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Drug Court & "Violent Offenders" Under 42 U.S.C.A. 3797u-2

Federally funded Drug Courts, such as West Virginia's Adult Drug Court Diversion Program operating in the northern panhandle counties of Brooke, Hancock, Ohio, Marshall, and Wetzel Counties are prohibited by federal law from accepting into the program "violent offenders" as defined by 42 U.S.C.A. 3797u-2. Suspension of grant funding will occur if one or more such "violent offenders" are permitted to participate in the Drug Court program. The applicable provision from the United States Code Annotated provides as follows:

§ 3797u-1. Prohibition of participation by violent offenders

The Attorney General shall--

(1) issue regulations or guidelines to ensure that the programs authorized in this subchapter do not permit participation by violent offenders; and

(2) immediately suspend funding for any grant under this subchapter, pending compliance, if the Attorney General finds that violent offenders are participating in any program funded under this subchapter.

42 U.S.C.A. § 3797u-1

Thus, potential participants in West Virginia's Adult Drug Court Diversion Program must be carefully screened to prevent even inadvertent participation in the program. This screening is initially accomplished upon referral of a potential participant by criminal background check and interview of the potential participant by the Drug Case Coordinator (DCC). The DCC also obtains information from review of the criminal charge and from the prosecutor and defense counsel, and is responsible for conveying this information to the Drug Court Judge or Magistrate assigned the diversion case. Drug Court Judges and Magistrates act as the final screening prior to admission of the potential participant into the program, and need to be alert to not admitting any individual into the program who may be a "violent offender" under 42 U.S.C.A. 3797u-2.

Who are "violent offenders" under this provision of the U.S. Code?

"[T]he term "violent offender" means a person who--

(1) is charged with or convicted of an offense, during the course of which offense or conduct--

(A) the person carried, possessed, or used a firearm or dangerous weapon;

(B) there occurred the death of or serious bodily injury to any person; or

(C) there occurred the use of force against the person of another, without regard to whether any of the circumstances described in subparagraph (A) or (B) is an element of the offense or conduct of which or for which the person is charged or convicted; or

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> **(2)** has 1 or more prior convictions for a felony crime of violence involving the use or attempted use of force against a person with the intent to cause death or serious bodily harm."

42 U.S.C.A. § 3797u-2

Note that the definition is an "either-or" between (1)(A, B, or C) and (2) above. Section (1)(A, B, or C) addresses the current charge or conviction for which the potential participant is being considered for drug court diversion. West Virginia's Adult Drug Court Diversion Program currently accepts persons with current "charges", and not with current "convictions" as the program is currently structured as a pre-trial diversion program.

Prior convictions, which should appear on the completed criminal background check, are reviewed under part (2) of the statute. Note that only prior "felony" convictions, not prior misdemeanor convictions will exclude a potential participant. Further, only prior felony "convictions", not prior felony "arrests", will exclude a potential participant.

Attached is part of an "Appendixes", pages 27 and 28, for your review from the Bureau of Justice Assistance (BJA)/ Department of Justice (DOJ) that answers five frequently asked questions concerning the federal definition of "violent offender". Of note is the effect of dropped or reduced charges on eligibility and what must occur if a drug court participant is charged with a violent crime while in the program. Also, below is a Q&A schematic that can be used to review prior convictions and currently charged crimes for eligibility under the federal "violent offender" statute:

PRIOR CRIMES:

1. Was Defendant previously arrested?
   No…Stop. Defendant is eligible under Section (2); go to current charged crimes, Question 6.
   Yes, continue…
2. Was Defendant previously convicted of the crime?
   No…Stop. Defendant is eligible under Section (2); go to current charged crimes, Question 6.
   Yes, continue…
3. Was the conviction a felony?
   No…Stop. Defendant is eligible under Section (2); go to current charged crimes, Question 6.
   Yes, continue…
4. Did the felony crime involve use or attempted use of force against a person?
   No…Stop. Defendant is eligible under Section (2); go to current charged crimes, Question 6.
   Yes, continue…
5. Did the felony crime include intent to cause death or serious bodily harm?

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No…Stop. Defendant is eligible under Section (2); go to current charged crimes, Question 6.
Yes, DEFENDANT IS NOT ELIGIBLE FOR DRUG COURT DIVERSION

CURRENT CHARGED CRIMES:

6. Did the Defendant carry, possess or use a firearm or another dangerous weapon during the course of the crime being considered for diversion?
   No… Go to Question 10
   Yes, continue…
7. Was the firearm or other dangerous weapon legally licensed?
   No… Stop. DEFENDANT IS NOT ELIGIBLE FOR DRUG COURT DIVERSION
   Yes, continue…
8. Was the legally licensed firearm or dangerous weapon only possessed or carried during the course of the crime?
   No, continue to Question 9
   Yes…Go to Question 10
9. Was the legally licensed firearm or dangerous weapon used in a legally justifiable way, such as in circumstances of self-defense?
   No…Stop. DEFENDANT IS NOT ELIGIBLE FOR DRUG COURT DIVERSION.
   Yes, continue…
10. Did death or serious bodily injury occur to any person during the course of the crime being considered for diversion?
    Yes… Stop. DEFENDANT IS NOT ELIGIBLE FOR DRUG COURT DIVERSION
    No, continue…
11. Did use of force against the person of another occur during the course of the crime being considered for diversion?
    Yes… Stop. DEFENDANT IS NOT ELIGIBLE FOR DRUG COURT DIVERSION
    No, Defendant is eligible under Section (1) (A, B, or C).

Here is an example worked through the Q&A schematic. Debbie Druguser is arrested for assault (WV Code 61-2-9(b)) for verbally threatening to kill her mother if she does not give her money for drugs. Mother locked herself in her home and called police while Debbie banged on the door yelling obscenities. No weapons were involved and no actual physical injury occurred to either mother or daughter. Debbie has a prior conviction of battery two years ago for which she served 30 days in jail under WV Code 61-2-9(c).

Following the Q&A schematic results in the following:
Prior Crimes:

1. Debbie was previously arrested for battery.

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2. Debbie was previously convicted for battery.
3. The prior conviction was a misdemeanor.

Current Charged Crimes:

6. Debbie did not carry, possess, or use a firearm or other dangerous weapon.
10. No death or serious bodily injury occurred.
11. Verbal threats do not constitute use of force against the person of another. Banging on the home's door does not constitute use of force against the "person" of another. Since Debbie did not actually use force against her mother, she is not precluded under the federal definition.

The screening for federal "violent offender" preclusion from West Virginia's Adult Drug Court Diversion Program is, of course, not the only violence screening for eligibility into the program. If Debbie Druguser passes the other legal criteria for entry into the program, such as residency, age, the crime charged is not a sex crime, nor has a child as a victim, she must still score low to moderate risk on the administered risk assessment before being considered for diversion.

Questions on the federal "violent offender" prohibition to participation in the drug court diversion program can be directed to the Administrative Office of the West Virginia Supreme Court of Appeals, Project Director Linda Richmond Artimez, J.D. (1-304-558-0145).

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