2018 WL 3864313
County Court, New York,
Monroe County.

The PEOPLE of the State of New York, Plaintiff,
v.
Miguel MARTINEZ, Defendant.

2018-0447
|
Decided August 14, 2018

Synopsis

Background: Defendant who was charged with two counts of criminal possession of a controlled substance in the third degree and one count of criminal sale of a controlled substance in the third degree filed application for judicial diversion for alcohol and substance abuse treatment.

Holdings: The County Court, John L. DeMarco, J., held that:

[1] defendant satisfied all of the statutory criteria for admission into Judicial Diversion Program and, thus, presumptively qualified for judicial diversion, but

[2] defendant's admission into the Judicial Diversion Program was not warranted in light of threat posed by defendant to public safety and welfare.

Application denied.

West Headnotes (13)

[1] Sentencing and Punishment

Under the judicial diversion statutes, in addition to receiving a favorable sentence, courts may permit a defendant to receive a disposition other than a felony conviction, e.g., withdrawing one's guilty plea and entering a plea to a misdemeanor or dismissal of the indictment in its entirety, in cases wherein the equities require such an outcome, as this result is consistent with the purposes of judicial diversion. N.Y. CPL § 216.00 et seq.

Cases that cite this headnote

[2] Sentencing and Punishment

It is only after statutory findings are made that a court may exercise its discretion to permit or deny entry into the Judicial Diversion Program for alcohol and substance abuse treatment. N.Y. CPL § 216.05(3)(b)(i-v).

Cases that cite this headnote

[3] Sentencing and Punishment

In deciding whether to allow defendant's admission into Judicial Diversion Program for alcohol and substance abuse treatment, a court may consider circumstances, insomuch as they exist, that are otherwise not accounted for by the diversion program statute yet bear significant relevance in determining the propriety of admission into the program. N.Y. CPL § 216.05(3)(b)(i-v).

Cases that cite this headnote

[4] Sentencing and Punishment

In determining defendant's eligibility for admission into Judicial Diversion Program for alcohol and substance abuse treatment, a court must consider, inter alia, the facts and circumstances encompassing the charged crimes in order to ascertain whether judicial diversion will best serve the interests of justice; accordingly, a court should consider, in relevant part, the seriousness of the circumstances of the offense, the extent of the harm caused, and the impact of a dismissal on the safety or welfare of the community. N.Y. CPL §§ 170.40, 210.40, 216.05(3)(b).

Cases that cite this headnote

[5] Sentencing and Punishment

Screening courts should employ a two-prong approach in assessing an eligible defendant for judicial diversion for alcohol and substance abuse treatment, under which an inquiry must first be undertaken with respect to the enumerated statutory factors; if each of the statutory factors militates in a defendant's favor, the screening court should nevertheless consider the totality of the circumstances, identifying any aggravating or mitigating factors not accounted for by the statute, in determining whether a defendant's admission to the program would serve the interests of justice. N.Y. CPL § 216.05(3)(b).

Cases that cite this headnote

[6] Sentencing and Punishment

It is the secondary component of the analysis of whether a defendant should be admitted into Judicial Diversion Program for alcohol and substance abuse treatment, under which court considers aggravating or mitigating factors not accounted for by statute, which authorizes a court to deny judicial diversion to an otherwise statutorily eligible defendant wherein a particularly egregious factor enters into the equation, such as the sale of fentanyl. N.Y. CPL § 216.05(3)(b).

Cases that cite this headnote

[7] Sentencing and Punishment

In assessing a defendant's eligibility for admission into Judicial Diversion Program for alcohol and substance abuse treatment, the court must consider the extent of the harm to the community caused by defendant's complicity in perpetuating the acute opioid crisis. N.Y. CPL § 216.05(3)(b).

Cases that cite this headnote

[8] Sentencing and Punishment

The court endeavors to determine if a defendant's conduct is likened more to that of a user or a dealer in determining his appropriateness for judicial diversion for alcohol and substance abuse treatment; however, there exists no bright-line rule articulating the tipping point in which a defendant's behavior crosses the threshold from user to dealer. N.Y. CPL § 216.05(3)(b).

Cases that cite this headnote

[9] Sentencing and Punishment

The lethal toxicity of fentanyl and the correlative community crisis requires the court to consider the impact on public safety in analyzing whether an eligible defendant should be permitted judicial diversion for alcohol and substance abuse treatment. N.Y. CPL § 216.05(3)(b).

Cases that cite this headnote

[10] Sentencing and Punishment

While protection of the public is a statutorily enumerated factor that the court is required to examine when determining whether to permit defendant's admission into Judicial Diversion Program for alcohol and substance abuse treatment, the analysis need not be limited to the context of the necessity of institutional confinement; rather, the court should consider the propriety of other available criminal sanctions in analyzing whether societal and penological interests may be furthered by imposition thereof. N.Y. CPL § 216.05(3)(b)(v).

Cases that cite this headnote

[11] Sentencing and Punishment

In determining whether an eligible defendant charged with a fentanyl-based offense should be permitted to participate in judicial diversion for alcohol and substance abuse

treatment, the public safety inquiry does not conclude upon a determination that institutional confinement is or may not be appropriate; pursuant to the first prong of the screening analysis, should the protection-of-the-public factor militate in a defendant's favor, the court must still scrutinize the manner in which the community can be adequately safeguarded against the potential risk posed by him. N.Y. CPL § 216.05(3)(b)(v).

Cases that cite this headnote

[12] Sentencing and Punishment

Defendant who was charged with criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree satisfied all of the statutory criteria for admission into Judicial Diversion Program for alcohol and substance abuse treatment, and thus defendant presumptively qualified for judicial diversion; defendant was legally and clinically eligible for the program, his substance abuse was contributing factor to his criminality, the program could effectively address defendant's substance abuse, and institutional confinement was not necessary for protection of the public. N.Y. CPL § 216.05(3)(b)(i-v).

Cases that cite this headnote

[13] Sentencing and Punishment

Although defendant was presumptively qualified for judicial diversion for alcohol and substance abuse treatment, admission to Judicial Division Program was not warranted in light of threat posed by defendant to public safety and welfare; defendant engaged in dealer-like conduct in selling fentanyl-infused heroin to customers and undercover officers and in having his brother engage in sales on his behalf, defendant was aware of the high potency of the heroin/fentanyl he sold, and defendant's conduct perpetuated the lethal opioid epidemic. N.Y. CPL § 216.05(3)(b)(i-v).

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

John L. DeMarco, J.

***1** Defendant seeks an order granting judicial diversion with respect to the above-referenced indictment charging him with two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16[1]) and one count criminal sale of a controlled substance in the third degree (Penal Law § 220.39[1]) all in conjunction with events allegedly occurring on or about May 6, 2018 in the County of Monroe, State of New York. The offenses charged considered together with defendant's criminal history [1] render him legally eligible for alcohol and substance abuse treatment in accordance with the Judicial Diversion Program ("Program") (*see generally* Criminal Procedure Law [CPL] § 216.00[1]). For that reason, upon defendant's request, he was assessed by a court-approved entity pertaining to his history and diagnoses for substance abuse (*see* CPL § 216.05[1]) and was ultimately recommended for Program participation based upon his clinical eligibility. The Court thereafter conducted a hearing (*see generally* CPL § 216.05[3]) to determine if defendant should be permitted entry into the Program. The People vehemently oppose. Now, upon due consideration of the parties' written and oral submissions, the following constitutes the decision of the Court.

Overview of Judicial Diversion

[1] The enactment of Article 216 of the Criminal Procedure Law came as part of the 2009 Drug Law Reform Act (DLRA) which was premised largely upon deconstructing the mandatory one-size-fits-all approach of the Rockefeller Drug Laws and providing "for a more sensible, comprehensive and cost-effective [process] for dealing with lower-level drug offenders and addicts" (2009 NY Assembly News Release [March 4, 2009] [quotations omitted]). Thus, one of the principal tenets of the Act was to confer upon judges the "*discretion* to appropriately tailor a sentence to fit [both] the conduct and rehabilitative efforts of each offender of drug-related crimes" (Sponsor's Mem., Bill Jacket, L. 2009, ch. 56; NY Spons. Memo., 2009 AB 6085 [emphasis added]). By establishing Article 216, the Legislature "entrusted the judiciary with the power to not only impose much lower, and sometimes even nonincarceratory sentences in felony cases in which addicts have been convicted of selling [or possessing] narcotics, but also 'diverting' these individuals from any prison sentence, and placing them into treatment, without first obtaining the prosecutor's consent" (*People v. De Young*, 95 A.D.3d 71, 940 N.Y.S.2d 306 [2d Dept. 2012] [citations and quotations omitted]). In addition to receiving a favorable sentence, courts may permit a defendant to receive a disposition other than a felony conviction (e.g. withdrawing one's guilty plea and entering a plea to a misdemeanor or dismissal of the indictment in its entirety) in cases wherein the equities require such an outcome as "this result is consistent with...the purposes of judicial diversion" (*People v. Alston*, 161 A.D.3d 472, 77 N.Y.S.3d 17 [1st Dept. 2018]).

***2** Judicial discretion is never wholly unfettered and undirected. There are a "thousand limitations — the product some of statute, some of precedent, some of vague tradition or of an immemorial technique — [which] encompass and hedge [courts]." (Benjamin N. Cardozo, *The Growth of the Law* 60-61 [1924].) "[L]ike the hole in a doughnut, [discretion] does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept." (Ronald Dworkin, *Taking Rights Seriously* 31 [1978].) On some occasions, the moral code which has been accepted as standards within the community will figure as [one of several] good reasons for a legal decision (Ronald Dworkin, *Judicial Discretion*, The Journal of Philosophy, vol 60, No. 21, 635 n 9 [1963]). Thus, a court's discretion is guided in part upon seeking the realization of certain policies and principles (*id.* at 629) which achieves the best moral interpretation of existing social practices all within the context of the statutory norm (*see generally* Aharon Barak, *Judicial Discretion*, 51 [1989]).

[2] Turning to the rules at hand, the framework in Article 216 for determining the suitability of an eligible defendant [2] for Program participation requires the Court to make findings of fact upon consideration of certain statutorily prescribed factors, to wit, whether:

> (i) the defendant is an eligible defendant as defined in subdivision one of section 216.00...;
>
> (ii) the defendant has a history of alcohol or substance abuse or dependence;
>
> (iii) such alcohol or substance abuse or dependence is a contributing factor to the defendant's criminal behavior;
>
> (iv) the defendant's participation in judicial diversion could effectively address such abuse or dependence; and
>
> (v) institutional confinement of the defendant is or may not be necessary for the protection of the public (CPL § 216.05[3][b][i]-[v]).

When a court determines, pursuant to these factors, that an eligible defendant should be offered substance abuse treatment, it *may* permit judicial diversion (*see* CPL § 216.05[4]). Thus, it is only after statutory findings are made may a court exercise its discretion to permit or deny entry into the Program (*see People v. Smith*, 139 A.D.3d 131, 30 N.Y.S.3d 19 [1st Dept. 2016], *lv denied* 28 N.Y.3d 1031, 45 N.Y.S.3d 382, 68 N.E.3d 111 [2016]). "If language of a statute is plain and free from ambiguity, and expresses single definite and sensible meaning, words cannot be interpreted and courts have no authority to add to the language of law" (*see* McKinney's Cons. Laws of N.Y. Book 1 Statutes § 73, N.Y. Annotations at 43 [2018 ed.], citing *Putnam County v. State*, 17 Misc. 2d 541, 186 N.Y.S.2d 944 [Ct. Cl. 1959]). Here, a plain and obvious reading of CPL § 216.05(4) — "an eligible defendant *may* be allowed to participate" in the Program — indicates that courts retain the ultimate discretion in rendering the final determination as to Program participation notwithstanding the findings relative to the enumerated factors (*see* CPL § 216.05[4] [emphasis added]; *see also Clarke*, 155 A.D.3d 1242, 65 N.Y.S.3d 578).

[3] **[4]** Although judicial discretion is a fundamental principle of Article 216, recent jurisprudence suggests that it is somewhat encumbered in that should a defendant meet the statutory criteria, he should presumptively be permitted entry into the Program (*see generally People v. Cora*, 135 A.D.3d 987, 22 N.Y.S.3d 655 [3d Dept. 2016] [court erred in denying defendant Program admission as the all of the statutory factors weighed in his favor]; *People v. Alston*, 161 A.D.3d 472, 77 N.Y.S.3d 17 [court improvidently exercised discretion in denying defendant judicial diversion; evidence before the court belied its conclusion that substance abuse was not contributing factor to criminality]; *People v. De Young*, 95 A.D.3d 71, 940 N.Y.S.2d 306 [all factors militated in defendant's favor and thus he should have been permitted Program entry]). Thus, courts are not limited to considering only the statutorily prescribed factors. To be certain, a court may consider circumstances — insomuch as they exist — that are otherwise not accounted for by the statute yet bear significant relevance in determining the propriety of admission into the Program (*see generally People v. Powell*, 110 A.D.3d 1383, 973 N.Y.S.2d 870 [3d Dept. 2013]; *People v. Driscoll*, 147 A.D.3d 1157, 48 N.Y.S.3d 522 [3d Dept. 2017], *lv denied* 29 N.Y.3d 1078, 64 N.Y.S.3d 168, 86 N.E.3d 255 [2017]; *People v. Clarke*, 155 A.D.3d 1242, 65 N.Y.S.3d 578 [3d Dept. 2017], *lv denied* 30 N.Y.3d 1114, 77 N.Y.S.3d 339, 101 N.E.3d 980 [2018]). Although not explicitly articulated by the Legislature, in determining Program eligibility, a court must consider, inter alia, the facts and circumstances encompassing the charged crimes in order to ascertain whether judicial diversion will best serve the interests of justice. [3] Accordingly, a court should consider, in relevant part, the "seriousness of the circumstances of the offense... the extent of the harm caused... [and] the impact of a dismissal on the safety or welfare of the community" (CPL §§ 170.40; 210.40) in determining Program admission.

***3** **[5]** **[6]** In consideration of the above — the Legislature's explicit and implicit intent to authorize and expand judicial discretion, the permissive directive of the statute itself and the manner in which the Departments of the Appellate Division have interpreted Article 216 — screening courts should employ a two-prong approach in assessing an eligible defendant for judicial diversion. First, an inquiry with respect to the enumerated statutory factors must be undertaken. If each of the statutory factors militates in a defendant's favor, the screening court should nevertheless consider the totality of the circumstances, identifying any aggravating or mitigating factors not accounted for by the statute, in determining whether a defendant's admission to this Program would serve the interests of justice. It is the secondary component of this analysis which authorizes a court to deny judicial diversion to an otherwise statutorily eligible defendant wherein a particularly egregious factor enters into the equation, e.g. the sale of fentanyl.

Impact of Fentanyl on the Eligibility Analysis

The onslaught of the heroin epidemic which has been exacerbated by its proliferating offspring, fentanyl (the massively concentrated synthetic opioid that delivers up to 50 times the strength of heroin), has created new challenges for this Court in terms of assessing an otherwise eligible defendant for judicial diversion. "According to Substance Abuse and Mental Health Services Administration (SAMHSA)'s National Survey on Drug Use and Health (NSDUH), in 2016, over 11 million Americans misused prescription opioids, nearly 1 million used heroin, and 2.1 million had an opioid use disorder due to prescription opioids or heroin. Over the past decade, the U.S. has experienced significant increases in rates of neonatal abstinence syndrome (NAS), hepatitis C infections, and opioid-related emergency department visits and hospitalizations. Most alarming are the continued increases in overdose deaths, especially the rapid increase since 2013 in deaths involving illicitly made fentanyl and other highly potent synthetic opioids. Since 2000, more than 300,000 Americans have died of an opioid overdose. [Furthermore], [p]reliminary data for 2016 indicate[d] at least 64,000 drug overdose deaths, the highest number ever recorded in the [United States]." (2017 U.S. Senate Committee on Health, Education Labor & Pension, Full Committee Hearing, *The Federal Response to the Opioid Crisis* [October 5, 2017].)

Local data collected from the Rochester Drug Treatment Court found that Monroe County experienced a 145% increase in overdose deaths from 69 in 2015 to 169 in 2016. Opioid overdoses continued to rise in 2017, accounting for 220 deaths (*see* Patti Singer, *Monroe County opioid overdose deaths up more than 200 percent in two years*, Democrat and Chronicle, July 3, 2018) and within the first six months of 2018 there have been 566 reported overdoses, 85 of which resulted in fatalities (*see* Jane Flash, *Overdose rose in first 6 mos. of 2018 in Monroe County*, 13 WHAM, August 1, 2018).

In this community, the reaction to the opioid crisis has been proactive and aggressive. For instance, the Monroe County District Attorney declared her intent to combat the epidemic by pursuing homicide charges against drug dealers tethered to fatal opioid-based overdoses (*see generally* Will Cleveland, *Drug dealer Dominic Hobbs sentenced for fatal overdose*, Democrat and Chronicle, December 19, 2017; *People v. Nikki Phillips*, Monroe County Ct., indictment No. 2018-0357 [charged with manslaughter in the second degree in conjunction with the sale of fentanyl]; *People v. Brian Saez*, Monroe County Ct., indictment No. 2018-3206, June 21, 2018, Dinolfo, J. [defendant pleaded guilty to criminally negligent homicide based upon the sale of fentanyl which led to the overdose death of the victim]). Additionally, Monroe County is pursuing a civil action against several makers and marketers of opioid drugs in New York State responsible for fanning the flames of addiction seeking to hold them accountable for their actions and recoup the costs incurred by taxpayers and reinvest in increased prevention, treatment and law enforcement (*see Monroe County filed a lawsuit against big pharma*, 13 WHAM, January 24, 2018). A concerted effort has also been undertaken to provide those individuals afflicted with addiction the medical care and supportive living necessary in order to assist them in achieving sobriety (*see* Patti Singer, *Widespread training in opioid antidote is part of Monroe County plan*, Democrat and Chronicle, February 24, 2018). The voice of this community persistently and strenuously advocates for a means to end this crisis by contemporaneously offering treatment to the addict while unequivocally calling for no tolerance for their dealers.

***4** **[7]** While the Court certainly recognizes the unprecedented, highly addictive nature of heroin — especially when combined with fentanyl — and the corresponding urgency to provide treatment to those persons afflicted with substance abuse and chemical dependency, it must balance that against the inherent danger posed to this community by those using, dealing, or otherwise handling fentanyl. Indeed, the introduction of fentanyl into the criminal justice system, especially in the context of judicial diversion, has caused a shift in the traditional examination of substance abuse and chemical dependency away from the individual user and toward society at large. The exponentially growing number of users and overdose-related deaths indiscriminately crossing racial, cultural and socioeconomic barriers has been classified as an "epidemic." Thus, in assessing a defendant's Program eligibility, the Court must consider the extent of the harm to the community caused by his complicity in perpetuating this acute crisis. Unlike cases involving drugs of a non-fatal composition, fentanyl-based offenses carry such substantial risks so as to cause this Court pause when considering Program admission (*cf. De Young*, 95 A.D.3d 71, 940 N.Y.S.2d 306 [judicial diversion appropriate for defendant charged with transporting large amounts of marijuana]).

Since its establishment, [4] this Court has routinely granted judicial diversion to defendants charged with possession with the intent to sell controlled substances, as such offenses are legally eligible (*see* CPL § 216.00[1]), provided that a defendant's substance abuse is a contributing factor to his criminality (*see* CPL § 216.05[3][b][iii]). The Court is acutely aware of the common practice amongst those in the throes of addiction to buy and sell controlled substances, and accordingly applies considerable scrutiny in determining where a particular defendant's conduct falls on the spectrum of user to dealer. The Legislature, in creating the Program, intended to "address[ ] substance abuse that often lies at the core of criminal behavior" (Sponsor's Mem., Bill Jacket, L. 2009, ch. 56; N.Y. Spons. Memo., 2009 AB 6085), but it certainly did not contemplate providing refuge for the recreational using salesman. [5]

[8] In "hard" [6] cases such as this, where a hybrid scenario of use and sale of fentanyl is presented, the Court must exercise its discretion in order to adjudicate this issue which the law does not reach. Thus, in identifying the particular conceptions of community morality as decisive on this issue (*see* Dworkin, 88 Harv L Rev 1057), the Court begins its analysis by scrupulously examining the circumstances, to the extent those facts are made available, [7] in order to assess whether there exists a substantial nexus between defendant's substance abuse and the sale of controlled substances such that the former outweighs the latter. In other words, if defendant's substance abuse is so intrinsically intertwined with selling fentanyl such that the sale is a symptom of his addiction, and the amount of narcotics involved is consistent with sale for use, he may be an appropriate candidate for the Program. Conversely, if defendant's culpability as it pertains to selling fentanyl exceeds the severity of his addiction, the Court would be well within the purview

of its discretion to deny Program admission. Thus, the Court endeavors to determine if a defendant's conduct is likened more to that of a user or a dealer in determining his appropriateness for judicial diversion. Insomuch as the Court strives for continuity in terms of applying measures which create a certain consistency that promotes fairness among defendants in the screening process, there exists no bright-line rule articulating the tipping point in which a defendant's behavior crosses the threshold from user to dealer, and the Court so declines to create one.

***5** **[9]** There is certainly a colorable claim to be made in each case in which fentanyl is the culprit that institutional confinement — prison (*see* Correction Law §§ 2[4][c]; 40[2]) — is necessary for the protection of the public and thus judicial diversion is not warranted (*see generally* CPL § 216.05[3][b][v]). Notwithstanding the public safety risk implicated in fentanyl-based matters, this Court declines to articulate an express decree outright prohibiting the admission of such offenses into the Program pursuant to CPL § 215.05(3)(b)(v). Likewise, it will not opine that all fentanyl-addicted defendants should be permitted admission to the Program simply based upon the highly addictive nature of the narcotic and the public interest in offering treatment as an alternative to incarceration. Such hard and fast rules would effectively vitiate the vast discretion now vested unto screening courts. Yet, the lethal toxicity of fentanyl and the correlative community crisis requires the Court to consider the impact on public safety in analyzing whether an eligible defendant should be permitted judicial diversion.

[10] **[11]** While protection of the public is a statutorily enumerated factor that the Court is required to examine (*see* CPL § 216.05[3][b][v]), the analysis need not be limited to the context of the necessity of *institutional* confinement. Rather, the Court should consider the propriety of other available criminal sanctions in analyzing whether societal and penological interests may be furthered by imposition thereof. In this Court's view, the constraints of such an absolute test do not account for intermediate scenarios in which neither institutional confinement nor community release is appropriate. For instance, in cases where a prison sentence may not be necessary for the protection of the public, a sentence of probation (or direct to parole) which substantially curtails a defendant's liberty, his associations as well as his place of habitation by subjecting him to close supervision within the community may be essential in order to achieve safety objectives. Similarly, it is certainly plausible that incarcerating and removing a defendant from the community may be imperative, yet a prison sentence would be disproportionately severe and definite or intermittent terms sufficiently address community safety concerns. Thus, in determining whether an eligible defendant charged with a fentanyl-based offense should be permitted to participate in judicial diversion, the public safety inquiry does not conclude upon a determination that institutional confinement is or may not be not appropriate. Pursuant to the first prong of the screening analysis, should CPL § 216.05(3)(b)(v) militate in a defendant's favor, the Court must still scrutinize the manner in which the community can be adequately safeguarded against the potential risk posed by him. In other words, the second prong of the Court's Program admission analysis permits the public safety inquiry to be considered beneath the vast umbrella of judicial discretion, without the constraints imposed by the statute, in rendering a determination as to whether a fentanyl-based offense should be diverted.

Instant Offense

In this case, defendant was arrested based upon his involvement in an undercover narcotics buy-and-bust operation conducted in connection with an ongoing investigation into the suspicious death and suspected fentanyl overdose of TC. Believing that defendant may have sold heroin to TC prior to his death, undercover officers executed a hand-to-hand transaction in which defendant sold heroin which was later discovered to contain fentanyl. At the time he was interviewed, defendant admitted that he and his brother sold heroin to the deceased. [8] In relevant part, defendant also confessed to investigators that he had been selling heroin for about a month, that he has "customers," [9] and his brother sells heroin on his behalf. He further indicated that he was aware that the heroin he was selling was "hot" and admitted that the potency thereof had the potential to result in fatalities. Defendant also provided information to investigators regarding the person from whom he purchased heroin, affirming that while he was unaware specifically what was mixed in with the bundles, that it was "scary" noting that he was "wrecked" after he used only one bag.

***6** At the time defendant was interviewed for Program eligibility, he met the DSM IV-TR criteria for Opiate and Cocaine dependence. Defendant, age 41, indicated that

his substance abuse began at the age of 13 at which time he experimented with alcohol and marijuana. He further reported that he started using cocaine at the age of 21 and heroin at the age of 30 and that his use progressed daily. In 2014, after nearly four years of participation, defendant successfully completed Drug Treatment Court and maintained a period of prolonged sobriety. In the late summer/early fall of 2017, defendant suffered an opioid-based relapse and shortly thereafter self-referred to an outpatient program at Strong Recovery where he started receiving prescription Suboxone. Defendant struggled with his sobriety for approximately eight months, graduating to phase two of outpatient treatment, before his relapse and arrest on the instant offense.

Shortly after his arraignment, defendant was released to the Neilson House under the supervision of Pre-Trial Services with the contingency of electronic monitoring. Defendant thereafter engaged in an opiate stabilization group and started attending daily supportive living meetings outside of chemical dependency treatment. Notably, defendant has been fully compliant with the terms and conditions of his release during the pendency of this matter.

Analysis

[12] The Court is satisfied that defendant is both legally and clinically eligible for the Program, his substance abuse is a contributing factor to his criminality, and that the Program could effectively address his substance abuse (*see* CPL § 216.05[3][b][i], [ii], [iii], [iv]). Turning briefly to the issue of whether institutional confinement is or may be necessary for the protection of the public, viewing the facts and circumstances in a light most favorable to defendant and affording him every beneficial inference, [10] at this juncture the Court finds that it is not (*see* CPL § 216.05[3][b][v]). Notably, the Court declines to opine as to the propriety of institutional confinement and limits its determination to a finding that in this case the public safety concerns do not constitute an outright statutory prohibition to judicial diversion, yet may be subject to further scrutiny by the Court.

[13] Accordingly, as defendant satisfies all of the statutory criteria, he thus presumptively qualifies for judicial diversion. Nevertheless, the Court finds that admission to the Program is not warranted based upon the threat posed by defendant to the public's safety and welfare (*see generally Powell*, 110 A.D.3d 1383, 973 N.Y.S.2d 870 [judicial diversion denied based upon defendant's extensive criminal history and risk to public safety]; *Clarke*, 155 A.D.3d 1242, 65 N.Y.S.3d 578 [defendant denied Program admission based upon, in relevant part, his criminal history which included a violent felony conviction]; *People v. Pittman*, 140 A.D.3d 989, 33 N.Y.S.3d 443 [2d Dept. 2016] [judicial diversion denied based upon defendant's threat to public safety]; *People v. Chavis*, 151 A.D.3d 1757, 56 N.Y.S.3d 744 [4th Dept. 2017], *lv denied* 29 N.Y.3d 1124, 64 N.Y.S.3d 674, 86 N.E.3d 566 [2017] [institutional confinement required where large amount of heroin and cash seized from defendant's home considered in conjunction with her history of narcotic sales]).

***7** In this Court's view, the totality of defendant's dealer-like conduct — that defendant sold fentanyl-infused heroin to customers and undercover officers, had his brother engage in sales on his behalf, and consciously disregarded the potential lethal implications of selling "hot" heroin/fentanyl — surpasses his clinical diagnoses for purposes of Program eligibility. Moreover, that defendant was aware of the high potency of the heroin/fentanyl he sold is particularly troubling as such a reputation increases demand for the illicit product: a fact undoubtedly known to dealers. Defendant's conduct is further compounded by the fact that he purchased and sold heroin/fentanyl which unquestionably perpetuates the lethal opioid epidemic afflicting this community and the corresponding public health crisis. To be certain, it is the combination of defendant's dealer-like conduct and that the substance he vended contained fentanyl that sufficiently outweighs defendant's chemical dependency for purposes of this Court's analysis. Stated another way, in balancing defendant's substance abuse with the sale of fentanyl, the scales are weighted against him in that his conduct is comparable to that of a dealer more so than an addict. Additionally, drugs are related to crime through the effects on a user's behavior, generating violence and other illegal activity (*see* Fact Sheet: Drug-Related Crime, U.S. Department of Justice, September 1994, NCJ-149286), thus defendant, as both a user and dealer, subjects the entire community to potential harm.

Upon due consideration of all the facts and circumstances presented, the Court concludes that defendant is a risk to public safety and therefore an inappropriate candidate for participation in the Program. Finally, defendant should

not be afforded a favorable disposition and/or sentence available through judicial diversion as the facts presented render such legal benefits incongruent with the tenets of equity and interests of justice.

Discretion is the cornerstone of Article 216 for circumstances precisely such as this. It is the instrument which empowers the Court to consider the prevailing social and moral ethos in reaching the correct result which upholds the principles of both this community and legal system. The permissive design of the statute also affords deference to lex ferenda by implicitly recognizing the continuously evolving values of society as it pertains to the influx of illicit narcotics and the impact on this community while maintaining the integrity of the lex lata within the greater context of the legislative war against drugs. The fundamental community conceptions which underpin Article 216 — empirically demonstrated by the tremendous outpouring of this community and its response to the opioid crisis which balances the necessity of offering treatment to an addict against that of punishing his dealer — lend credence to this Court in deciding whether defendant's case should be diverted. Thus, for all the reasons herein discussed and notwithstanding defendant's presumptive Program eligibility, the facts surrounding his purchase of fentanyl and distribution thereof constitutes behavior so egregious and contrary to the social mores necessary to ensure the safety and well-being of this community that the Court, in its discretion, cannot justify judicial diversion.

Defendant's application is accordingly denied.

All Citations

--- N.Y.S.3d ----, 2018 WL 3864313, 2018 N.Y. Slip Op. 28250

Footnotes

1 Although defendant has a prior violent felony conviction for criminal possession of a weapon in the second degree (*see* Penal Law §§ 70.02[1][b]; 265.03), it does not render him legally ineligible by virtue of the statutorily sufficient passage of time (*see* CPL § 216.00[1][a]).

2 A defendant is legally eligible for judicial diversion when he stands charged with at least one of the 37 specified offenses and no violent felony offense and he is not otherwise disqualified based upon his criminal history. However, a prosecutor may consent to an ineligible defendant's Program participation. (*See* CPL § 216.00 *et seq.*).FN2.At the request of the eligible defendant, a court may order an alcohol and substance abuse evaluation, and upon receipt thereof the court may conduct a hearing to determine whether treatment should be offered pursuant to Article 216 (*see* CPL §§ 216.05[1]; [3][a]).

3 Upon enacting the DLRA, the Legislature encouraged courts to employ its vested authority pursuant to CPL §§ 170.40 and 210.40 to dismiss a drug charge upon the successful completion of a diversion program (Sponsor's Mem., Bill Jacket, L. 2009, ch. 56; NY Spons. Memo., 2009 AB 6085).

4 The Rochester/Monroe County Judicial Diversion Program has been one of the State's most robust since its inception in 2009. To date, the Court has considered nearly 2500 legally eligible defendants and adjudicated approximately 50% eligible for judicial diversion.

5 In discussing the justification for judicial diversion, the Legislature cited, in relevant part, the nearly 40% of defendants incarcerated for drug possession as opposed to sale. While it did not explicitly distinguish between possession and sale-based offenses in the context of Program eligibility, offering treatment, or the imposition of lesser sentences, the spirit of the Drug Law Reform Act is clear: to reduce “the number of New Yorkers abusing and addicted to controlled substances.” (Sponsor's Mem., Bill Jacket, L. 2009, ch. 56; N.Y. Spons. Memo., 2009 AB 6085). Thus, the Program was established for the addict, not his dealer.

6 Cases in which the result is not clearly dictated by statute or precedent (Ronald Dworkin, *Hard Cases*, 88 Harv L Rev 1057 [1975]).

7 Since its creation, this Court has customarily conducted screening conferences wherein it relies upon proffers from counsel regarding an eligible defendant's legal history and the circumstances pertaining to the offense under consideration for Program eligibility. Typically, the screening conference occurs at an early stage of the proceeding and thus the parties are positioned to furnish merely a general summary of the most essential facts for the Court's consideration. Yet, this case is somewhat unique in that ancillary facts were made available in light of an unrelated, ongoing investigation into to a suspected fentanyl overdose death and defendant's involvement therewith. Additionally,

defendant provided a lengthy statement to investigators which was provided to the Court by way of notice filed pursuant to Article 710 of the Criminal Procedure Law.

8 To be certain, defendant contends that he merely provided transportation to his brother who ultimately sold heroin to the deceased. Notwithstanding the dispute enveloping defendant's culpability with respect to this drug transaction, that his conduct may have contributed to the death of TC is inconsequential for purposes of this Court's inquiry. While the Court certainly appreciates the inherent tragedy of these circumstances, there exists too tenuous a connection to militate against defendant. Affording the People every favorable interference and assuming arguendo defendant's complicity, there is no other evidence (the Medical Examiner's report is still pending) aside from an ill-timed drug transaction that TC's death resulted from an overdose of fentanyl which was provided to him by defendant. Absent additional proof concerning the cause of death and timing of defendant's conduct relative thereto (which is not available at the time of this decision), tethering defendant to the alleged overdose constitutes nothing more than conjecture.

9 Contrary to defendant's contention, the existence of merely two customers does not vitiate proof otherwise characterizing him as a dealer. Consider by way of example the high-level distributor who repeatedly sells mass quantities of controlled substances to only one lower-level distributor, or the street-level dealer who possesses mass quantities of controlled substances who is arrested after his first sale to a single customer. Though hyperbolic illustrations, both examples present a similar scenario in which it cannot reasonably be said that the limited number of purchasers undermines the sellers' intent to engage in the trafficking and sale of controlled substances. In this case, affording defendant the benefit of his self-serving contention, his minimal number of customers is not dispositive in determining his culpability. Furthermore, defendant's act of selling fentanyl to an undercover officer — presumptively a stranger — belies his contention that his sales are consistent with informal exchanges conducted amongst addicts and thus causes the Court's pendulum to move toward the conclusion defendant is, albeit low-level, a dealer.

10 The Court certainly acknowledges the exceptional advocacy for defendant's acceptance into the Program as evidenced, in part, by letters of support from both his sponsor/mentor and Nielson House (highly regarded supportive living environment) manager. When considering defendant's admission into the Program with an eye toward the likelihood of success, the endorsement of individuals and organizations well equipped to assist on his path to achieving sobriety further buttresses his application for judicial diversion. Furthermore, while released under supervision, defendant has remained compliant with all of the conditions and engaged in chemical dependency treatment. Nevertheless, for all the reasons herein discussed, such community support for defendant is insufficient to overcome the inflammatory circumstances presented in this matter.

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