

# CHAPTER 15

## DRUG COURT PROGRAMS

### 15.01 INTRODUCTION

A defendant charged with a controlled substances offense may be eligible for one of several alternative treatment programs under the law. Depending upon the nature of the charge, the amount of drugs involved, whether there is evidence of drug sales and other variables, a defendant may be eligible for pretrial diversion for narcotics offenders pursuant to PC §§ 1000 et seq., traditional Drug Court under Penal Code § 1000.5, treatment under Penal Code § 1210 et seq. (Proposition 36 - the Substance and Prevention Act of 2000) or, Sentenced Offender Drug Court. Each of the aforementioned treatment alternatives have strict rules of eligibility for those who may participate. The programs are outlined below.

### 15.02 PRETRIAL DIVERSION FOR NARCOTICS OFFENDERS

Pretrial diversion is an alternative to criminal prosecution available to a defendant charged with an offense listed in Penal Code § 1000(a).

Deferred Entry of Judgment (DEJ) formerly required the defendant to plead guilty prior to entry into the program. Effective January 1, 2018, the statutes providing for DEJ were amended to change the program to “pretrial diversion.” A guilty plea is no longer required. It is Office policy that Penal Code §§ 1000 et seq., as amended, applies to defendants regardless of when their applicable crime was committed.

Under Penal Code §§ 1000 through 1000.4, a court may summarily grant pretrial diversion or may refer the defendant to the Probation Department for its evaluation and recommendations if a court determines that a defendant should be granted pretrial diversion, and if the defendant:

- consents to the procedure;
- pleads not guilty to the charge(s);
- waives his or her rights to a speedy trial and a speedy preliminary hearing (if applicable); and
- waives his or her right to a jury trial.

If the defendant is granted pretrial diversion, the length of the program is between 12 months and 18 months. Extensions are available to defendants, pursuant to Penal Code § 1000.2(c), upon a showing of “good cause.” If the defendant successfully completes the drug program, the court dismisses the charge(s). A motion to dismiss may be made by the defendant, the prosecutor, the Probation Department, or the court itself. If the defendant performs unsatisfactorily in the drug program, is arrested and convicted of any felony or a misdemeanor which reflects a propensity for violence, or is convicted of any felony, the court may terminate the program and return the case to the pre-trial stage of proceedings. A motion for termination may be made by the prosecutor, the Probation Department, or the court itself. As set forth in Penal Code §§ 1000 to

1000.4, a court may only make referrals to designated programs certified by the county drug program administrator.

### 15.02.01 **PRETRIAL DIVERSION ELIGIBILITY**

The requirements for pretrial diversion eligibility are set forth in Penal Code § 1000(a). A defendant is eligible for pretrial diversion if all of the following apply:

- Within the last five years, the defendant has no conviction for any offense involving controlled substances other than the offenses that are eligible for pretrial diversion.
- The offense charged did not involve a crime of violence or threatened violence.
- There is no evidence of a contemporaneous violation relating to narcotics or restricted dangerous drugs other than a violation of the offenses that are eligible for pretrial diversion.
- The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense.

### 15.02.02 **WRITTEN NOTICE**

A deputy shall give written notice to the court, counsel, and the defendant whenever the defendant is eligible for pretrial diversion. (PC § 1000(b).) The defendant shall also be given an explanation of the procedure and the role of the prosecuting attorney, the court, and the Probation Department.

The evaluation of a defendant's eligibility for pretrial diversion is to occur as soon as possible after the initial filing of the charges. Therefore, each defendant's eligibility shall be reviewed as part of the filing process. Filing deputies shall complete a declaration. This declaration evaluates both eligible and ineligible defendants and provides the explanation of pretrial diversion procedures. The form shall be provided to the defendant and his or her attorney.

If a defendant is ineligible for pretrial diversion, Penal Code § 1000(b) allows a deputy to give either written notice to the defendant or make a statement on the record reflecting ineligibility. It is Office policy to issue a written notice of ineligibility in every case. The sole remedy available to a defendant who is found ineligible for pretrial diversion is a post-conviction appeal.

### 15.03 **PROPOSITION 36**

Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, added new Penal Code §§ 1210, 1210.1 and 3063.1 and Health and Safety Code §§ 11999.4, et seq. Proposition 36 did not repeal any existing statutes. To be eligible for Proposition 36 treatment programs, both the offender and the offense must qualify. The law mandates that when the offender and the offense qualify, a court shall initially grant probation. The court must impose drug treatment as a condition of probation and may not order incarceration. The law also sets out procedures to be followed should the defendant violate probation. Depending on the nature of the offense, the law appears to permit revocation if a court makes certain factual findings. For an in-depth analysis

of the proposition and its implementation, deputies should refer to the June 2001 District Attorney publication “Analysis and Implementation Plan for Proposition 36.”

A qualifying offender is eligible for Proposition 36 sentencing if the conviction for the qualifying offense occurs after July 1, 2001. Conviction within the meaning of Penal Code § 1210.1 means adjudication of guilt and sentencing. (*In re Delong* (2001) 93 Cal.App.4th 562.) Therefore, even if the offense date, guilty plea, or guilty verdict precedes the effective date of Proposition 36, a qualifying offender may still be eligible for sentencing under Proposition 36.

If a bench officer imposes an illegal sentence in a Proposition 36 case, deputies must immediately report the illegal sentence to their Head Deputy. Head Deputies must report illegal sentences to their Bureau Director for appellate consideration.

#### **15.03.01 QUALIFYING OFFENSES**

Nonviolent drug possession convictions occurring after July 1, 2001, are covered under Proposition 36. Any person convicted of a nonviolent drug possession offense shall receive probation with drug treatment as a condition of probation if the offender also qualifies under Proposition 36.

Qualifying offenses include the unlawful possession, use, or transportation for personal use of any controlled substance identified in Health and Safety Code §§ 11054 through 11058 or being under the influence of a controlled substance. (PC § 1210(a).)

#### **15.03.02 QUALIFYING OFFENDERS**

Defendants who possess, transport for personal use, or are under the influence of a controlled substance qualify for Proposition 36 sentencing. Under Penal Code § 1210.1(b)(1) - (5), Proposition 36 does not apply to:

- Defendants with one or more prior serious or violent felony convictions unless the nonviolent drug possession offense occurred after a period of five years during which the defendant remained free of both prison custody and the commission of an offense that results in a felony conviction (other than a nonviolent drug possession offense) or a misdemeanor conviction involving physical injury or the threat of physical injury;
- Defendants who are convicted in the same proceeding of any felony or a misdemeanor not related to the use of drugs;
- Defendants who, while using a firearm, were in possession of or were under the influence of cocaine base, cocaine, heroin, methamphetamine or phencyclidine;
- Defendants who refuse treatment as a condition of probation; or
- Defendants who have two separate convictions in which they participated in drug treatment and are found by a court to be unamenable to any and all forms of drug treatment.

### 15.03.03 SENTENCING

Once a defendant is convicted under Proposition 36, a court must impose probation and drug treatment as a condition of probation. Further incarceration of the defendant is prohibited. (PC § 1210.1(a).)

Penal Code § 1210(b) defines drug treatment as a licensed and/or certified community drug treatment program. Treatment may include outpatient treatment, half-way house treatment, narcotic replacement therapy, drug education or prevention courses and/or limited inpatient or residential treatment as needed to address special detoxification or relapse situations or severe dependence.

Drug treatment services may not exceed 12 months, but additional aftercare services may be required for up to 6 months. (PC § 1210.1(c)(3).)

### 15.03.04 DISMISSAL OF CHARGES

A defendant may petition the sentencing court for dismissal of the charges upon successful completion of drug treatment. The court shall dismiss the case if it finds that the defendant successfully completed drug treatment and complied with the conditions of probation. (PC § 1210.1(d)(1).)

“Successful completion of treatment” means a defendant has completed drug treatment and, as a result, there is reasonable cause to believe that the defendant will not abuse controlled substances in the future. (PC § 1210(c).)

### 15.03.05 PROBATION VIOLATIONS

Penal Code § 1210.1(e) distinguishes between drug-related and non-drug-related probation violations.

#### Non-drug-related probation violations:

- The court may modify or revoke probation if the alleged violation is proved.

#### Drug-related probation violations:

The court may modify or revoke probation under certain circumstances, depending on the number of prior violations the defendant has suffered.

- For a first time drug-related probation violation, the court may revoke probation if the alleged violation is proved and it is also proved that the defendant is a danger to the safety of others.
- For a second time drug-related probation violation, the court shall revoke probation if the violation is proved and it is also proved that the defendant is a danger to the safety of others or is unamenable to drug treatment.

- For a third time drug-related probation violation, if the alleged violation is proved, the defendant is not eligible for continued probation under Proposition 36.

*Commentary*

*Penal Code § 1210.1(b) defines classes of defendants who are ineligible for Proposition 36 sentencing. Penal Code § 1210.1(b)(5) states that the trial court shall sentence such defendants to 30 days in jail. The language of Penal Code § 1210.1(b)(5) shall not be construed to apply to all classes of defendants ineligible for Proposition 36 sentencing. It appears to be limited to the class of defendants who are not eligible for Proposition 36 sentencing due to prior nonviolent drug possession offense convictions, prior drug treatment and a finding by the court of unamenability to all forms of treatment. The 30 day jail sentence shall not be treated as a sentencing limitation, but rather a sentencing minimum.*

**15.04 DRUG COURT**

Drug Court, codified in Penal Code § 1000.5, is a pre-plea alternative to Proposition 36 and DEJ programs.

Drug court is a specifically designated court that supervises non-violent felony drug defendants who have been referred to a comprehensive and judicially monitored program of drug treatment and rehabilitation services. Criminal proceedings are suspended, without a guilty plea, for those defendants who are participating in the drug court program.

**15.04.01 ELIGIBLE DEFENDANTS AND QUALIFYING OFFENSES**

Consideration for admission to the drug court program shall be limited to those defendants who have been arrested for violations of Health and Safety Code §§ 11350, 11364, 11365, 11377, or 11550 who:

- Qualify for a pre-guilty plea drug court program as first time offenders under Penal Code § 1000.5;
- Do not qualify for DEJ or diversion under Penal Code § 1000 because of prior conviction(s) of Health and Safety Code §§ 11350 or 11377 or completion of a Penal Code § 1000 diversion program within the past five years, but are otherwise deemed suitable for the drug court program;
- Have qualified for a court-ordered diversion program under Penal Code § 1000 for offenses alleged to have occurred prior to January 1, 1997, but have failed to comply with program requirements; or
- Have violated probation on prior conviction(s) of Health and Safety Code §§ 11350 and 11377 or other non-violent, non-drug trafficking/sales felony or misdemeanor offenses.

**15.04.02 INELIGIBLE DEFENDANTS**

Defendants with a prior conviction of a violent felony as defined by Penal Code § 667.5, or serious felony as defined by Penal Code § 1192.7, or any offense, whether misdemeanor or felony, involving an act of violence, or any drug trafficking or sales offenses are ineligible.

In unusual cases, a defendant with a prior misdemeanor conviction involving an act of violence may be admitted to the drug court program upon concurrence of all parties and the court.

#### **15.04.03 DETERMINATION OF SUITABILITY FOR DRUG COURT PROGRAM**

In determining the defendant's overall suitability for the program, the:

- Probation pretrial services staff shall complete a standardized drug court risk classification assessment for eligible defendants; and
- Drug court treatment counselor shall interview eligible defendants and summarize any background and/or drug history information which may bear on the individual's potential for success in the intensive drug court treatment program.

A final determination on admission to the drug court program shall be made by the drug court judge based on recommendations from the district attorney, public defender, pretrial services staff, and the treatment counselor.

#### **15.04.04 REINSTATEMENT OF CRIMINAL CHARGES**

Pursuant to Penal Code § 1000.5(b), a court will reinstate the criminal charge(s) when a defendant:

- Is not performing satisfactorily in the assigned program;
- Is not benefiting from education, treatment, or rehabilitation;
- Has been convicted of a crime specified in Penal Code § 1000.3; or
- Has engaged in criminal conduct rendering the defendant unsuitable for the pre-guilty plea program.

#### **15.04.05 COMPLETION OF THE DRUG COURT PROGRAM**

If a defendant has performed satisfactorily during the program, at the end of that period, the criminal charge(s) shall be dismissed and the provisions of Penal Code § 1000.4 shall apply.

#### **15.05 SENTENCED OFFENDER DRUG COURT**

The Sentenced Offender Drug Court (SODC) provides an alternative drug treatment program for defendants who have pled guilty or admitted a violation of probation. To be eligible, defendants:

- Must not be charged with a serious or violent felony or probation violation or have a prior serious or violent felony conviction;
- Must have a history of drug abuse and addiction; and
- Must exhibit a sincere desire to get clean and sober.

Because this program assists participants who suffer from substance use disorders, it would be detrimental to recovery if drug dealers were also permitted to participate in the same program. Therefore, candidates who are currently charged with a crime involving the sale, possession for

sale, or transportation for purposes of sale of a controlled substance should generally not be referred to SODC. However, if all parties agree, deputies may refer otherwise eligible candidates who are charged with low level sale, possession for sale, or transportation for sale charges, where there is clear evidence that the sales activity is driven by a documented history of addiction and motivated by the candidate's desire to afford or obtain drugs for his or her own consumption.

If accepted into the program, defendants are placed on probation for up to five years and receive 12 to 18 months of drug treatment. Defendants spend the first 90 days in custody where they participate in intensive addiction treatment followed by residential or sober living/outpatient treatment. The program is designed to gradually and incrementally move defendants into mainstream society and a regular probation caseload. Pursuant to Penal Code § 1203.4, the defendant can earn a dismissal after two and a half years on probation. If the charge is a wobbler, the defendant can also seek a reduction to a misdemeanor.