

JUDICIAL DIVERSION

CPL ARTICLE 216

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Reform of the Rockefeller Drug Laws

- **Many components**
 - Reduced sentence ranges for drug offenses
 - Expands eligibility for parole supervision (Willard)
 - Expands shock incarceration
 - Allows some drug offenders sentenced under Rockefeller laws to be re-sentenced
 - Adds 2 new crimes: sale to children and major trafficking

Judicial Diversion – CPL Article 216

- This presentation will focus on Judicial Diversion piece of the “new” laws
 - Review of the key provisions of Article 216
 - Update on case law interpreting the statute
 - Discussion regarding how to make most effective use of Judicial Diversion Program

ROCKEFELLER DRUG REFORM

Part of the Public Protection and General Government Budget 2009-2010



ARTICLE 216

- Major shift in who determines admission to diversion

FROM PROSECUTOR TO JUDGE



- Prosecutor consent no longer needed for diversion

ARTICLE 216

- When:
 - After arraignment on indictment or SCI and before plea or commencement of trial
 - At the request of the defendant
- Eligible Defendant:
 - 1) Any PL Article 220 or 221 felony (Class B,C,D,E)
 - Stands charged in an indictment or SCI
 - Intent of legislature was to preclude judicial diversion to any defendant charged with the new B felony offense of CSCS to a Child <17. But did it succeed? Probably not (see PL 60.04(3)).

Eligible Defendant (continued)

- 2) Or any “specified offense” under CPL 410.91 (Parole Supervision [i.e., Willard])
 - Burglary 3rd
 - Criminal Mischief 2nd or 3rd
 - Grand Larceny 2nd (no firearms or meth components)
 - Grand Larceny 3rd (except firearms)
 - Unauthorized Use of a Vehicle
 - CPSP 3rd (no firearms or meth components)
 - CPSP 4th (no firearms)
 - Forgery 2nd
 - Criminal Possession of a Forged Instrument 2nd
 - Unlawfully Using Slugs
- Or attempt to commit the above if attempt is a felony

Exceptions

- 1) No prior violent felony offense within the past 10 years (excluding prison time)
- 2) No prior conviction for a crime which does not allow “merit time.” See Correction Law 803(1)(d)(ii) [next slide]
- 3) No prior A felony
- 4) Not eligible as a discretionary persistent offender or has two prior violent felony convictions
- 5) No pending VFO or offense which does not allow merit time (Corr. Law 803(1)(d)(ii) – next slide)
- 6) Unless the People consent

Alcohol and Substance Abuse Evaluation Report

- Court orders an evaluation be made by an approved entity:
 - Court approved
 - Licensed health care professional experienced in alcohol and substance abuse dependency
 - Substance abuse counselor credentialed by the Office of Alcoholism and Substance Abuse Services (OASAS)
- Defendant must sign a written disclosure agreement

The Report

- Evaluation of the defendant's substance abuse history under definitions used in the "Diagnostic and Statistical Manual of Mental Disorders" [DSM-IV]
- May make a recommendation to the court on whether judicial diversion is appropriate
- May offer a treatment plan

The Hearing

- Unless all sides agree to judicial diversion, either party can request a hearing
 - Witnesses may be called by either side at discretion of judge
 - Victim impact statements of past crimes may be introduced
 - Prior YO adjudications for violent acts are relevant
 - Any other relevant information
 - Court can rely on oral and written submissions

Court Findings

- Court must make findings of fact related to the following:
 - Eligibility of defendant
 - Defendant's history of abuse or dependence
 - Whether abuse or dependence is a contributing factor to the defendant's criminal behavior
 - Whether judicial diversion will effectively address the abuse or dependence
 - Confinement is not required for public safety

Guilty Plea Required

- Defendant must plead guilty
 - unless court and people agree to other terms; or
 - court finds that there are “exceptional circumstances”, including “severe collateral consequences” (i.e., immigration consequences, housing or licensing issues most likely)

Conditions of Release

- Defendant must agree to release conditions, including, but not limited to:
 - Detoxification
 - Residential in-patient treatment
 - Out-patient treatment
 - Periodic court appearances
 - No criminal behavior or drug relapse
 - Any other relevant condition

Court Supervision

- Statute references “drug court” components, including:
 - Consideration of the prosecutor, the defense, treatment (sound like a drug court team?)
 - Graduated and appropriate responses or sanctions
 - Recognition that relapse may occur
- Any lesser sentence authorized by PL § 70.70 (b) or (c)
 - i.e., probation (but not for class B second drug) or city time

Termination from Judicial Diversion

- If court terminates individual from Judicial Diversion:
 - Sentence according to plea agreement
 - Impose any lesser sentence authorized by PL § 70.70 (b) or (c), i.e., probation (but not for class B second drug) or city time

Success

- Interim probation supervision (up to 1 additional year – this is new)
- Withdrawal of plea and dismissal
- Withdrawal of plea and misdemeanor
- Promised sentence under the plea agreement (i.e., any terms the court and parties agree to – pretty wide open)

Conditional Sealing - New CPL 160.58

- Upon successful completion of the judicial diversion program, and no pending charges, court may, so long as the sentence is completed, seal “all official records and papers relating to the arrest prosecution and conviction”
- Not just limited to Article 216 Judicial Diversion
 - Also includes:
 - One of the programs heretofore known as drug treatment alternative to prison, or
 - Another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision
 - But DTAP requirements are traditionally 18-24 months residential drug treatment – so requirement of “similar” may set a high standard.

Rule 143: Superior Courts for Drug Treatment Effective October 7, 2009

- Chief Administrative Judge may establish Superior Court for Drug Treatment, after consultation with PJ of appropriate Department.
- Cases eligible for judicial diversion . . . shall be assigned to court parts in the manner provided by the chief administrator and that, to the extent practicable, such cases are presided over by judges who, by virtue of the structure, caseload and resources of the parts and the judges' training, are in the best position to provide effective supervision over such cases, such as the drug treatment courts . . .

2015 Amendments - MAT

Three amendments to CPL Article 216 statute:

- Participants in Judicial Diversion must be given access to medication-assisted treatment when prescribed by an authorized health professional.
- Participants may not be violated for receiving medication-assisted treatment when prescribed by authorized health professional.
- The court may not decide which medication may be used by a participant in Judicial Diversion.

Denial of Request for Evaluation

Matter of Carty v Hall, 92 AD3d 1191 (3d Dept 2012)

A county court did not err in refusing to direct an alcohol and substance abuse evaluation prior to denying the defendant's request for judicial diversion even though he faced deportation if convicted.

People v Carper, 124 AD3d 1319 (4th Dept 2015)

Trial court's decision to summarily deny a defendant's application for judicial diversion without first ordering an alcohol and substance abuse evaluation was entitled to great deference. The court was not required to make explicit findings as to why it summarily denied the defendant's application since the defendant had an extensive criminal history.

Unsuitable Factors

***People v O'Keefe*, 112 AD3d 524 (1st Dept 2013)**

The trial court did not err in summarily denying the defendant's request for a judicial diversion evaluation given his "very extensive criminal record, including numerous felony convictions" which "made him an unsuitable candidate for a judicial diversion program, regardless of what an evaluation might reveal."

More Unsuitable Factors

***People v Chavis*, 2017 NY App. Div. LEXIS 4638 (4th Dept 2017)**

Not an abuse of discretion to deny admission to Judicial Diversion program where defendant had a drug abuse problem and such drug abuse was a factor in her behavior because institutional confinement was proper due to large amount of heroin and cash seized from her home and defendant's history of convictions related to the sale of narcotics using adolescents.

Substance Abuse a Contributing Factor

People v Pittman, 140 AD3d 989 (2d Dept 2016)

Court providently exercised its discretion in denying the defendant's application to participate in a diversion program, finding that his history of alcohol and substance was not a contributing factor to his criminal behavior.

BUT

People v DeYoung, 95 AD3d 71 (2d Dept 2012)

“...CPL 216 “does not require that a defendant's alcohol or substance abuse or dependence be the exclusive or primary cause of the defendant's criminal behavior—it only requires that it be a contributing factor.”

Sufficient Substance Abuse

People v Cora, 135 AD3d 987 (3d Dept 2016)

Defendant's description of his progressively escalating marijuana use since he was 14 culminating in him becoming a mule who transported marijuana across state lines for other individuals to receive compensation in the form of marijuana coupled with expert testimony of a substance abuse counselor who opined that defendant was an addict who was cannabis dependent found sufficient.

Ineligible Charges in an Indictment

- ***People v Smith, 139 AD3d 131 (1st Dept 2016)***

“the legislature’s decision not to list certain offenses as disqualifying means their mere inclusion in an indictment will not prevent an otherwise eligible defendant from making an application for judicial diversion.”

Make Your Record Case

People v Bona, 92 AD3d 1242 (4th Dept 2012)

Although the trial court agreed to the defendant's participation in a treatment program, at no time did defendant agree on the record or in writing to abide by the drug court's release conditions. Thus defendant was free to withdraw his application and have his case transferred out of drug court without consequence.

Due Process

People v Cooney, 120 AD3d 1445 (3d Dept 2014)

Defendant argued denial of due process because she was not represented by counsel at status conferences and at the meeting of the treatment court at which it was concluded her program would be terminated. However, her program contract, which the defendant signed and agreed to on the record, waived her right to counsel at status conferences. Also, it was determined that her attorney was actually present at the termination proceeding. Appellate Division confirmed lower court sentence.