

Final Minutes

State Drug Treatment Court Advisory Committee Meeting

9:30 a.m. • Tuesday, July 24, 2012

Legislative Council Conference Room • 3rd Floor Boji Tower

124 W. Allegan • Lansing, MI

Members Present:

Judge William Rush, Chair
Stephanie Drury
Judge William Ervin
Judge Allen Garbrecht
Judge Michael Haley
Janette Kolodge
Andrew Konwiak
Judge Brian MacKenzie
Dr. Jessica Parks
Jeffrey Sauter
Mark Witte

Members Excused:

Judge Amy Ronayne Krause
Christopher Luty

I. Call to Order

The Chair called the meeting to order at 9:30 a.m.

II. Roll Call

The Chair asked the clerk to take the roll. A quorum was present. Absent members were excused.

III. Approval of Minutes of May 22, 2012 Meeting

The Chair asked members to review the minutes of the May 22, 2012 meeting. No changes or additions were recommended. The Chair asked for a motion to approve the minutes as proposed. **Judge Haley moved, supported by Judge Ervin, to approve the proposed minutes of the May 22, 2012 State Drug Treatment Court Advisory Committee meeting. The motion was unanimously approved.**

IV. Resignation of Pamela Davis-Drake and Election of Vice-Chair

The Chair directed the members' attention to Ms. Davis-Drake's letter of resignation found in the meeting packet. He explained that besides needing to find her replacement, the Committee needs to elect a new Vice Chair. Judge MacKenzie nominated Mr. Sauter, but Mr. Sauter declined. **Judge Ervin nominated Judge Krause for the position and made a motion that she be elected Vice-Chair of the State Drug Treatment Court Advisory Committee, provided Judge Krause has no objection. The motion was supported by Judge MacKenzie. There was no further discussion. The motion was unanimously approved.**

V. Committee Appointments and Reappointments

The Chair announced that the Senate Majority Leader and the Speaker of the House have reappointed Andrew Konwiak, Christopher Luty, and Jeff Sauter to their respective positions on the Committee. A discussion of possible recommendations for the four vacant positions currently on the Committee—the Court Administrator Representative, the Defense Attorney Representative, a juvenile graduate, and an adult graduate—followed. The Chair noted that Ms. Davis-Drake has recommended either Mr. Robert Nida, the Barry County Family Court Administrator, or Diane Melton, the Genesee County Juvenile Section Administrator, be considered as her replacement. He also noted that Judge Krause had suggested Anethia Brewer, the court administrator at the 54-A District Court, be considered as well. **Judge Ervin made a motion that the Committee recommend to the Senate Majority Leader and the Speaker of the House that Mr. Robert Nida be appointed to fill the Court Administrator representative position, provided Mr. Nida has no objection. The motion was supported by Judge MacKenzie. There was no further discussion. The motion was unanimously approved.** The Chair will contact Mr. Nida to let him know that the Committee is recommending his appointment to the Committee.

Judge Haley recommended Mark Risk, a Traverse City defense attorney, for the defense attorney representative position. Mr. Sauter concurred that Mr. Risk would be an excellent addition to the Committee. **Judge Haley made a motion that the Committee recommend to the Senate Majority Leader and the Speaker of the House that Mr. Mark Risk be appointed to fill the Defense Attorney representative position on the Committee, provided Mr. Risk has no objection. The motion was supported by Mr. Sauter. There was no further discussion. The motion was unanimously approved.**

Judge Haley recommended Ms. Stacy Salon for the adult graduate position. He noted that Ms. Salon successfully completed a sobriety court program a few years ago and has been active in the recovery community. **Judge Haley made a motion, supported by Ms. Kolodge, that the Committee recommend to the Senate Majority Leader and the Speaker of the House that Ms. Stacy Salon be appointed to fill the Adult Graduate position on the Committee, provided Ms. Salon has no objection. There was no further discussion. The motion was unanimously approved.**

There were no recommendations for the juvenile graduate at this time. Ms. Kolodge may have someone to recommend, but would prefer to make some inquiries before bringing the name of the individual forward. Judge Ervin will also make some inquiries to see if there is anyone interested in the position. The Chair asked that this be placed on the next meeting agenda and that any suggestions be brought forward and confirmed before the next meeting.

VI. Drug Court Transfer Protocol

Ms. Parks began by highlighting the issues SCAO legal staff had with the previously drafted drug court transfer form and presented some acceptable protocols (see attached document) developed after a meeting she had with the individuals responsible for approving any transfer form. Dr. Parks noted that a second discussion had taken place after that meeting and distributed some case law SCAO administrative counsel is looking at to determine if a drug court program is like any other program. A discussion followed and it was decided that the members of the Cross Assignment subcommittee along with some other individuals should meet with Supreme Court staff to work on an acceptable transfer form or suggest amendments to the statute to address any issues.

VII. Subcommittee Updates

Confidentiality Subcommittee: Mr. Sauter had no update to report.

Medical Marijuana: Mr. Sauter reported that the Supreme Court has clarified an issue involving a controversial amendment added to HB 4851 at the last minute. He thinks the amendment will be taken out since it is now not needed. The Senate Judiciary started taking the bills up last week, but action on the bills has been delayed at the request of the Department of Licensing and Regulatory Affairs (LARA) until August or September.

Legislative Subcommittee: Judge Hoffman was unable to attend today's meeting so Mr. Sauter provided the legislative update. He shared that the diversion bills made it through the Senate, but a House committee staffer had some concerns regarding who would have access to non-public records. He believes this may now be worked out.

Mr. Witte shared that House Bills 4862 and 4863 that relate to coordinating agencies passed the House and are waiting for action in the Senate. The bills consolidate coordinating agencies for substance abuse services in with the organizations that hold the Medicaid contract with the Community Mental Health Department. To the extent that members work with coordinating agencies, Mr. Witte thought the Committee would want to keep attuned to this legislation.

Cross-Assignment Subcommittee: The Chair noted this subject was addressed under the Drug Court Transfer Protocol discussion.

Funding Alternative Subcommittee & Funding Update: Judge Hoffman was unable to attend today's meeting so no funding alternative report was given. Dr. Parks provided a funding update and presented a broad overview of the grant programs for the upcoming fiscal year. Levels of funding include the Michigan Drug Court Grant Program at \$2.1 million, Bryne-Jag Grant Program between \$1.5 and \$1.8 million, the OHSP Grant Program at

\$750,000, the Urban Drug Court Initiative at \$1.25 million, Michigan Mental Health Court Grant Program at \$2.1 million, the Swift and Sure Sanction Program at \$6 million, and the Community Courts Program at \$20,000.

Juvenile Issues Subcommittee: Judge Ervin had no update to report.

Recidivism Subcommittee: Dr. Parks had no update to report.

Defense Attorney Participation Subcommittee: No report was given.

VIII. Ad Hoc Committees

Veteran Treatment Court

Judge MacKenzie provided an update on status of the veteran treatment court bill. The Senate Committee unanimously passed the bill and sent it to the floor where he anticipates the Senate will take it up in September. He noted there is no serious opposition to the bill.

IX. Public Comment

The Chair asked for public comment. There was none.

X. Next Meeting Date

The Chair announced that the next meeting is tentatively scheduled for **Tuesday, September 25, 2012, at 9:30 a.m.**

XI. Adjournment

The Chair asked for a motion to adjourn. **Judge Ervin moved, supported by Judge Garbrecht, the meeting be adjourned. There was no further discussion. The motion was unanimously approved. The meeting was adjourned at 10:45 a.m.**

(Approved at the November 27, 2012 SDTCAC meeting.)

1. SCAO approved drug or sobriety courts may accept participants from any other jurisdiction pursuant to MCL 600.1062(4)
2. The participant must demonstrate residency outside the jurisdiction of the transferring court or the unavailability of a drug court in the transferring court's jurisdiction and the participant's defense attorney, prosecutor, and judge in the transferring court must agree to the transfer.
3. The receiving court must determine if the participant will be accepted. If so, the receiving court judge must determine if the receiving prosecutor agrees to accept the case and then sign the order to transfer. If the receiving court does not agree to the transfer, the receiving court must return a letter of rejection to the transferring court.
4. If approved by both the transferring court and the receiving court, the transferring court will send the PARTICIPANT INFORMATION TEMPLATE, ORDER TO TRANSFER, and the entire case file to the receiving court. If the case is post-plea, the transferring court shall collect fines, fees, restitution, and costs acquired up to the date of transfer. Any outstanding fines, fees, restitution, and costs at the time of transfer shall be collected by the receiving court. If the case is pre-plea, the transferring court may not assess fines, fees, restitution or costs.
5. If a case is post-plea and the transferring court's prosecutor agreed to reduce or dismiss the charges if the participant successfully completed drug court, the receiving court must also agree to honor that agreement prior to accepting the case for transfer.
6. If the transfer is a district to district court transfer or a circuit to circuit court transfer, an assignment order is not necessary. If the case is transferred from circuit to district court or district to circuit court, an assignment order is needed in addition to the order to transfer.
7. The receiving drug court may assess a drug court fee, drug testing fee, and/or a supervision fee for post-plea cases pursuant to MCL 600.1070(4). If the case is accepted pre-plea, the receiving court may assess fines, fees, costs, drug court fees, drug testing fees, and/or supervision fees.
8. Once accepted, the receiving court judge has jurisdiction over the participant in all aspects of drug court including sanctions (if jail is used as a sanction time would be served in receiving court's jail), incentives, issuing bench warrants, determining program requirements, and program discharge. The case is not transferred to the court of original jurisdiction after program discharge.
9. If the participant is unsuccessful, the receiving court sentences the participant and the participant serves his or her sentence in the receiving court's jail or is sent to prison.

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C

Court of Appeals of Kentucky.
Keith Aaron DUNSON, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 1999-CA-001253-MR.
Aug. 3, 2001.
Case Ordered Published by Court of Appeals Oct. 5,
2001.

Probation was revoked by the Circuit Court, Fayette County, James E. Keller, J., for failing to successfully complete a drug treatment program. Probationer appealed. The Court of Appeals, Johnson, J. held that: (1) evidence was sufficient to support finding that probationer had violated the terms of his probation, and (2) probationer's due process rights were not violated.

Affirmed.

West Headnotes

[1] Criminal Law 110 1156.7

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156.1 Sentencing
110k1156.7 k. Revocation of Probation
or Supervised Release. Most Cited Cases
(Formerly 110k1147)

In reviewing a trial court's decision to revoke probation, an appellate court is limited to a determination of whether trial court abused its discretion.

[2] Sentencing and Punishment 350H 2003

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(I) Revocation
350HIX(I)2 Factors Affecting Revocation
350Hk2003 k. Violation of Probation

Condition. Most Cited Cases

Sentencing and Punishment 350H 2021

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(I) Revocation
350HIX(I)3 Proceedings
350Hk2015 Evidence
350Hk2021 k. Sufficiency. Most
Cited Cases

Evidence was sufficient to support a finding that probationer had violated the terms of his probation, and thus, trial court acted within its discretion in revoking probation; probationer failed to successfully complete drug treatment program that was a condition of probation, probationer failed five drug screens over a four-month period, probationer was charged with an unrelated felony that was reduced to a misdemeanor so that probationer could continue in drug treatment program, and probationer refused to accept repeated offers of additional counseling.

[3] Chemical Dependents 76A 20

76A Chemical Dependents
76AII Commitment or Treatment
76Ak13 Proceedings
76Ak20 k. Counsel. Most Cited Cases

Constitutional Law 92 4733(2)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)6 Judgment and Sentence
92k4730 Probation and Related Dispositions
92k4733 Reconsideration, Modification, or Revocation
92k4733(2) k. Notice and Hearing; Proceedings. Most Cited Cases
(Formerly 92k270(5))

Constitutional Law 92 4807

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92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)10 Counsel
92k4803 Stage of Prosecution
92k4807 k. Sentencing. Most Cited

Cases
(Formerly 92k270(5))

Probationer's due process rights were not violated by not having counsel represent probationer at "**Drug Court**"; probationer was represented by counsel at **probation revocation** hearing, probationer and his counsel had opportunity to cross-examine coordinator of drug treatment program at **probation revocation** hearing, probationer and his counsel had the opportunity to present probationer's side of case and argue that he should not have been terminated from "**Drug Court**" at **probation revocation** hearing, and "**Drug Court**" was not a "court" in jurisprudence sense but rather a drug treatment program administered by court system. U.S.C.A. Const.Amend. 14.

*847 Keith Eardley, Lexington, KY, for Appellant.

Albert B. Chandler, III, Attorney General, Dennis W. Shepherd, Assistant Attorney General, Frankfort, KY, for Appellee.

Before: JOHNSON, SCHRODER and TACKETT, Judges.

JOHNSON, Judge:

Keith Aaron Dunson has appealed from a final judgment of the Fayette Circuit Court entered on May 20, 1999, which found that he had violated the terms of his probation by failing to successfully complete a drug treatment program and sentenced him to prison for a term of five years. Having concluded that Dunson was afforded all rights to which he was entitled and that the trial court did not abuse its discretion, we affirm.

*848 On January 6, 1998, Dunson was indicted by a Fayette County grand jury for the unlawful possession of a gun on school property,^{FN1} a Class D felony. On January 23, 1998, Dunson, through counsel, filed a waiver of further proceedings and petition to enter a plea of guilty. When Dunson appeared for

sentencing, the trial court presented him with a choice of serving the one-year sentence recommended in his plea agreement, or being placed on probation for five years on the condition that he successfully complete a drug treatment program. Against the advice of his counsel, Dunson chose to enter the drug treatment program.

FN1. Kentucky Revised Statutes (KRS) 527.070(1).

At a hearing on April 23, 1999, the Fayette Circuit Court ruled that there was probable cause to believe that Dunson had violated the conditions of his probation by failing to successfully complete the drug treatment program. On May 11, 1999, a **probation revocation** hearing was held. Connie Reed, the treatment coordinator of Fayette County **Drug Court**, testified that Dunson's termination from the program was due to eight specific violations over the course of a four-month period. In addition to these violations, Dunson had been charged with another criminal offense. Reed also testified that Dunson did not display the proper attitude and that he was not allowing the treatment program to help him. After hearing the evidence, the circuit court ruled that Dunson had violated the conditions of his probation by failing to successfully complete the **drug court** treatment program and it revoked Dunson's probation. This appeal followed.

[1] We are limited in our review of the trial court's decision to revoke Dunson's probation to determining whether the trial court abused its discretion.^{FN2} In Tirung, the trial court revoked the appellant's probation based in large part on evidence that was illegally seized during a warrantless search. The Court of Appeals held that the trial court did not abuse its discretion by allowing this evidence at the **probation revocation** hearing. The Court stated, "[o]ne may retain his status as a probationer only as long as the trial court is satisfied that he has not violated the terms or conditions of the probation."^{FN3}

FN2. Tirung v. Commonwealth, Ky.App., 717 S.W.2d 503, 504 (1986). See also Welch v. Commonwealth, Ky.App., 988 S.W.2d 506, 507 (1999); and Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999) (citing Fowler v. Black, Ky., 364 S.W.2d 164 (1963); Belcher v. Ky Parole Board,

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Ky.App., 917 S.W.2d 584 (1996); Lynch v. Wingo, Ky.App., 425 S.W.2d 573 (1968)), which states, “[K]entucky courts have repeatedly held that there is no constitutional right to parole, but rather parole is a matter of legislative grace or executive clemency.”

FN3. *Tirying, supra.*

[2] In the case *sub judice*, it is undisputed that Dunson violated the terms of his probation. One of the conditions of Dunson's probation was that he successfully complete Fayette County's **Drug Court** program. Dunson simply failed to do so. Over a four-month period Dunson failed five drug screens, he failed to appear for three others, and he was charged with an unrelated felony that was reduced to a misdemeanor so he could continue in the drug treatment program. Furthermore, according to Reed, Dunson was repeatedly offered additional counseling, but refused to accept it. When Dunson was asked at his probation hearing whether Reed's testimony was a fair and accurate description of his participation in the **Drug Court** program, he responded “yes sir.” Clearly, there were sufficient grounds for the trial *849 court to conclude that Dunson had violated the terms of his probation, and revoking his probation was not an abuse of discretion.

[3] Dunson's primary argument is that he was not afforded representation by counsel at the **Drug Court** hearing and therefore his due process rights were violated. However, as the Commonwealth points out, Dunson was never without counsel at any critical stage of the proceedings, and Dunson's brief supports this finding.^{FN4}

FN4. Commonwealth v. Watkins, Ky., 398 S.W.2d 698, 699 (1966).

Dunson's brief states:

In Gagnon v. Scarpelli, [411 U.S. 778,] 93 S.Ct. 1756[, 36 L.Ed.2d 656] (1973), the United States Supreme Court discusses the importance of being represented by counsel at a **probation revocation** hearing. The court held that there is not an absolute right to appointed counsel at a probation hearing. The need for counsel is to be made on a “case-by-case” basis. *Id.* at 1763. *If the grounds for the revocation are not in dispute, as in the case of the*

conviction of a new offense, then appointed counsel might not be required. Id. at 1764. But if there are contested issues, then the need for appointed counsel is apparent since the “unskilled or uneducated probationer ... may well have difficulty in presenting his version of a disputed set of facts” [emphasis added]. *Id.* at 1762.

Appellant contends that he should have received appointed counsel at his termination from **Drug Court** hearing. To the extent that Appellant's termination from **Drug Court** resulted in the revocation of Appellant's probation, Appellant had substantial rights at stake. Decisions to terminate from **Drug Court** are made on a case-by-case basis and are not made according to precise guidelines. It is beyond question that Appellant could have benefited from the assistance of appointed counsel in presenting his version of events at the hearing. Had Appellant had appointed counsel, it is conceivable that a decision to terminate Appellant from **Drug Court** would not have been made. And had Appellant not been terminated from **Drug Court**, Appellant's probation would not have been revoked [citation to record omitted].

In the case *sub judice*, there are no “contested issues” and the “grounds” for revocation are not in dispute. Clearly, Dunson violated the terms of his probation. Dunson repeatedly violated the terms and conditions of **Drug Court** and his termination from that program certainly provided the trial court with grounds for revocation of his probation.

This case is clearly distinguishable from the cases cited by Dunson. Dunson was represented by counsel at the **probation revocation** hearing. The cases cited by Dunson have held that the determination of whether counsel is necessary is to be made on a case-by-case basis. The Supreme Court in Gagnon held:

We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally

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unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—***850** will require that the State provide at its expense counsel for indigent probationers or parolees.

Dunson insists that since he was not represented by counsel at the **Drug Court** termination hearing, he was denied representation at a critical stage of the proceedings. However, Dunson was represented by counsel at the **probation revocation** hearing; and at that hearing, Dunson and his counsel had the opportunity to cross-examine the drug treatment program's coordinator, to present his side of the case, and to argue that he should not have been terminated from **Drug Court**. Dunson's attempt to elevate the drug treatment program to a critical stage of the revocation proceedings must fail. While this particular drug treatment program is known as the "Fayette County **Drug Court**" and while it is operated through this state's Court of Justice, the "**Drug Court**" is not a "court" in the jurisprudence sense; it is a drug treatment program administered by the court system. Accordingly, Dunson's termination from this particular drug treatment program was not subject to due process protections any more than his participation in a private drug treatment program would have been, or his participation in any other rehabilitation program such as anger management counseling or a job training program.

Since Dunson was afforded an opportunity to argue his case at the proper time, was represented by counsel at every critical stage of the proceedings and his due process rights were not violated, the final judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

Ky.App.,2001.
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