
5. Mental Health Courts: Mission and Goals, available at http://www.nycourts.gov/courts/problem_solving/mh/mission_goals.shtml.
6. Michael Winerip and Michael Schwartz, Rikers; Where Mental Illness Meets Brutality in Jail, (July 14, 2014), available at http://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html?_r=0.
7. What Makes a Court Problem-Solving?, Center for Court Innovation, (Feb. 2010), at 16, available at http://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf.
8. Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York, Final Report, (Feb. 2012), at 17-18, available at http://www.courtinnovation.org/sites/default/files/documents/Criminal_Justice_Interventions.pdf.
9. Susan K. Knipps and Greg Berman, New York's Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies, (June 2000), at 10, available at <http://www.courtinnovation.org/sites/default/files/NYProblemSolvingCourts.pdf>.

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