

Drug Treatment as a Condition of Release

In early 2009, judges in the Chittenden District Court started to refer defendants in criminal cases to two local social service agencies, Spectrum Youth and Family Services and the Howard Center, for evaluation and treatment of substance abuse problems. These referrals were made as part of the conditions of release imposed on the defendants during their arraignments for alcohol and/or drug related offenses. Title 13 Vermont Statutes Annotated sections 7554(a)(1)(C) and 7554(a)(2)(C) give a judge presiding at arraignment the power to require a defendant to participate in an alcohol or drug treatment program to "assure the defendant's appearance" at future court proceedings and to "reasonably assure protection of the public." The same statute says that the judge can impose other conditions that are "reasonably necessary" to assure a defendant's appearance and/or to assure the protection of the public.

I was the judge doing most of the arraignments from January to September of 2009. Because I did not know whether treatment was appropriate for a specific defendant, I found that it was "reasonably necessary" to impose a condition requiring that a defendant undergo an evaluation to determine if he or she should be treated. With help from senior law clerk Naomi Almeleh, I drafted an order that provided, among other things, for an evaluation of the defendant's substance abuse problems and, at the same time, prohibited the use of any information gathered during the evaluation process against the defendant and protected the confidentiality of communications between the evaluator and the defendant. If the evaluator found that treatment was appropriate and could recommend a program suitable for the defendant, a treatment condition was imposed as part of the pre-trial conditions of release.

There were many reasons for imposing these conditions. One of those reasons was that there had been a change in the nature of some of the drug and alcohol related charges that were being filed in Chittenden County. I was a Public Defender in Burlington in 1991. At that time there were very few cases that involved the abuse of prescription drugs and binge drinking. At the beginning of 2009, the names of some defendants were coming up on the arraignment schedules once a month. This was often the case for defendants charged with abusing pharmaceuticals—like Oxycotin and buprenorphine. The affidavits submitted by the police who made the arrests

reported that 80 milligram Oxycotin pills—Oxy 80s—were selling for as much as \$100 each. To feed this expensive habit, many defendants were stealing from their family members. At the same time, there were defendants appearing on DUI charges who had been caught driving with very high BAC (blood alcohol content) readings. It was not unusual to see young defendants with BAC readings over .20%. Since the legal limit is .08%, these reports showed that some defendants were driving with BACs more than twice the legal limit. These defendants were binge drinkers who were drinking heavily for the specific purpose of becoming extremely intoxicated. Their arrests often involved reports of extremely bad driving. The reports included driving on the wrong side of the road, driving the wrong way on a one-way street or highway, even driving over curbs and lawns.

Like many of my colleagues, I was accustomed to imposing pre-trial conditions that prohibited defendants from using drugs and/or alcohol while criminal charges were pending. In some cases, like those that involved very high levels of intoxication and/or very bad driving, I imposed a condition that the defendant report daily to his local police station for alcosensor testing. In the most extreme cases, I required defendants to report twice daily for alcosensor testing. These conditions were not always useful. Some police departments were not open every day and others were only open during certain hours of the day when the defendant was working. Some departments began to report that defendants were testing positive for small amounts of alcohol. The low numbers were an indication that the defendant was drinking as soon as possible after the breath sample was given at the police station with the hope that his body would clear itself of the alcohol before he had to return for his next test.

Faced with these problems, I went back to the bail statutes (Section 7554 of Title 13 – Release Prior to Trial) and looked for a way to impose free pre-trial treatment as a condition of release. Since many of the defendants were quite young, I thought of Spectrum Youth and Family Services, an organization that had helped young defendants that I had dealt with in the past. I contacted Annie Ramniceanu who was in charge of counseling services (she is now the clinical director at Spectrum). She explained that Spectrum could provide free evaluation and substance abuse treatment for people between the ages of fourteen and twenty-three at the Spectrum offices

in Burlington. She offered to provide me with four standing appointments per week so that, during a defendant's arraignment, I would be able to order that defendant to appear at a Spectrum office on a specific day, at a specific time, to meet with the counselor who was assigned to that time slot. This meant that an arraignment judge could give a defendant an appointment for evaluation in the same week that his or her arraignment occurred. In fact, the arraignment judge has often been able to give a defendant an appointment for an evaluation on the day after his or her arraignment.

It is important to note that referrals have not been made for every DUI or drug possession case. In DUI cases, I generally made referrals if the BAC report was .15 or higher. Given the body's clearance rate for alcohol (.015% per hour), a .15 result for a test administered an hour or more after arrest indicates that the defendant was driving with a BAC of .16 or higher when he or she stopped. In other words, the driver was operating at twice the legal limit for alcohol. Occasionally, I would make a referral because, although the BAC was less than .15, the defendant's driving was particularly bad, e.g., driving the wrong way on the Interstate. Some cases involved relatively low BAC reports for defendants who were stopped while using drugs. These cases involved defendants who were smoking marijuana after consuming alcohol. In drug possession cases, defendants often admitted stealing from family members to support their drug habit.

Within two months of the initial referral for an evaluation by Spectrum, I was contacted by Bob Wolford of the Howard Center who offered to provide the same services for defendants twenty-three years of age or older. Bob also gave the court standing appointments—three or four per week. As a result, treatment could start quickly when the facts warranted it. Both Spectrum and Howard have provided evaluation and treatment services at little or no cost to defendants. Both agencies have made arrangements to use funds that have already been appropriated by the state and federal governments to Medicaid programs. These funds can be used to provide evaluation and treatment for substance abuse at no cost to defendants who do not have private medical insurance. If the defendant does have private insurance, the agencies have agreed to take whatever payment that insurance provides. I once received a complaint from a defense attorney that the services were not really free because his cli-

ent had private insurance and was required to make a \$10 co-payment for each treatment session. (You just can't please all the people all the time.)

Almost all of the defendants who are told to report for an evaluation at the Howard Center show up for their appointments. Howard reports that 192 of the first 198 defendants referred to it showed up as ordered. Records provided by Spectrum and the Chittenden Court show that of the first 147 defendants referred to Spectrum, 84 completed evaluation and treatment. Of that number, thirteen were later charged with a new offense. Most of these new arrests were for Driving with a Suspended License (DLS) and/or Violation of Conditions of Release (VCR). Only one of the treated defendants was later charged with a DUI. Of the sixty-two defendants who did not undergo treatment, fifteen were later charged with a new offense—usually DLS and/or VCR. However, four of them were later charged with DUI. Obviously, the re-arrest rate for treated defendants (15%) is lower than the rate for untreated defendants (24%) and the difference in the rates of re-arrest for DUI is remarkable (1% versus 6%). Moreover, one could question whether a defendant charged with DUI becomes a “recidivist” if he or she is later charged with a DLS.

These preliminary results indicate that defendants charged with drug and/or alcohol related offenses should be arraigned as soon as possible after arrest so that a judge can determine if evaluation and treatment are appropriate. Every county in Vermont should determine if there are local agencies available that can provide for pre-trial evaluation and treatment in that county. The Medicaid program used to pay for most of these services is funded by both the state and federal governments. Those funds should not be cut. Defendants who do not receive pre-trial evaluation and treatment cost Vermont much more than those who do. For defendants who complete treatment, the disposition of their cases is likely to be more favorable to them—for example, a fine only instead of probation. A defendant who completes a treatment program can use that treatment to satisfy the CRASH requirement imposed by the DMV as a condition for getting back his or her driver's license. This saves the defendant a considerable amount of money. This is truly a win-win program for all concerned.

Hon. Ben W. Joseph is a retired Vermont trial court judge.

