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January 18, 2011

Opinion No. 11-10

Drug Court Treatment Programs

QUESTIONS

In *State v. Brent R. Stewart*, No. W2009-00980-CCA-R3-CD, 2010 WL 3293920 (Tenn. Crim. App. Aug. 18, 2010), the Court of Criminal Appeals held that a defendant, who was part of a Drug Court Treatment Program (DCTP), was denied his due process rights when the judge presiding over his probation revocation hearing had previously served as a member of his drug court team and had received ex parte information regarding the defendant's conduct at issue by virtue of prior involvement. In light of that opinion, the following questions have arisen:

1. Can a drug court team discuss sanctions for infractions committed by a participant and decide by vote on the appropriate punishments, including, but not limited to: additional community service, additional meetings, incarceration for a finite period of time, or termination from the program?

2. Is a DCTP participant who, because of his failure to comply with basic program requirements, is facing a period of incarceration, but not termination from the program, entitled to

   a. written notice of the claimed violation?

   b. a probation violation hearing?

   c. representation by counsel?

3. Must the judge who presides over the DCTP team recuse himself and appoint a different judge to determine sanctions for a participant who is facing a period of incarceration for noncompliance, but not termination from the DCTP?

OPINIONS

1. Yes.

2. a. No.

b. No.

c. No.

3. No.

ANALYSIS

1. The "Drug Control Treatment Act of 2003" authorized drug court treatment programs in Tennessee. Tenn. Code Ann. §§ 16-22-101 through -114 (2009 & Supp. 2010). A "drug court treatment program" (DCTP) is defined as "any drug court treatment program created within the state that follows the general principles referenced in § 16-22-104 and that is established by the judge of a court in this state exercising criminal jurisdiction or by the judge of a juvenile court." Tenn. Code Ann. § 16-22-103(2). The General Assembly intended for drug courts to operate in accordance with the general principles "as established by the National Association of Drug Court Professionals, Drug Court Standards Committee." Tenn. Code Ann. § 16-22-104.

Under a DCTP, certain drug cases will be processed through a drug court after a plea of guilty. Thereafter, the defendants will enter into contracts requiring them to undergo intensive therapy and appear periodically in drug court. The sanctions for violations include incarceration and dismissal from the program.

The purpose of a drug court is to "reduce the incidence of drug use, drug addiction and crimes committed as a result of drug use and drug addiction." Tenn. Code Ann. § 16-22-102(a). Under the Act, a "drug court" is not a "court" in the jurisprudential sense; it is a treatment program and an extension of the court that establishes it. In most drug court programs, eligible participants are sent to drug court in lieu of the traditional criminal justice system. National Association of Drug Court Professionals, *What Are Drug Courts?,* available at http://www.nadcp.org (visited Oct. 12, 2010). The program uses a team, which includes a judge, a prosecutor, defense counsel, probation authorities, a law enforcement representative, and treatment professionals, to assist and encourage defendants to accept help in overcoming their addictions. The National Association of Drug Court Professionals, Drug Court Standards Committee, *Defining Drug Courts: The Key Components* (U.S. Dep't of Justice, Bureau of Justice Assistance 1997) (hereafter "*Defining Drug Courts")*, available at http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf) (visited Oct. 15, 2010). To achieve the goals of the DCTP, prosecution and defense counsel are directed to work together as a team and "use a nonadversarial approach." Tenn. Code Ann. § 16-22-104(2). The judge is the leader of the drug court team and is expected to have "ongoing . . . interaction with each drug court participant as an essential compenent of the program." Tenn. Code Ann. § 16-22-104(7). The drug court team is directed to develop a coordinated strategy for responding to noncompliance by a participant. Tenn. Code Ann. § 16-22-104(6). This coordinated strategy can include a continuum of sanctions, such as warnings from the bench, demotion to earlier steps in the program, increased monitoring, community service, fines, and "escalating periods of jail

confinement." *Defining Drug Courts* at 14. The DCTP team must develop standards that "emphasize[ ] the predictability, certainty, and swiftness of [the] application" of sanctions, while allowing for program flexibility and the tailoring of different responses to fit the demographics and needs of each individual and jurisdiction. *Id.* Accordingly, it would be entirely appropriate for a treatment team to discuss infractions committed by a participant and to decide by vote which sanction(s) to recommend for a noncomplying participant.

2. Your next three questions focus on due process concerns when a DCTP participant is facing incarceration, but not termination from the program, as a sanction for noncompliance and will be addressed together to avoid duplicative answers.

All drug court treatment programs in Tennessee must operate according to the general principles outlined in Tenn. Code Ann. § 16-22-104. The general principles include a requirement that the drug courts integrate treatment services with justice system case processing and use ongoing judicial interaction with each drug court participant as an essential component of the program. Beyond these general principles, the Act provides little guidance regarding the operation of drug courts, including the procedure to follow when imposing sanctions. In general, under the drug court model, participants are asked to waive some of their rights in exchange for the opportunity to receive treatment and avoid incarceration. A defendant who has voluntarily entered the drug treatment court alternative may still decide to refuse sanctions and leave the program. The defendant would then return to the traditional criminal justice system, with all his or her constitutional rights reinstated, including the right to a probation violation hearing in the sentencing court.

Brief periods of incarceration for noncompliance with the terms of the treatment program are an integral part of drug treatment courts. *Defining Drug Courts* at 14. However, there is no requirement for a formal hearing with written notice and representation by counsel when the drug court team determines that a remedial period of incarceration is necessary to ensure the participant's future compliance and successful completion of the program. This is in keeping with the general principles of the drug court treatment act, which emphasize the use of a nonadversarial approach and flexibility in responses to participant's successes or infractions. *Id*. Moreover, because the DCTP team has agreed in advance that incarceration is an available sanction, and the participant has knowingly and voluntarily consented to this process when he or she enrolled in the program, a formal adversarial hearing with written notice and representation by counsel is not required. *See* Peggy Fulton Hora, *Drug Treatment Courts in the Twenty-First Century: the Evolution of the Revolution in Problem-Solving Courts,* 42 Ga. L. Rev. 717, 762 (2008). Despite this, the certification criteria for DCTP in Tennessee include a requirement that the program have written operating procedures that protect the participants' due process rights. Department of Finance and Administration, *2010 Drug Court Certification Overview,* available at http://tennessee.gov/finance/rds/ocjp/history/Overview.html (visited Oct. 12, 2010). The operating procedures must address the program's plan for imposing sanctions, including procedures for reporting noncompliance. The procedures should be explained to the participant and provided in writing during program orientation. Additionally, periodic reminders of responses to compliance and noncompliance should be given throughout the program. *Id.* Such safeguards protect a participant from a denial of due process.

3. There is no requirement for the judge who presides over the DCTP team to recuse himself and appoint a different judge to determine sanctions for a participant who is facing a period of incarceration for noncompliance. In *Stewart*, the Court of Criminal Appeals held that the Due Process Clause bars a trial court judge who participated on the defendant's drug court team from presiding over that defendant's probation revocation proceeding after the defendant has been terminated from the program "when the violations or conduct at issue in both forums involves the same or related subject matter." *Id.* at *1. The court reached this conclusion after examining the role of the judge in the drug court treatment program, which requires him to "step beyond [the] traditionally independent and objective arbiter role[ ]." *Id.* at *5. The judge is also expected to "play an active role in the [participant's] drug treatment process." *Id.* at *6. The court was also concerned that the judge, during the treatment proces, receives a "considerable amount of *ex parte* communication" from and about the participant that could impact the decision in the subsequent probation revocation hearing. *Id.* at *8-9. From all this, the court determined that the defendant's due process right to a neutral hearing body was "violated when his probation revocation case [was] reviewed by something other than a „neutral and detached' arbiter." *Id.* at *5.

Based on the unique nature and design of drug courts, it is our opinion that the holding in *Stewart* does not extend to proceedings to impose sanctions in the DCTP, even when the participant is facing a deprivation of his liberty. The judge is an essential member of the treatment team and is expected to maintain an active, supervising role on the team. The program guidelines require frequent and ongoing judicial interaction with each drug court participant. *Defining Drug Courts* at 15. To maintain continuity in the treatment process, the same judge should be involved in the participant's drug court appearances, thereby reducing the chance of inconsistent rulings that could be detrimental to the participant's treatment. *See* Hora, *supra*, 42 Ga. L. Rev. at 763. The collaborative, nonadversarial nature of a decision to impose sanctions in a DCTP, including remedial incarceration, does not raise the same due process concerns that were present in *Stewart*, where, after termination from the DCTP, the defendant faced punitive incarceration imposed by the judge who had participated on his DCTP team. *See id.* at 771-788 (discussing judicial discretion in drug courts, including the effectiveness of "regular and immediate delivery of sanctions and incentives").

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