

Doing the Due and Beyond: *Legal
and Constitutional Issues in
Treatment Courts*

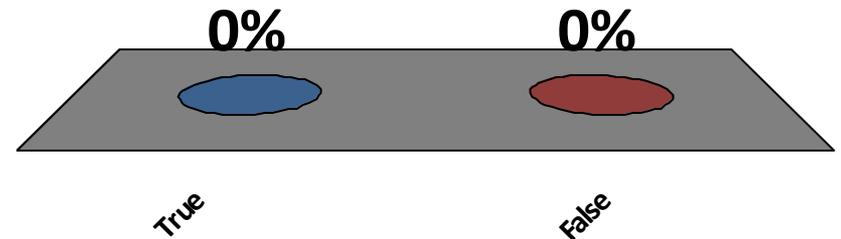
Judge William Meyer (ret)

Sr. Judicial Fellow

National Drug Court Institute

I have seen a constitutional presentation I have done before?

- A. True
- B. False



Ten Cases in the last 3 years that are
important to your Drug Court

Your jail is not constitutionally required to give a defendant MAT, if he is sentenced to 60 days and was on legally prescribed methadone, prior to sentencing?

- A. True
- B. False



Pesce v. Coppinger

- To prove a violation of Title II ADA, a plaintiff must show that he: (1) is a qualified individual with a disability; (2) "was either excluded from or denied the benefits of some public entity's services, programs, or was otherwise discriminated against;" and (3) "that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability."
- *Pesce v. Coppinger*, Dist. Court, D. Massachusetts 2018; *Smith v. Aroostook County*, Dist. Court, D. Maine 2019, affirmed 1st Circuit 4/29/19

Pesce v. Coppinger

To prevail on an Eighth Amendment claim of deliberate indifference based on inadequate or delayed medical care, the plaintiff must satisfy both an objective and subjective inquiry:

1. Objectively- “sufficiently serious medical need”

--diagnosed as needing medical attention

--withdrawal/overdose potential upon release

2. Subjective - defendants acted with intent or wanton disregard when providing inadequate care.

---individualized assessment

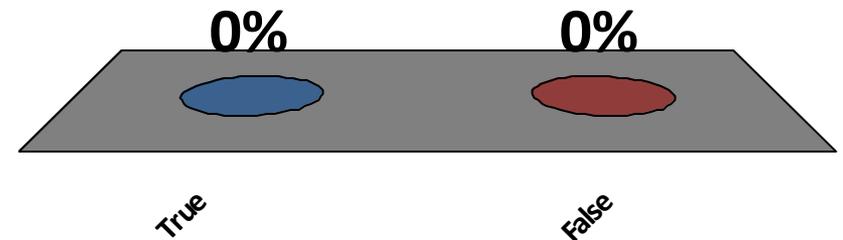
--- methadone only adequate treatment

Bazzle v. State, 434 P. 3d 1090 (Wyo. Supreme Court 2019)

- Mr. Bazzle was obligated, under the probation order, to successfully complete the Treatment Court Program. He was aware that he could not participate in the program until he ceased using Suboxone. If he was unable or unwilling to comply with the probation condition, he was required to petition the district court for modification rather than make the unilateral choice not to comply. The district court's conclusion that Mr. Bazzle willfully violated the term of his probation that required him to successfully complete the Treatment Court Program is supported by the evidence.

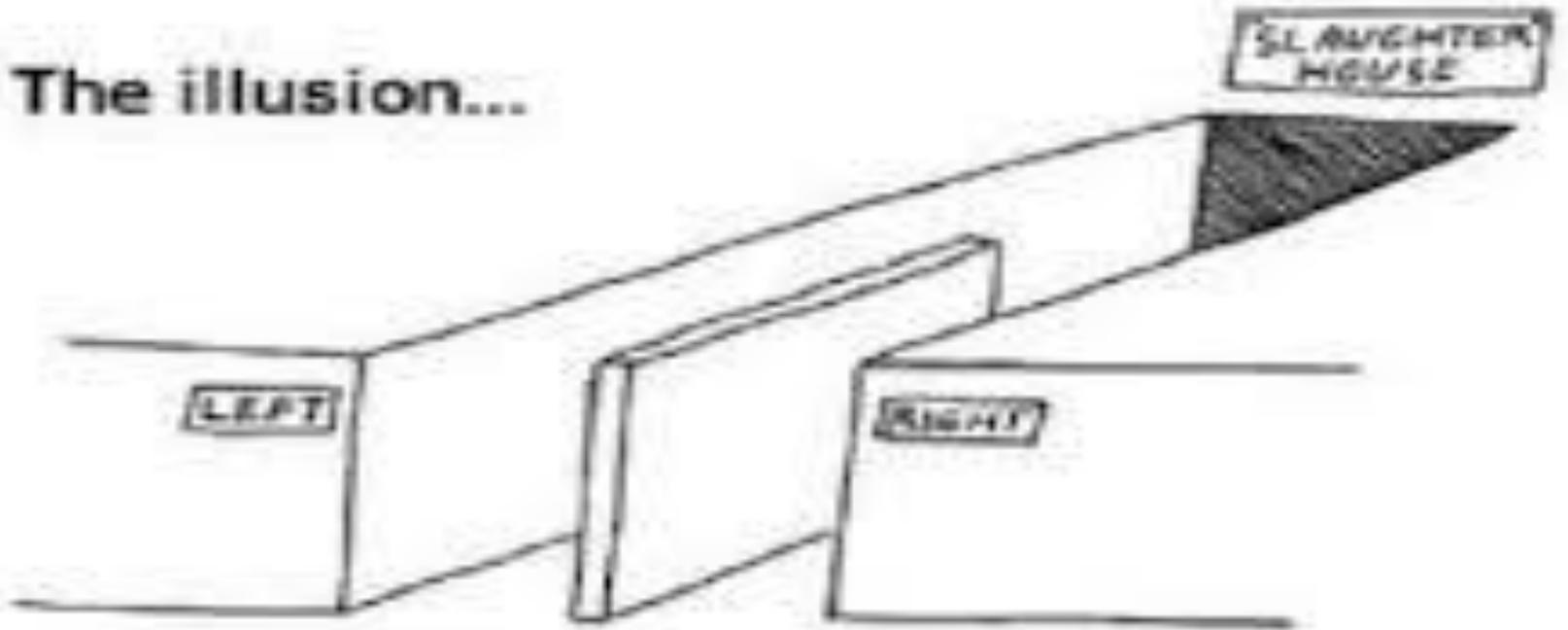
You should refrain from drug free conditions of probation, until defendant is stabilized because an addicts use is not willful, given that addiction is a brain disease, and a chronic relapsing condition.

- A. True
- B. False



Free Will vs Determinism

The illusion...



...of free choice.

Free Will

- Operant Conditioning and Contingency Management studies show that people can and do change their behavior—even with a SUD
- The success of Drug Courts—a classic example of the application of OC/CM, demonstrates addicts do have free will to change their behavior—when given the proper tools

NO PHILOSOPHER'S DREAM-but

- The circumstances of the defendant's case exemplify why the imposition of a drug free condition of probation and the enforcement of such condition are permissible within the confines of the probation process. From crafting special conditions of probation to determining the appropriate disposition for a defendant who has violated one of those conditions, judges should act with flexibility, sensitivity, and compassion when dealing with people who suffer from drug addiction. Commonwealth v. Eldred, 480 Mass. 90 (2018)

Exemplary Resolution

- Trial court judges, particularly judges in the drug courts, stand on the front lines of the opioid epidemic. In circumstances where a defendant is likely addicted to drugs and the violation in question arises out of the defendant's relapse, judges are faced with difficult decisions that are especially unpalatable. This is particularly true at a detention hearing where a judge must decide whether the defendant should be detained prior to a final violation hearing. The core of this dilemma is that although probation violations often arise out of a defendant's relapse, we recognize that relapse is part of recovery.

Commonwealth v. Eldred, 480 Mass. 90 (2018)

- Quick Probable cause determination for probation violation
- Detention determination
 - Opioid addicted
 - Just used fentanyl
 - No family support
 - Rejected inpatient
 - Holiday weekend coming up
- Re-granted probation, adding inpatient treatment

Court can impose one day jail time as a sanction without a hearing for defendant who passed dilute sample, when defendant denies water loading

- A. True
- B. False



Dilute=Positive

- IN RE INTEREST OF ORLANDO D., Neb: Court of Appeals 2018 NOT SELECTED (recognizing that dilute samples can be considered as positive drug tests)
- State v. Snow, Not Selected for Publication, 32144-4-III (Wash. App. 12-9-2014)(defendant's due process rights were not violated during termination procedure, including relying on reports reflecting dilute drug samples, particularly where he did not contest testing result)

No Hearing

- Brookman v. State, 190 A. 3d 292 (Md. Ct of App. 7/31/2018) (Sanctions imposed reversed and remanded for a hearing. Defendants wanted to contest sanctions imposed without a hearing for low creatinine results and failure to appear for a drug test. Court held it was a due process violation to not accord an adversarial hearing, including the right to counsel, the ability to call witnesses, the right to put on mitigating evidence and a continuance, if necessary for preparation.

Taylor v. State, 229 So.3d 269 (Ala. Crim. App. 2016)

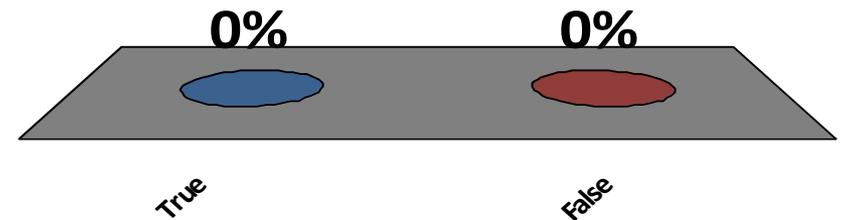
- Sanctioning hearing using hearsay not due process violation. Concurrence: I realize that developing specific procedures for handling drug-court sanctions can be an arduous task — especially given the dearth of case law in this State addressing drug-court programs. I would encourage other drug-court judges in this State either to use or to develop a drug-court-sanction procedure similar to the one outlined in this Court's opinion (ie: provision of a hearing). I would also recommend to other drug-court professionals that they take advantage of the vast training resources and educational opportunities available through the National Association of Drug Court Professionals.

Ethical Issue for Judge as well

- Mississippi Commission on Judicial Performance v. Thompson, 169 So. 3d 857 (Miss Supreme Court 5/21/2015) (Drug Court Judge removed from office for, inter alia, sanctioning individuals to jail without according due process of hearing.)

Expungement is in the public interest for drug court offenders who successfully complete the program

- A. True
- B. False

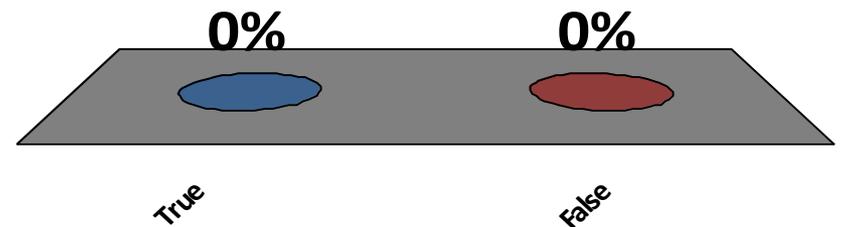


Expungement

- MATTER OF TB, 199 A. 3d 744 (NJ: Supreme Court 2019) (expungement is consistent with drug court principles and should be available as a drug court remedy for successful completion of the drug court program)
- DA v. STATE EX REL. OSBI, 433 P. 3d 727 (Okla. Supreme Court 2018) (We hold that a drug court's dismissal following successful conclusion of the drug court program is not excluded from expungement under 22 O.S. Supp. 2016 §18)

It is not appropriate for a Judge to call a drug court defendant a f***** addict

- A. True
- B. False



State v. Lemke, 434 P. 3d 551 (Wash. Court of Appeals, 1st Div. 2018)

No judge wielding the power of the State in any courtroom has any good reason to call a litigant a "fucking addict" and "just a criminal." The judge's manifestation of personal animosity toward Lemke is not something we can write off as a byproduct of the informal and confrontational culture of drug court. A "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The sentence must be reversed.

Minnesota v. Cleary, 882 N.W.2d 899 (Court of Appeals of Minnesota 2016.)

- (When the sole basis for revoking probation is a probationer's termination from drug court and the drug court judge participated in the drug court team's decision to terminate the probationer from drug court, a probationer is entitled to have a judge other than the drug court judge preside over the probation revocation hearing, because of the appearance of lack of impartiality)

Because a urine screen is a search, and drug court defendants are on probation-like supervision, urine screens require reasonable suspicion

- A. True
- B. False

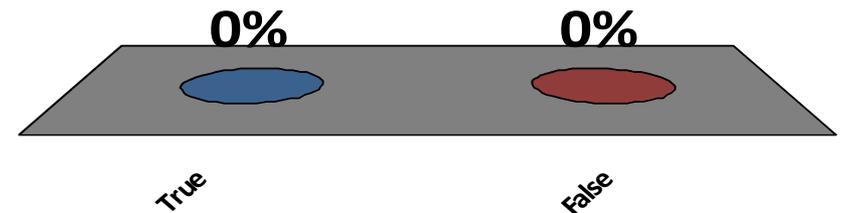


State v. Olsen, 399 P. 3d 1141 (Wash. Supreme Court 2017)

- [As] noted by the National Drug Court Institute, "it is crucial that samples be collected in a random, unannounced manner," as random testing prevents individuals from planning ahead and avoiding detection. Requiring reasonable suspicion as a basis to test could make it prohibitively difficult for the probation officer to carry out his or her responsibilities of supervising the probationer and accurately assessing progress toward rehabilitation.

The defendant can waive his rights to a termination hearing in his entry contract to drug court

- A. True
- B. False

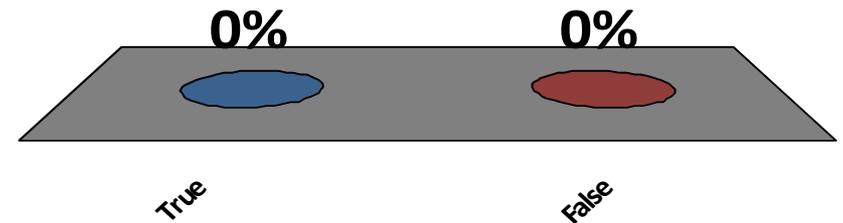


Neal v. State, 2016 Ark. 287
(Ark. Sup. Ct. 2016)

- Citing *Laplaca* and *Staley*, Ark. Sup. Ct. holds: “[T]he right to minimum due process before a defendant can be expelled from a drug-court program is so fundamental that it cannot be waived by the defendant in advance of the allegations prompting the removal from the program.”

Court can simply rely on drug court team's recommendation regarding termination from drug court

- A. True
- B. False

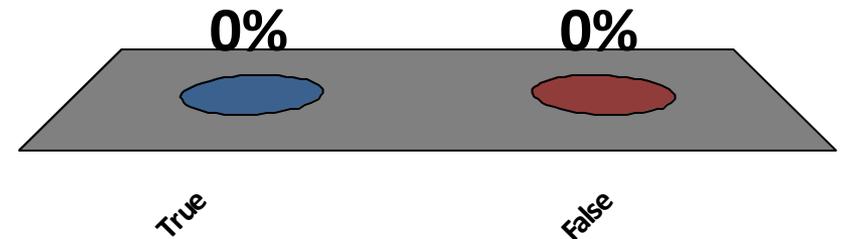


State v. Watson, 507 S.W.3d 191 (Tenn. Court of Criminal Appeals 2016)

Citing previously unpublished case that Drug court judge's decision to leave the termination decision to team was an abdication of responsibility and a violation of due process

Defendants signing waiver of counsel sufficient to proceed with sentencing hearing

- A. True
- B. False



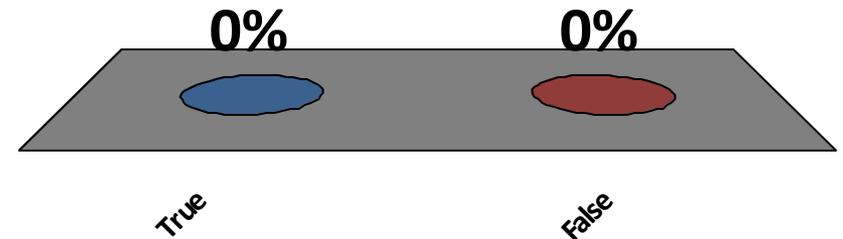
Commonwealth v. TIBETS, Mass: Appeals Court 2018

Setting aside sentencing hearing where defendant appeared without proper waiver of counsel and Court denied drug court and sentenced defendant to incarceration, despite extensive drug history.

“...[W]e believe notice should be taken of the "important and special role of the drug court in achieving important public policy interests. The Massachusetts Trial Court has expanded the number of drug courts and encourages judges to recommend appropriate defendants to be screened for participation in such programs. ... See also Latessa & Reitler, What Works in Reducing Recidivism and How Does It Relate to Drug Courts?, 41 Ohio N.U. L. Rev. 757, 775 (2015) (Well-designed drug courts produce a statistically significantly greater reduction in recidivism than incarceration).”

Drug Courts can defer to the risk assessment tools, like the LSIR or Compass in determining sentences

- A. True
- B. False



State v. Loomis, 2016 WI 68 (Wisc. 2016)

- Consideration of risk assessment, such as COMPAS, at sentencing is permissible, sole reliance on such a tool is violation of due process because it would be sentencing on group data and the Constitution requires individualized sentencing.