The Supreme Court of Ohio

CHAMBERS OF
CHIEF JUSTICE MAUREEN O'CONNOR
65 SOUTH FRONT STREET
COLUMBUS, OH 43215-3431

March 12, 2019

Senator John Eklund
The Ohio Senate
1 Capitol Square
Senate Building
Columbus, Ohio 43215

Dear Senator Eklund:

Thank you for the opportunity to comment on S.B. 3 and for your continued work in addressing the important topics therein. If I can be of any assistance during the General Assembly's work on this bill, please do not hesitate to reach out to me or the Supreme Court staff.

S.B. 3 proposes to convert fifth and fourth degree drug-possession felonies into unclassified misdemeanors. Converting drug possession felonies into misdemeanors will hamper our very successful drug court programs across the state. We know, through multiple studies, that drug courts are very effective in combating substance use disorder. These programs are successful because they combine the carrot-and-stick approach that enables judges to use the possibility of prison time and the prospect of a felony conviction to incentivize participants to complete drug treatment programs.[1]

Incentives to Participate in Drug Courts

The "stick" for drug possession felonies currently in place consists of the length of incarceration, the place of incarceration (a prison operated by the Ohio Department of Rehabilitation and Correction), and the restrictions that being a convicted felon place on an offender. Avoidance of those three consequences incentivizes offenders to participate in drug court programs.

Incarceration time

Fourth degree felonies carry a maximum of 18 months of prison time and fifth degree felonies carry up to one year of prison time. The maximum penalty for S.B. 3's unclassified misdemeanor is 364 days in a local jail. As a practical matter, it is rare for an

[1] Dr. Ted Parran, an Ohio doctor that has been an outspoken advocate for drug courts, has commented that the unique amount of "coercive control" that can be applied by the criminal justice system is key to the success of treatment in drug courts.

offender convicted of a misdemeanor to be sentenced to anywhere near to the maximum penalty. And local jails are more likely to have prisoners released to address overcrowding. By way of contrast, felony sentences carry very specific, definite periods of incarceration in prison. For example, for a fourth degree felony, the prison term must be a definite term of six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months. An offender convicted of an unclassified misdemeanor could be sentenced to anywhere between one and 364 days.

Incarceration location

The location of incarceration also matters to offenders. State prison time usually means increased distance from family and often results in contact with more serious and dangerous offenders, deterrents that would be eliminated with the reduction of felonies to misdemeanors. Another related consequence to the conversion of felonies to misdemeanors is the shift in cost of incarceration from the state ODRC budget to the already strapped budgets of county sheriffs.

Collateral consequences

The desire of offenders to avoid the collateral consequences of becoming a convicted felon also serve as a motivator for participation in drug court treatment programs. Convicted felons cannot obtain certain professional licenses. They cannot coach children's sports programs. They often struggle to find jobs and have difficulty renting apartments. These consequences are best addressed through participation in drug court programs or intervention in lieu of conviction so they can be avoided altogether, or through the sealing of the record process.

It is laudable that S.B. 3 proposes to alleviate the stigma associated with felony convictions. But the desire to avoid that very stigma can be the incentive to enter treatment.

The provisions making it easier for defendants to have possession charges held in abeyance – which can work *without* reclassifying felonies as misdemeanors – go a long way toward reducing the collateral effects of drug offense convictions. And, as a practical matter, law enforcement and prosecutors retain considerable discretion under the current system to reduce charges to misdemeanors when the circumstances warrant it.

There is no question that we need more treatment for those who are addicted to drugs. But there are consequences for illegal actions. The drug crisis calls for tough love, not leniency and consequence avoidance. We must preserve the discretion of judges to incentivize treatment consistent with these principles.

Issues Concerning Change in Jurisdiction

S.B. 3 also modifies court jurisdiction for drug possession offenses. Specifically, it requires the cases to be heard in the applicable municipal or county court, provided the court operates a "drug court." If the municipal or county court does not have a drug court, then the cases are to be heard in the appropriate court of common pleas.

Drug court definition

The first concern is that S.B. 3 does not provide a definition for "drug court." While Sup.R. 36.20 through 36.28 establish a certification process for specialized dockets, which includes drug courts, there are courts that have established dockets they refer to as "drug courts," but that lack any type of certification or meeting any defined standards for certification as a true specialized docket drug court. Using the general term "drug court" in the statute would mean that the General Assembly's constitutional authority to set the jurisdiction of courts would be exercised by the municipal or county court judge determining whether to have a drug court.[2] It also creates the possibility of these possession cases being handled by self-described, non-specialized docket certified "drug courts" with no established credentials or standards, thus not serving the offenders as the bill intends.[3]

Jurisdiction mandate / drug court participation

Presently, specialized-docket certified drug courts thoroughly screen cases before they are accepted into the drug court docket. This step ensures that cases are appropriate for the drug court, so as to not waste resources on cases with a low likelihood of success in the program.

It also ensures that the offender enters the program willingly. An offender's willingness to participate in programming is a cornerstone of the specialized docket concept. Not only does it increase the odds of success, it's also necessary given the offender waives a handful of important rights once they are accepted into the drug court (e.g., speedy trial rights, HIPAA protections, etc.)

This jurisdictional mandate of S.B. 3 will funnel a number of cases into municipal and county drug courts that are currently being heard in common pleas courts. While some counties (such as the Franklin County) might already be primarily using their municipal drug courts for low-level possession offenses, others counties have not allocated the resources to deal with these cases at the municipal or county court level.

Additionally, such an influx of cases might strain the municipal or county drug court's ability to effectively manage the offenders. The effectiveness of drug court treatment hinges not just on the supervision over the participant, but also on the *closeness* of the supervision. If a drug court is over capacity, it becomes ineffective for all its participants.

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[2] Additionally, the bill requires that unclassified misdemeanors committed before the effective date of the bill only go to municipal and county courts that have drug courts. Cases for such misdemeanors committed after the bill's effective date would go to municipal/county courts regardless of whether they have a drug court. Based on statements from the bill's sponsors and other members of the Judiciary Committee, it's unclear if this was the intent of the bill.

[3] Also, while the bill specifically points to drug courts, it does not list other specialized dockets that could prove useful to an offender with addiction issues. This could include a veteran's treatment court, mental health court, or OVI court.

In cases not handled in drug court, it is worth noting that common pleas courts generally have the capability to subject offenders to more intensive and individualized monitoring. The number of probationers assigned to a common pleas probation officers is typically significantly less than the number of probationers assigned to a municipal court probation officer.

Drug Court Perspective

As previously noted, the use of the term "drug court" in the bill raises concerns. Ohio's terminology is "specialized docket." Almost every type of specialized docket in Ohio (mental health, drug, family, veteran, etc.) treats individuals with substance use disorder. Additionally and as noted above, Ohio requires certification of specialized dockets, assuring a minimal level of operation as well as fidelity to the treatment court model. Without certification, there is no oversight of a drug court's operation nor confidence that the intervention is compliant with national best practice standards.

In Ohio, current certification standards permit each judge/certified docket to define the legal criteria under which participants are admitted locally. This includes types and degrees of charges. If the intent of the proposed bill is to mandate certain cases be heard in a drug court, it would eliminate this local discretion. Additionally, there are numerous charges, such as theft and assault, that are not classified as possession charges but often have a nexus to substance use disorder. [4] Flooding specialized dockets with all reclassified possession charges may eliminate the court's ability to also serve other charges.

Ohio certification standards leave sole discretion for specialized docket admission with the judge. Legal screenings and treatment assessments should be completed prior to an individual's admission to a specialized docket, confirming the individual is of the research-based risk and treatment need levels. Within the current structure of the bill, the judge would not have this discretion nor would there be a mechanism to guarantee that the appropriate individuals are being offered the specialized docket.

Research is definitive that specialized dockets should target high risk (risk of recidivism) and high need (need for treatment) individuals. Automatically sending a charge to a specialized docket prior to assessing the risk and need level of an individual would result in individuals who do not fit the risk/need profile best suited for drug courts being admitted.

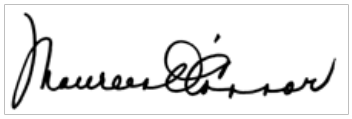
[4] On a related note, S.B. 3 also amends the civil commitment statute by allowing evidence of being revived from an opioid overdose "at least three times." Just as addiction issues don't always show themselves as drug possession charges, they don't always require an overdose – let alone three. This section should be examined to see if broader language would better serve families trying to get their loved ones into treatment.

There are many dangers with this practice, most importantly, mixing risk levels. Individuals with high criminogenic risk do not adopt the behaviors of their lesser risk peers. The opposite is true with low risk individuals becoming high risk with their exposure to higher risk peers and being treated like high risk individuals.[5]

Overall, the drug court should be for a very specific segment of the court's defendants and will be a very small percentage of the total cases. It is not an intervention that is effective for all drug cases nor any defendant with a substance use disorder.

Once again, thank you for this opportunity and I look forward to continue working together on this important issue.

Warm Regards,



Maureen O'Connor
Chief Justice

[5] "Generally speaking, the higher the prognostic risk level, the more intensive the supervision services should be. Similarly, the higher the need level, the more intensive the treatment services should be. Drug-involved offenders who are both high-risk and high-need typically require the full array of treatment and supervision services embodied in the 10 Key Components of drug courts. The converse, however, is also true. The lower the risk level, the less intensive the supervision services should be. And the lower the need level, the less intensive the treatment services should be. Providing too much treatment or too much supervision is not merely a potential waste of scarce resources. **It can increase crime or substance abuse by exposing individuals to more seriously impaired or antisocial peers, or by interfering with their engagement in productive activities such as work, school, or parenting.**"

ALTERNATIVE TRACKS IN ADULT DRUG COURTS: Matching Your Program to the Needs of Your Clients, Douglas B. Marlowe, JD, PhD, Chief of Science, Law & Policy, National Association of Drug Court Professionals, *available at* https://www.ndci.org/wp-content/uploads/AlternativeTracksInAdultDrugCourts.pdf.