STATE OF NEW YORK

6603

2021-2022 Regular Sessions

IN ASSEMBLY

March 19, 2021

Introduced by M. of A. HEVESI -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to judicial diversion programs; and to repeal certain provisions of such law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The article heading of article 216 of the criminal procedure law, as added by section 4 of part AAA of chapter 56 of the laws of 2009, is amended to read as follows:

JUDICIAL DIVERSION [~~PROGRAM FOR CERTAIN FELONY OFFENDERS~~] **PROGRAMS**

§ 2. The opening paragraph of subdivision 1 of section 216.00 of the criminal procedure law, as amended by chapter 90 of the laws of 2014, is amended to read as follows:

"Eligible defendant" means any person who stands charged in an indictment [~~or a~~], superior court information [~~with a class B, C, D or E felony offense defined in article one hundred seventy-nine, two hundred twenty or two hundred twenty-one of the penal law or any other specified offense as defined in subdivision four of section 410.91 of this chapter, provided, however, a defendant is not an "eligible defendant" if he or she:~~], **misdemeanor complaint or felony complaint with any offense and has a functional impairment.**

§ 3. The opening paragraph of subdivision 1 of section 216.00 of the criminal procedure law, as added by section 4 of part AAA of chapter 56 of the laws of 2009, is amended to read as follows:

"Eligible defendant" means any person who stands charged in an indictment [~~or a~~], superior court information [~~with a class B, C, D or E felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law or any other specified offense as defined in subdivision four of section 410.91 of this chapter, provided, however, a~~

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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~~defendant is not an "eligible defendant" if he or she:~~], misdemeanor complaint or felony complaint with any offense and has a functional impairment.

§ 4. Paragraphs (a) and (b) and the closing paragraph of subdivision 1 of section 216.00 of the criminal procedure law are REPEALED.

§ 5. Subdivision 2 of section 216.00 of the criminal procedure law, as added by section 4 of part AAA of chapter 56 of the laws of 2009, is amended to read as follows:

2. [~~"Alcohol and substance abuse~~] "Functional impairment" means a condition determined by a licensed health care professional to impair the defendant's functioning. A functional impairment may include, but is not limited to, substance abuse or alcohol dependence, mental illness, developmental disability, intellectual disability, traumatic brain injury or other neurological disease, personality disorder, cognitive dysfunction, dementia or emotional disturbance. The court shall defer to licensed health care professionals and the broader medical community consensus in determining what a functional impairment is in recognition that such standards may change quickly within the medical field based on new research. A person may have more than one functional impairment.

3. "Clinical evaluation" means a written assessment and report by a court-approved entity or licensed health care professional experienced in the treatment of [~~alcohol and substance abuse, or~~] functional impairments as defined in subdivision two of this section or an evaluation conducted by an addiction and substance abuse counselor credentialed by the office of [~~alcoholism and substance abuse services~~] addiction services and supports pursuant to section 19.07 of the mental hygiene law, which shall include:

(a) an evaluation as to whether the defendant currently has a [~~history of alcohol or substance abuse or alcohol or substance dependence~~] functional impairment including but not limited to a mental disorder, as [~~such terms are~~] defined in the diagnostic and statistical manual of mental disorders, [~~fourth~~] fifth edition, and a co-occurring [~~mental disorder or mental illness and the relationship between such abuse or dependence and mental disorder or mental illness~~] functional impairment, if any;

(b) a recommendation as to whether the defendant's [~~alcohol or substance abuse or dependence~~] functional impairments, if any, could be effectively addressed by judicial diversion in accordance with this article;

(c) a recommendation as to the treatment modality, level of care and length of any proposed treatment to effectively address the defendant's [~~alcohol or substance abuse or dependence and any co-occurring mental disorder or illness~~] functional impairments; and

(d) any other information, factor, circumstance, or recommendation deemed relevant by the assessing entity or specifically requested by the court.

§ 6. Section 216.05 of the criminal procedure law, as added by section 4 of part AAA of chapter 56 of the laws of 2009, subdivision 5 as amended by chapter 67 of the laws of 2016, subdivision 8 as amended by chapter 315 of the laws of 2016 and paragraph (a) of subdivision 9 as amended by section 21 of part JJJ of chapter 59 of the laws of 2019, is amended to read as follows:

§ 216.05 Judicial diversion program; court procedures.

1. At any time after the arraignment of an eligible defendant, but prior to the entry of a plea of guilty or the commencement of trial, the court at the request of the eligible defendant, [~~may~~] shall order [~~an~~

~~alcohol and substance abuse~~] a clinical evaluation. An eligible defendant may decline to participate in such an evaluation at any time. The defendant shall provide a written authorization, in compliance with the requirements of any applicable state or federal laws, rules or regulations authorizing disclosure of the results of the assessment to the defendant's attorney, the prosecutor, the local probation department, the court, authorized court personnel and other individuals specified in such authorization for the sole purpose of determining whether the defendant should be offered judicial diversion for treatment for [~~substance abuse or dependence, alcohol abuse or dependence and any co-occurring mental disorder or mental illness~~] functional impairment or mental disorder.

2. Upon receipt of the completed [~~alcohol and substance abuse~~] clinical evaluation report, the court shall provide a copy of the report to the eligible defendant and the [~~prosecutor~~] defendant's counsel. Any finding in the report or assessment that the defendant has a mental disorder as defined in the diagnostic and statistical manual of mental disorders, fifth edition, or a clinical diagnosis of another serious functional impairment shall be viewed as presumptive evidence that the case should be diverted and the defendant should receive treatment.

3. (a) Upon receipt of the evaluation report [~~either party~~] the defendant may request a hearing on the issue of whether the eligible defendant should be offered [~~alcohol or substance abuse~~] treatment pursuant to this article. At such time, the defendant shall turn over a complete copy of the evaluation report to the prosecutor and the court. At such a proceeding, which shall be held as soon as practicable so as to facilitate early intervention in the event that the defendant is found to need [~~alcohol or substance abuse~~] treatment, the court may consider oral and written arguments, may take testimony from witnesses offered by either party, and may consider any relevant evidence including, but not limited to, evidence that:

(i) the defendant had within the preceding ten years (excluding any time during which the offender was incarcerated for any reason between the time of the acts that led to the youthful offender adjudication and the time of commission of the present offense) been adjudicated a youthful offender for: (A) a violent felony offense as defined in section 70.02 of the penal law; or (B) any offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law; and

(ii) in the case of a felony offense defined in subdivision four of section 410.91 of this chapter, any statement of or submitted by the victim, as defined in paragraph (a) of subdivision two of section 380.50 of this chapter; and

(iii) the defendant has a functional impairment; and

(iv) the defendant's functional impairment contributed to their criminal legal system involvement.

(b) Upon completion of such a proceeding, the court shall consider and make findings of fact with respect to whether:

(i) the defendant is an eligible defendant as defined in subdivision one of section 216.00 of this article;

(ii) the defendant has a [~~history of alcohol or substance abuse or dependence~~] functional impairment as defined in subdivision two of section 216.00 of this article;

(iii) such [~~alcohol or substance abuse or dependence~~] functional impairment is or may be a contributing factor to the defendant's [~~criminal behavior~~] involvement in the criminal legal system;

(iv) the defendant's participation in judicial diversion could effectively address such [~~abuse or dependence~~] functional impairment; and

(v) institutional confinement [~~of~~] or outpatient treatment for the defendant [~~is or may not be necessary for the protection of the public~~] would benefit the public or the defendant.

4. (a) When an authorized court determines, pursuant to paragraph (b) of subdivision three of this section, that an eligible defendant should be offered [~~alcohol or substance abuse~~] treatment, or when the parties and the court agree to an eligible defendant's participation in [~~alcohol or substance abuse~~] treatment, an eligible defendant [~~may~~] shall be allowed to participate in the judicial diversion program offered by this article. [~~Prior to the court's issuing an order granting judicial diversion, the eligible defendant shall be required to enter a plea of guilty to the charge or charges; provided, however, that no such guilty plea shall be required when:~~

~~(a) the people and the court consent to the entry of such an order without a plea of guilty; or~~

~~(b) based on a finding of exceptional circumstances, the court determines that a plea of guilty shall not be required. For purposes of this subdivision, exceptional circumstances exist when, regardless of the ultimate disposition of the case, the entry of a plea of guilty is likely to result in severe collateral consequences.~~]

(b) There shall be a presumption in favor of allowing eligible defendants to participate in the judicial diversion program without a prior plea of guilt. This presumption recognizes the presumption of innocence in all cases before the prosecutor obtains a conviction. This presumption also protects defendants from the severe collateral consequences associated with a criminal conviction, particularly consequences relating to immigration status, licensing for employment, and housing. Under no circumstances shall the prosecutor serve as a gatekeeper to diversion.

(c) In the rare circumstance that a court determines that a plea of guilty prior to treatment is necessary, such as when the defendant has previously failed to complete judicial diversion under this article on more than two occasions, the defendant shall not be required to waive their trial rights or submit an affidavit conceding their guilt. Under no circumstance shall a court require a plea of guilty prior to disclosure of the discovery material in the case pursuant to section 245.25 of this chapter.

5. The defendant shall agree on the record or in writing to abide by the release conditions set by the court, which, shall include[~~:~~] participation in a specified period of [~~alcohol or substance abuse~~] treatment at a specified program or programs identified by the court[~~, which may include~~]. The court shall take into account the views of the health care professional who conducted the clinical evaluation and any health care professionals responsible for providing such treatment or monitoring the defendant's progress in such treatment. Additional release conditions may include:

(a) adhering to a doctor's prescribed medication,

(b) periods of detoxification,

(c) residential or outpatient treatment, or both, as determined after taking into account the views of the health care professional who conducted the mental health assessment or alcohol and substance abuse

evaluation and any health care professionals responsible for providing such treatment or monitoring the defendant's progress in such treatment; and may include:

[~~(i)~~] **(d)** periodic court appearances, which may include periodic urinalysis;

[~~(ii)~~] **(e)** a requirement that the defendant refrain from engaging in criminal behaviors;

[~~(iii)~~] **(f)** if the defendant needs treatment for opioid abuse or dependence **or has another condition requiring prescription medication**, that he or she may participate in and receive medically prescribed drug treatments under the care of a health care professional licensed or certified under title eight of the education law, acting within his or her lawful scope of practice[~~, provided that no~~]**. No** court shall require the use of any specified type or brand of drug during the course of medically prescribed drug treatments.

6. Upon an eligible defendant's agreement to abide by the conditions set by the court, the court shall issue a securing order providing for bail or release on the defendant's own recognizance and conditioning any release upon the agreed upon conditions **pursuant to article five hundred ten of this chapter**. The period of alcohol or substance abuse treatment shall begin as specified by the court and as soon as practicable after the defendant's release, taking into account the availability of treatment, so as to facilitate early intervention with respect to the defendant's abuse or condition and the effectiveness of the treatment program. In the event that a treatment program is not immediately available or becomes unavailable during the course of the defendant's participation in the judicial diversion program, the court may release the defendant pursuant to the securing order.

7. When participating in judicial diversion treatment pursuant to this article, any resident of this state who is covered under a private health insurance policy or contract issued for delivery in this state pursuant to article thirty-two, forty-three or forty-seven of the insurance law or article forty-four of the public health law, or who is covered by a self-funded plan which provides coverage for the diagnosis and treatment of **mental illness,** chemical abuse and chemical dependence**, or any other functional impairment** however defined in such policy; shall first seek reimbursement for such treatment in accordance with the provisions of such policy or contract. **The court in its discretion may order the defendant to obtain public insurance such as Medicaid or Medicare if they so qualify. However, the defendant shall not be required to pay for any part of the cost of treatment required by the court that is not covered by private or public health insurance.**

8. During the period of a defendant's participation in the judicial diversion program, the court shall retain jurisdiction of the defendant, provided, however, that the court may allow such defendant to (i) reside in another jurisdiction, or (ii) participate in **mental health and/or** alcohol and substance abuse treatment and other programs in the jurisdiction where the defendant resides or in any other jurisdiction, while participating in a judicial diversion program under conditions set by the court and agreed to by the defendant pursuant to subdivisions five and six of this section. The court may require the defendant to appear in court at any time to enable the court to monitor the defendant's progress in alcohol or substance abuse treatment. The court shall provide notice, reasonable under the circumstances, to the people, the treatment provider, the defendant and the defendant's counsel whenever it orders or otherwise requires the appearance of the defendant in

court. Failure to appear as required without reasonable cause therefor shall constitute a violation of the conditions of the court's agreement with the defendant.

9. (a) If at any time during the defendant's participation in the judicial diversion program, the court has reasonable grounds to believe that the defendant has violated a release condition in an important respect or has willfully failed to appear before the court as requested, the court except as provided in subdivision two of section 510.50 of this chapter regarding a failure to appear, shall [~~direct the defendant to appear or issue a bench warrant to a police officer or an appropriate peace officer directing him or her to take the defendant into custody and bring the defendant before the court without unnecessary delay~~] **order a hearing to determine whether it is appropriate to issue a bench warrant**; provided, however, that under no circumstances shall a defendant who requires treatment for **mental health issues and/or** opioid abuse or dependence be deemed to have violated a release condition on the basis of his or her participation in medically prescribed drug treatments under the care of a health care professional licensed or certified under title eight of the education law, acting within his or her lawful scope of practice. The relevant provisions of section 530.60 of this chapter relating to issuance of securing orders shall apply to such proceedings under this subdivision.

(b) In determining whether a defendant violated a condition of his or her release under the judicial diversion program, the court [~~may~~] **shall** conduct a summary hearing consistent with due process and sufficient to satisfy the court that the defendant has, in fact, violated the condition.

(c) If the court determines that the defendant has violated a condition of his or her release under the judicial diversion program, the court may modify the conditions thereof, reconsider the order of recognizance or bail pursuant to subdivision two of section 510.30 of this chapter, or terminate the defendant's participation in the judicial diversion program; and when applicable proceed with the defendant's sentencing in accordance with the agreement. Notwithstanding any provision of law to the contrary, the court may impose any sentence authorized for the crime of conviction in accordance with the plea agreement, or any lesser sentence authorized to be imposed [~~on a felony drug offender pursuant to paragraph (b) or (c) of subdivision two of section 70.70 of the penal law taking~~]**. The court shall take** into account the length of time the defendant spent in residential treatment and how best to continue treatment while the defendant is serving that sentence. In determining what action to take for a violation of a release condition, the court shall consider all relevant circumstances, including the views of the prosecutor, the defense and the **mental health and/or** alcohol or substance abuse treatment provider, and the extent to which persons who ultimately successfully complete a drug treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse or by failing to comply fully with all requirements imposed by a treatment program. The court shall also consider using a system of graduated and appropriate responses or sanctions designed to address such inappropriate behaviors, protect public safety and facilitate, where possible, successful completion of the **mental health and/or** alcohol or substance abuse treatment program.

(d) Nothing in this subdivision shall be construed as preventing a court from terminating a defendant's participation in the judicial diversion program for violating a release condition when such a termi-

nation is necessary to preserve public safety. Nor shall anything in this subdivision be construed as precluding the prosecution of a defendant for the commission of a different offense while participating in the judicial diversion program. **Prior to such termination, the defendant shall be entitled to a hearing at which clear and convincing evidence shall be offered to support that there exists a substantial risk to an identifiable person. In the absence of such a hearing and such a finding, there can be no termination.**

(e) A defendant may at any time advise the court that he or she wishes to terminate participation in the judicial diversion program, at which time the court shall proceed with the case and, where applicable, shall impose sentence in accordance with the plea agreement. Notwithstanding any provision of law to the contrary, the court may impose any sentence authorized for the crime of conviction in accordance with the plea agreement, or any lesser sentence authorized to be imposed on a felony drug offender pursuant to paragraph (b) or (c) of subdivision two of section 70.70 of the penal law taking into account the length of time the defendant spent in residential treatment and how best to continue treatment while the defendant is serving that sentence.

10. Upon the court's determination that the defendant has successfully completed the required period of alcohol or substance abuse treatment and has otherwise satisfied the conditions required for successful completion of the judicial diversion program, the court shall comply with the terms and conditions it set for final disposition when it accepted the defendant's agreement to participate in the judicial diversion program. Such disposition may include, but is not limited to:

(a) requiring the defendant to undergo a period of interim probation supervision and, upon the defendant's successful completion of the interim probation supervision term, notwithstanding the provision of any other law, permitting the defendant to withdraw his or her guilty plea and dismissing the indictment **or information**; or

(b) requiring the defendant to undergo a period of interim probation supervision and, upon successful completion of the interim probation supervision term, notwithstanding the provision of any other law, permitting the defendant to withdraw his or her guilty plea, enter a guilty plea to a misdemeanor **or violation** offense **if the original charge was a felony, or enter a guilty plea to a violation if the original charge was a misdemeanor,** and sentencing the defendant as promised in the plea agreement, which may include a period of probation supervision pursuant to section 65.00 of the penal law; or

(c) allowing the defendant to withdraw his or her guilty plea and dismissing the indictment **or information; or**

(d) sentencing the defendant to less than the statutory minimum required by article seventy of the penal law where the judge finds that the defendant took steps to substantially comply with the treatment and such a reduced sentence is in the interests of justice.

11. Nothing in this article shall be construed as restricting or prohibiting courts or district attorneys from using other lawful procedures or models for placing appropriate persons into [~~**alcohol or substance abuse**~~] treatment.

12. No agreement entered into pursuant to this article shall contain a provision waiving defendant's right to sealing pursuant to section 160.50 of this chapter.

§ 7. The criminal procedure law is amended by adding a new section 216.10 to read as follows:

§ 216.10 Diversion part established.

1. The chief administrator of the courts is hereby directed to establish, in each county of the state, a part of the court to be known as the diversion part for the county in which such court presides. To aid in their work, such judges shall receive annual training in specialized areas, including, but not limited to mental health and substance abuse needs, including co-occurring disorders, evidence based-practices, and trauma-informed care, as well as training in procedural justice and cultural competency. The chief administrator of the courts shall ensure that all employees who staff the diversion parts receive specialized training in procedural justice and working with people with complex needs.

2. Each chief administrator of the courts shall at the end of each year prepare and file an annual report, which the office shall compile, publish on its website and make available upon request to members of the public. Such reports shall not include any personal identifying information for any individual defendants. Each such report, in addition to other relevant information, shall set forth, disaggregated by each county served:

(a) the number of defendants with cases in the diversion part;

(b) the length of time, in months, each case remained in the diversion part prior to acquittal, dismissal, release on recognizance, revocation of release on conditions, and sentencing;

(c) the race, ethnicity, age and sex of each defendant in the diversion part;

(d) the crimes with which each defendant was charged;

(e) whether the treatment obtained was for substance use, mental health, co-occurring or other;

(f) the court disposition in each supervised case, including sentencing information;

(g) the costs saved to the county by avoiding pre-trial or post-conviction detention in a county jail or state prison; and

(h) a list of service providers, including contact information, that the diversion part in the superior court of the county partners with to serve defendants.

§ 8. This act shall take effect immediately; provided, however that the amendments to the opening paragraph of subdivision 1 of section 216.00 of the criminal procedure law made by section two of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 12 of chapter 90 of the laws of 2014, as amended, when upon such date the provisions of section three of this act shall take effect.