

LEGAL ISSUES IN TRIBAL HEALING TO WELLNESS COURTS

Common Challenges for Drug
Courts and Unique Challenges
for Healing to Wellness Courts



Presenters:
Charlene Jackson
Korey Wahwassuck
Lauren van Schilfgaarde
Tribal Law and Policy Institute

JURISDICTIONAL ISSUES

- Participant Eligibility:
Before screening and
assessment
- Can the court exercise
jurisdiction over this
individual?



TRIBAL COURT JURISDICTIONAL FACTORS

- Indian Civil Rights Act
- Tribal Constitution
- Tribal Code and Tribal Policy
- Type of Case: Civil, Family, Juvenile or Criminal
- Ethnicity of participant
- Defendant's history: violent offender issues



INDIAN CIVIL RIGHTS ACT

- 25 USC § 1302
 - Double jeopardy prohibited
 - Prohibition against self-incrimination
 - Speedy trial
 - Sentencing limitations
 - TLOA issues:
 - Required defense counsel – licensure requirements
 - Judges – training requirements



TRIBAL LAW AND ORDER ACT: INCREASED SENTENCING AUTHORITY WITH CONDITIONS

○ Defense Counsel

- “equal to that guaranteed by the United States Constitution”
- “licensed to practice law in any jurisdiction in the United States that applies appropriate licensing standards and effectively ensure the competence and professional responsibility of its licensed attorneys”

○ Judges

- “sufficient legal training to preside over criminal proceedings”
- “licensed to practice law by any jurisdiction in the United States”



VIOLENCE AGAINST WOMEN ACT

- Authorizes tribes to exercise special domestic violence criminal jurisdiction over all persons
- Jurisdiction concurrent with states and US
- Exceptions:
 - Victim and Defendant are non-Indian
 - Defendant's ties to Indian tribe
 - Residence
 - Employment
 - Spouse/Intimate Partner/Dating partner of tribal member or Indian resident






VAWA: DEFENDANT RIGHTS

- Impartial jury
 - Cross section of the community AND
 - Does not exclude any distinctive group, including non-Indians AND
 - All other rights/necessary protections of the Constitution of the United States



LIMITATIONS ON TLOA AND/OR VAWA

Limitations	TLOA	VAWA
<p><u>Particular Offenses Only:</u> Defendant must either (1) previously have been convicted of same or comparable offense by any jurisdiction in U.S.; or (2) is being prosecuted for a “felony” (an offense that would be punishable by more than 1 year imprisonment if prosecuted by U.S. or any of the States).</p>		
<p><u>Particular Offenses Only:</u> Defendant must be prosecuted for either (1) domestic violence, (2) dating violence, or (3) violation of a protection order.</p>		
<p><u>Particular Defendants Only:</u> Defendant must have sufficient ties to the community, which could be either (1) residence on the reservation, (2) employment on the reservation, or (3) a relationship with a tribal member or Indian resident.</p>		

DUE PROCESS PROTECTIONS REQUIRED BY TLOA AND/OR VAWA





TLOA and VAWA Due Process Requirements		TLOA	VAWA
1.	Defendants are provided with effective assistance of counsel equal to at least that guaranteed in the U.S. Constitution.*	✓	✓
2.	Tribal government provides, at their expense, to an indigent defendant a defense attorney licensed to practice by any jurisdiction in the United States.*	✓	✓
3.	Defense attorney is licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.*	✓	✓
4.	Judges presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants have sufficient legal training to preside over criminal trials.*	✓	✓
5.	Any judge presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants are licensed to practice law by any jurisdiction in the United States.*	✓	✓

*Note: These due process protections are required under TLOA. But, they are only required under VAWA if a term of imprisonment of any length may be imposed.

TLOA and VAWA Due Process Requirements		TLOA	VAWA
6.	The tribe's criminal law, rules of evidence, and rules of criminal procedure are made available to the public prior to charging the defendant.*	✓	✓
7.	Tribal court maintains a record of the criminal proceeding, including an audio or other recording.*	✓	✓
8.	Any defendant sentenced to greater than 1-year imprisonment to be served in a tribal facility, that facility must pass the BIA jail standards for long-term incarceration.	✓	
9.	Tribal court provides the defendant the right to a trial by an impartial jury.		✓
10.	Tribal court ensures that the jury pool reflects a fair cross section of the community.		✓
11.	Tribal court ensures that juries are drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians.		✓

*Note: These due process protections are required under TLOA. But, they are only required under VAWA if a term of imprisonment of any length may be imposed.



TLOA and VAWA Due Process Requirements		TLOA	VAWA
12.	Tribal court ensures that anyone detained under the special domestic violence criminal jurisdiction is “timely notified” of his/her rights and responsibilities.		
13.	Tribal court ensures that a defendant is notified of their right to file “a petition for a writ of <i>habeas corpus</i> in a court of the United States.”		
14.	Tribal court ensures that “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant” are provided.		
15.	Tribal court ensures that “all applicable rights under the special domestic violence criminal jurisdiction provisions” are provided.		





LOST

CONFUSED

UNSURE

UNCLEAR

PERPLEXED

DISORIENTED

BEWILDERED

TRIBAL CONSTITUTIONS



JUDICIAL AUTHORITY

- Separation of Powers/Independent Judiciary
- Specific Requirements
- Legislatively “granted” authority
- Inconsistent with ICRA
 - Sentencing authority
- Inconsistent with TLOA
 - Requirements to be a judge



TRIBAL DOCUMENTS

Tribal Codes

- Legislative Authorization or Restriction
 - Subject matter
 - Personal jurisdiction
 - Statute of Limitations
- Sentencing Limitations

Policy and Procedure

- Rules of Procedure
- Evidentiary Rules
- Operational Procedures
 - Court
 - Tribal Personnel



TYPE OF CASE

- Jurisdictional reach
- Incarceration as a sanction
- Length of time to get case through system
- Defendant/Participant Rights



DEFENDANT ETHNICITY

- Originally criminal jurisdiction limited to Indian
 - Is Defendant an “Indian”
 - Element of jurisdiction
 - Indian but not enough to be enrolled anywhere
- VAWA
 - Potentially opens the door for non-Indian participants if jurisdiction complies with requirements
- Civil Jurisdiction – family and/or juvenile cases
 - Flexibility but no certainty for non-Indian



DEFENDANT'S HISTORY

- Violent Offender
- Confusing definition
- Grant funding restrictions



COMMON CHALLENGES: MANY JURISDICTIONS



COMMON CHALLENGES: EQUAL PROTECTION AND DUE PROCESS ISSUES

○ Arguments:

- It is a denial of equal protection if a defendant would have been eligible for drug court in another jurisdiction but is denied participation because the local jurisdiction doesn't offer drug court.
- Rejection from drug court participation violates due process

○ Held:

- No drug court in specific local is not a denial of equal protection
- Drug court is a privilege and not a right thus rejection from admission is not a violation of due process



COMMON CHALLENGES: DOUBLE JEOPARDY

- Argument: Conduct resulting in sanctions cannot also be used for termination and/or later sentencing considerations
- Held:
 - Decisions upheld on various grounds
 - Agreement to attend drug court not a sentence – double jeopardy does not apply
 - “Double jeopardy analysis lies in the expectation of finality that a defendant vests in his sentence”
 - New Jersey v. Delcristo (2011)



COMMON CHALLENGES: “TIME SERVED”

- Argument: Time served as a sanctions should be credited toward unimposed jail sentence in underlying criminal matter.
- Held: Mixed - No consensus
 - Denial – Waived credit when signed participation agreement
 - Credit for time served waiting to be admitted and/or following termination but denied credit for time served as participant
 - Credit granted
 - Drug court as part of probation sentence – no credit but drug court as community corrections sentence - credit



COMMON CHALLENGES: TERMINATION

○ Three Emerging Issues

- Adequacy of record of drug court hearings
- Drug court failure/termination as aggravating factor to support enhanced sentence
- Does program termination require a different hearing apart from probation termination



TERMINATION ISSUES: ADEQUACY OF THE RECORD

- Cases being remanded to the trial court
- Create a record
- Need for sound record to provide information on appeal
- What does this mean for you?
 - Create a record
 - Findings and Conclusions



TERMINATION ISSUES: FAILURE AS AGGRAVATING FACTOR

- Challenges of sentences at upper limits imposed on terminated participants
- Sentences usually upheld – not an abuse of discretion if less severe terms were not documented in the plea agreement
- What does this mean for you?
 - Contents of the plea agreement sentencing scheme may be binding



TERMINATION ISSUES: HEARING REQUIRED

- Jurisdictions split but emerging trend is to require a hearing
- What does this mean for you?
 - Court should consider reasons termination is recommended and other issues/recommended services
 - Basing termination solely on recommendation of treatment provider may be relinquishment of judicial authority to someone other than the judge



TERMINATION ISSUES: PROCESS QUESTIONS

- Applicable procedures
- Standard of proof
- Is the participant entitled to the same due process protections as a probation violation?
- Can the plea bargain include a waiver?



COMMON ISSUES: RECUSAL OF JUDGE

- Drug Court Judge recusal from sentencing a participant terminated participant
- Jurisdictions split
- What does this mean for you?
 - You may not have another judge
 - May result in *habeas corpus* petition to District Court



COMMON ISSUES: USE OF INFORMATION REVEALED IN DRUG COURT

- Held: In most instances use of the information was allowed because information was not precluded by federal confidentiality requirements



COMMON ISSUES: STAFFING AN *EX PARTE* COMMUNICATION?



EX PARTE COMMUNICATION

- Direct or indirect communication on the substance of a pending case without the knowledge, presence, or consent of all parties involved in the matter.

<http://definitions.uslegal.com/e/ex-parte/>



STAFFING AN EX PARTE COMMUNICATION?

- Does participant have knowledge?
- Does participant consent?
- Is presence required?
 - Participant
 - Defense counsel
 - Defense counsel generally as Team member
 - Participants individual defense counsel



OTHER JURISDICTIONS

- California – specific waiver
- Alaska – ok if authorized by law (includes therapeutic treatment courts)
- Idaho – Judge can communicate on substantive issues if:
 - party had notice and
 - failed to appear



MORE FROM OTHER JURISDICTIONS

- Maryland – when serving on a problem solving court and within established program operational protocols if the participant consented to the protocols.



ABA MODEL CODE

- Rule 2.9(A)(5): “A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.”
- Comment (4): “A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers and others.”



TRIBAL CODE OF JUDICIAL CONDUCT

- Canon 3(B)(7)(e): “a judge may initiate or consider any ex parte communication when expressly authorized by law to do so.”
- Sample Tribal Code of Judicial Conduct - National Tribal Judicial Center at the National Judicial College



TRIBAL COURT DECISIONS



POLICIES AND PROCEDURES

- Violation of civil rights to impose sanction in violation of your policies and procedures
- Violation of ICRA if you fail to provide notice of intent to revoke
- Policies and procedures not approved by Tribal Council are not valid*
 - *may be a requirement of the Tribal Code or Constitution
- What does this mean for you?
 - If you have policies/procedures ... follow them!
 - If Tribal Council approval is needed ... secure it!



ORDERING PARTICIPATION

- Motion for reconsideration of participant placement in juvenile drug court
- Held: drug court is a blending of traditional, treatment oriented jurisprudence



AUTHORITY TO DISMISS CRIMINAL CASE

- Held: Court has authority to dismiss underlying criminal case upon showing of compliance with peacemaking agreement



EMERGING/ON-GOING ISSUES



SOCIAL MEDIA

- Participant's availability or use of social media
- Admissibility issues
- Reliability issues
- Authentication issues
- Messages should be authenticated on a case-by-case basis
 - State v. Fleck, 23 A.3d 818 (Conn. App. Ct. 2011)



REVISITING THE EX PARTE ISSUE: A NEW ARGUMENT

- Washington v. Sykes
- Issue: Are staffings proceedings that must be “open” to the public as required by the state constitution?
- Facts:



FACTS

- Defendant charged with drug related offenses & opted into drug court
- Waiver as prerequisite and gave up right to jury trial
- Defendant non-compliant
- Defendant terminated
- Motion to rescind and vacate drug court waivers and agreements
- staffings violated the open court requirement of state constitution
- State agreed
- Issue: what happens to defendant



ARGUMENTS

- Openness – necessity – deters misconduct, tempers bias and impartiality
- Presumption of openness in all proceedings that can only be overcome by findings that closure is essential to preserve higher values and narrowly tailored
- Staffing – “the integral part”
- Invisible tail wagging the dog
- HIPPA does not apply to Drug Court



AMICUS BRIEF

- Washington State Association of Drug Court Professionals
- Decision has serious implications for future of therapeutic and specialty courts
- Staffing discussions do not involve an actual decision by the court
- Participants knowingly waive their rights to a public trial



- Staffing – critical therapeutic component – issues discussed by counsel involved, judge and therapeutic staff
- Consensus about best therapy for participant
- No decisions made until more formal court proceeding
- Effectiveness of Drug Court will change if staffings are open to the public
- Willingness to share critical and sensitive information “chilled”
- Illogical – settlement discussions, appellate conferences are closed



RESULT



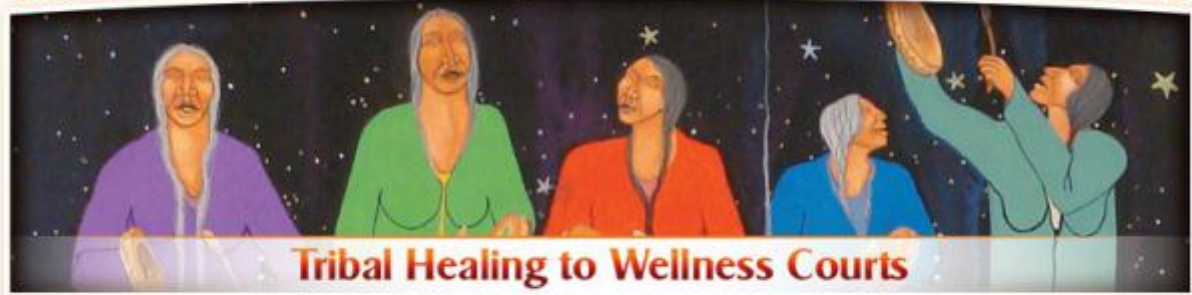
- Amicus brief filed April 21, 2014
- Decision has implications for future of Drug Courts
- Expect similar challenges in other jurisdictions
- Revised procedures may be necessary



FOR MORE INFORMATION

- Tribal Law and Policy Institute
- Excerpts from Selection Opinions of Federal, State and Tribal Courts Relevant to Drug Court Programs, Volume II: Decision Summaries by Issue and Jurisdiction, BJA Drug Court Clearinghouse and Technical Assistance Project, American University, January 2014
- Washington State Supreme Court





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TRIBAL LAW AND POLICY INSTITUTE RESOURCES

- www.WellnessCourts.org
- Tribal Healing to Wellness Court Publication Series
 - Tribal 10 Key Components
 - Preliminary Overview
 - Judicial Bench Book
 - Program Development
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TRIBAL LAW AND POLICY INSTITUTE

- Lauren van Schilfgaarde
Tribal Law Specialist
8235 Santa Monica Blvd. Ste. 211
West Hollywood, CA 90046
lauren@tlpi.org
Tribal Court Clearinghouse: www.tlpi.org
www.WellnessCourts.org

