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Judicial supervision and adult drug court outcomes*

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Adult drug courts reduce substance abuse and offending. Yet, much remains unknown about how they achieve these outcomes and for whom they are most effective. This article explores what we know about one aspect of drug courts that has received a considerable amount of scrutiny: the role of the judicial officer.

What are drug courts?

Drug courts are a class of problem-solving court for offenders with substance use disorders. Problem-solving courts aim to address the root causes of offending in an attempt to reduce the rate at which convicted offenders return to the criminal justice system. While the characteristics of drug courts vary from jurisdiction to jurisdiction, most tend to share the following features: they integrate drug treatment into the justice system; they operate as alternatives to custody; they monitor drug use through regular supervised drug testing; and participants are usually required to report back to the judge on a regular basis. Drug courts are heavily grounded in behavioural principles insofar as positive behaviours are rewarded and antisocial behaviors are admonished. Rewards usually take the form of encouragement and praise from the bench, reduced levels of supervision and, ultimately, graduation from the program and avoidance of the original prison sentence. Punishments vary in severity and range from warnings through to demotion to earlier program phases, increased monitoring or short episodes in custody.

Since their emergence in the United States in the late 1980s, drug courts have expanded across many countries as one of the primary policy responses to the over-representation of substance users in prison. The first drug court was established in Miami, Florida in 1989 and there are now more than 2,300 drug courts operating across the United States.¹ Drug courts have also been established in Australia, Belgium, Bermuda, Brazil, Canada, the Cayman Islands, Chile, England, Ireland, Jamaica, Mexico, New Zealand, Norway, Scotland, Suriname and Wales.² The first Australian Drug Court opened in Parramatta in February 1999. This court works with offenders residing in defined parts of Western and South-Western Sydney. Drug courts have since been established and supported in most other States of Australia. The second NSW Drug Court was opened in Newcastle in 2011 and the NSW Attorney General opened the third NSW Drug Court, located in Sydney, in February 2013.³

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1 US Justice Programs Office, *Summary of drug court activity by State and County*, April 5, 2013, at <www1.spa.american.edu/justice/document_center.php?keywords=&project=1&category=187>, accessed 28 October 2013.

2 International Association of Drug Treatment Courts *Drug treatment courts worldwide*, at <www.nadcp.org/iadtc-home/?q=iadtc-home/>, accessed 28 October 2013.

3 See R Dive, "The Drug Court now sits at the Downing Centre" (2013) 25 *Judicial Officers' Bulletin* 6.

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The NSW Drug Court is a specialist jurisdiction that exercises both Local and District Court jurisdictions. One of the features that sets the NSW courts apart from many of those in the United States is that the NSW courts operate under their own legislation (the *Drug Court Act 1998* (NSW)). Participants in the NSW Drug Court program are required to pass through three phases of treatment prior to graduating (initiation/stabilisation, consolidation, and reintegration). They submit to supervised urinalysis tests at least three times per week during phase 1, and twice weekly during phases 2 and 3, and are typically required to report back to the Drug Court once each week during phase 1, fortnightly during phase 2 and monthly during phase 3. The minimum time participants must spend on the program is 12 months, although the actual length of time on the program depends on a range of factors including the length of the initial sentence and on-program behaviour.

Drug courts reduce substance use and offending behaviour

One of the reasons why drug courts have become so popular is their widely-touted impact on substance abuse and recidivism. While early studies that looked at the impact of drug courts on drug use and recidivism were hampered by methodological problems, more recent research provides evidence in support of their effectiveness. The main weakness with early studies was that the researchers failed to properly match drug court participants with comparison groups of similar offenders who did not receive the program. This matching is required to build an understanding of what evaluators call the counterfactual, or what would have happened in the absence of the program. More recent studies that have overcome these weaknesses tend to find encouraging evidence that adult drug courts reduce recidivism.

Consistent evidence for the effectiveness of drug courts arises from a class of research known as meta-analysis. These studies pool the effects from a large number of studies in an effort to work out the average effect of drug courts on various outcomes. One recent meta-analysis identified 92 evaluations of adult drug courts that met the eligibility criteria for inclusion in the study.⁴ This research concluded that re-offending rates were, on average, much lower among drug court participants than offenders in matched comparison groups. If the expected rate of re-offending in the absence of the drug court was 50 per cent, this study estimated that drug courts reduce re-offending rates to 38 per cent.⁵

An evaluation of the NSW Drug Court⁶ was one of only three randomised controlled trials identified in the meta-analysis identified above. Randomised controlled trials involve allocating participants into “treatment” and “control” groups by way of a random ballot. This process is often the fairest way of allocating places in treatment programs when there are more people eligible to take part than there are places available on the program. The random ballot process is sometimes used in NSW so ethical concerns for the researchers and the practitioners involved in the trial are therefore reduced. The advantage of random assignment is that, when samples are large enough, the treatment and control groups are balanced on all factors that might impact on outcomes such as drug use and recidivism (eg severity of substance abuse or motivation to stop using drugs). The only difference between the groups is the type of treatment they receive, which results in greater certainty in the causal attributions that can be made about program effectiveness. It is for this reason that randomised controlled trials are seen as the “gold standard” in evaluation methodology. In this landmark study, participants in the NSW Drug Court program were found to have lower rates of re-offending than offenders in the control group. The Drug Court was also found to be marginally more cost-effective than prison.⁷ The strength of this research design gives policy makers a great deal of confidence that the Drug Court is causally associated with these reductions in re-offending.

Key components of drug courts

The evidence outlined above gives policy makers confidence that offenders are, on average, less likely to re-offend if they take part in a drug court program than if they are sent to prison. However, there is still a great deal of uncertainty about how drug courts produce this effect. As with any number of social programs, drug courts emerged as “black box” programs,⁸ insofar as they were neither grounded in a strong theoretical framework nor expanded in any systematic way. In fact, in an effort to bring uniformity to the operations of drug courts as they expanded throughout the 1990s, the US National Association of Drug Court Professionals published a list of 10 key drug court components in 1997.⁹

1. they integrate alcohol and other drug treatment into the justice system
2. they are non-adversarial
3. participants are identified early and are promptly placed on the program
4. they provide access to a continuum of alcohol, drug, and other treatment services
5. abstinence is monitored by frequent alcohol and other drug testing

4 O Mitchell et al, “Assessing the effectiveness of drug courts on recidivism: a meta-analytic review of traditional and non-traditional drug courts” (2012) 40 *Journal of Criminal Justice* 60.

5 It should be noted that more methodologically rigorous studies tend to find more modest, although still statistically meaningful, effect sizes. This does suggest, however, that the true effect size from drug courts may be lower than the pooled estimates arising from these meta-analyses.

6 M Shanahan et al, “Cost-effectiveness analysis of the New South Wales Adult Drug Court program”, (2004) 28(1) *Evaluation Review* 3.

7 B Lind et al, *New South Wales Drug Court evaluation: cost-effectiveness*, NSW Bureau of Crime Statistics and Research, Sydney, 2002.

8 JS Goldkamp et al, “Do drug courts work? Getting inside the drug court black box” (2001) 31(1) *Journal of Drug Issues* 27.

9 US Department of Justice, Office of Justice Programs, National Association of Drug Court Professionals, “Defining drug courts: the key components” (1997) *Drug Courts Resources Series*.

6. the court responds in a coordinated way to reward compliance and admonish non-compliance
7. the judge oversees and interacts with each drug court participant
8. monitoring and evaluation is a core part of program delivery
9. interdisciplinary education promotes effective planning, implementation, and operations
10. partnerships are forged among drug courts, public agencies, and community-based organisations.

This list of key components almost certainly brought a level of consistency to the way in which drug courts operate both here and overseas. However, the empirical evidence underpinning each of these key components was not strong at that time and is only beginning to emerge now. For example, there is little evidence bearing on the relative importance of substance abuse treatment, judicial oversight and rewards/sanctioning in bringing about positive outcomes for participants. Indeed, it is not at all clear whether each of these elements is even critical in the presence of the other elements.

The one aspect of drug courts that has received a significant amount of scrutiny is judicial oversight. The next section of this article examines evidence bearing on the impact of the judge on participant outcomes.

The drug court judge matters

Drug courts represent a major departure from the traditional adversarial criminal justice system. While defence solicitors and prosecutors still ensure that offenders retain their rights to due process, they also work together and with other members of the drug court team to ensure that an appropriate recovery plan is put in place to address the issues underpinning the offending behaviour. The judicial officer is assumed to play a pivotal role in this process by putting in place clear rules and applying an appropriate set of rewards and punishments to ensure adherence to those rules. Drug courts have received a significant amount of support from the judiciary for this reason because they put case management firmly under the control of the judge.¹⁰

Does this judicial oversight lead directly to improved behaviour among participants? This is more than just an academic question. Judicial oversight of the treatment program carries with it serious capacity constraints. Recent research suggests that for every drug court participant in the United States there are 27 offenders who are potentially eligible but not placed in a program.¹¹ Program capacity is one of the most significant contributors to this imbalance between supply and

demand.¹² The scale of this capacity constraint is likely to be larger in NSW given that drug courts operate at a much smaller scale than they do in the United States (there are, on average, 44 drug courts per US State compared with three drug courts in NSW). If the judge does not “add value” to the process, one could argue that drug courts could be taken to scale much more easily in the absence of judicial oversight. If the judge does add value, one could argue that more judicially over-sighted drug courts are required if they are to be brought to scale.

Research strongly suggests that the judge does have an impact on outcomes. Most notably, researchers at the Treatment Research Institute (TRI) at Pennsylvania University conducted a series of experimental studies where the level of judicial supervision was varied according to a randomised schedule for participants in several misdemeanor drug courts. The theory behind these experiments was that if judicial oversight has any benefit, increasing exposure to the judge should result in better outcomes for participants. Recall that the major benefit of testing this hypothesis using a randomised controlled design means that the benefits can be causally attributed to the one factor that differs between groups (ie level of judicial supervision).

In their initial studies, the TRI researchers found no overall effect of increased judicial supervision.¹³ However, in separate planned comparisons, high-risk participants were found to remain abstinent for significantly longer periods under bi-weekly supervision than under supervision on an as-needed basis. High-risk participants were those who had a diagnosis of antisocial personality disorder (ASPD) and/or a prior history of drug treatment. Low-risk participants tended to do just as well regardless of their level of judicial supervision. These results were subsequently extended by prospectively matching high-risk participants to higher levels of supervision at baseline.¹⁴ In that study, high-risk participants matched to higher levels of supervision had better outcomes than high-risk participants under usual supervision conditions.

This effect was replicated and extended in a study carried out among participants on the NSW Drug Court. Jones¹⁵ reported on a randomised controlled trial where all participants entering the Parramatta Drug Court over the course of one year were randomly allocated to receive either intensive supervision or supervision at the usual level. Those in the intensive supervision group reported to the judge twice a week while those in the usual supervision group reported back once a week. The key differences between this study and the ones conducted in the US are that the NSW Drug Court services a much riskier population of participants.

10 S Turner et al, “A decade of drug treatment court research” (2002) 37(12 & 13) *Substance Use & Misuse* 1489.

11 A Bhati et al, “To treat or not to treat: evidence on the prospects of expanding treatment to drug-involved offenders”, *Research Report*, Urban Institute, Justice Policy Center, Washington DC, 2008.

12 EI Sevigny et al, “Can drug courts help to reduce prison and jail populations?” (2013) 647 *The Annals of the American Academy of Political and Social Science* 190.

13 D Festinger et al, “Status hearings in drug court: when more is less and less is more” (2002) 68(2) *Drug and Alcohol Dependence* 151.

14 DB Marlowe et al, “Matching judicial supervision to clients’ risk status in drug court” (2006) 52(1) *Crime & Delinquency* 52.

15 CG Jones, “Early-phase outcomes from a randomised trial of intensive judicial supervision in an Australian drug court” (2013) 40(4) *Criminal Justice & Behavior* 453.

Baseline levels of supervision are also significantly higher in the NSW court than many US courts. In a recent study, Jones¹⁶ found that the risk of substance use and sanctioning decreased by more than 40 per cent among the intensive supervision group as a whole relative to those under the usual supervision conditions. This had flow-on effects to subsequent program outcomes. Thirty-five per cent of intensively supervised participants were returned to prison when their program finished. This compares with 49 per cent of participants under supervision as usual. The NSW Drug Court now supervises all participants intensively when they enter the program until such time as they stabilise and adapt to the program requirements.

The exact mechanism underpinning this judicial effect is not yet known, although research by the current author points to two important factors. Firstly, the formation of a personal relationship between the judge and the participant appears to be crucial. Drug courts have become synonymous with the principles of therapeutic jurisprudence, or the notion that the administration of the law can have a therapeutic impact on people who come before it. Two of the leading proponents of therapeutic jurisprudence, Winick and Wexler, suggest that the formation of a meaningful close personal relationship between drug court participant and the judicial officer is "more important than the substance of therapies and sanctions"¹⁷ because it creates an "ethic of care". As Judge Herbert Klein, who is often credited with founding the drug court model, remarked the way the judge communicates with participants "is a pronouncement from those in authority to some of our least powerful and most ignored citizens that we care about you and want to reach out and help you ...".¹⁸ There was some support for this theoretical explanation from the study outlined above. Participants under intensive supervision conditions rated their relationship with the judge as being significantly stronger than participants under usual supervision conditions. This effect remained even after accounting for prior behaviour on the program, including frequency of recent drug use.¹⁹

The second mechanism that may be driving this judicial supervision effect is that the judge helps to keep the consequences for compliance and non-compliance fresh in participants' minds. This is important because people

with substance use dependencies tend to be highly impulsive. They overweight the immediate rewarding effects of substance use and underweight its longer term health and social consequences.²⁰ One of the things that intensive supervision does is to reduce the delay between judicial appearances from once every seven days to once every two to five days. This time reduction may help to keep rewards and sanctions more salient in participants' minds when opportunities for illicit drug use arise. In support of this hypothesis, forthcoming research by the current author shows that intensive supervision was only effective for participants with lower levels of impulsivity.²¹ Even five days, it seems, may be too long to be an effective deterrent for those demonstrating the highest levels of impulsivity.

Summary

We can now be quite confident that drug courts are effective,²² that they are cost-effective,²³ and that the judge has an important role to play in the rehabilitation process.²⁴ Importantly from this researcher's point of view, the willingness of drug courts to innovate and evaluate represents a triumph for what can be learned when legal practitioners and social scientists combine their respective skillsets.

There are many more questions to answer as researchers and practitioners work together to unpack the drug court black box. While there are still many internal aspects of drug courts that deserve attention (eg the relative importance of rewards and sanctions on outcomes), factors external to the court itself also ought to be priorities for future research. In particular, the types of clinical practice provided by drug treatment providers have received relatively little attention in forensic settings such as drug courts. Similarly, the impact of the nature and intensity of interactions between Community Offender Services staff and drug court participants has never received much scrutiny. Given that the judge only sees the participant for a matter of minutes each week, more research attention ought to be focussed on what happens outside the court if practitioners are to make continued gains in rehabilitation efforts for drug dependent offenders.

16 *ibid.*

17 B J Winick D B Wexler, *Judging in a therapeutic key: therapeutic jurisprudence and the courts*, Carolina Academic Press, Durham NC, 2003.

18 H Klein, "The power of connection: fuel for drug courts", keynote address to the 1996 Florida Drug Court Conference, Florida, 1996, p 4.

19 C G Jones and R Kemp, "The strength of the participant-judge relationship predicts better drug court outcomes", *Psychiatry, Psychology and Law*, in press.

20 K N Kirby et al, "Heroin addicts have higher discount rates for delayed rewards than non-drug-using controls" (1999) 128(1) *Journal of Experimental Psychology: General* 78.

21 C G Jones et al, "The relationship between delay discounting, judicial supervision, and substance use among adult drug court clients", *Psychology, Public Policy, and Law*, in press.

22 Mitchell, above n 4.

23 Shanahan, above n 6.

24 Marlowe et al, above n 14; Jones, above n 15.