Civil Alternatives for Disposing of Criminal Proceedings of Defendants with Mental Disabilities

By Neil J. Rowe*

Although most defense attorneys are familiar with the mechanisms for invoking the relevant procedures in the Criminal Procedure Law (CPL) when a defendant is suffering from a mental disability, most attorneys are not familiar with the impact that a finding of mental disability in a criminal proceeding ultimately has on an individual's liberty and ability to access treatment once the criminal proceeding has concluded. Many times there are civil options available to the defendant pursuant to the Mental Hygiene Law (MHL) that may be appropriate to resolve the criminal proceeding, and which in the long term provide the defendant a more flexible, less restrictive, and better quality of care and treatment.

Fitness to Proceed — CPL Article 730

Article 730 of the CPL provides that any time the court is of the opinion that the defendant may be an incapacitated person, the court must order a psychiatric exam. By law, the Psychiatric Examiner selected may be a psychiatrist or psychologist, and the examination may be conducted at the place the defendant is held in custody, or at a hospital. If the defendant is not in custody, it may be conducted on an outpatient basis. Significantly, unless the defendant has been admitted to a hospital, these examiners invariably are either on the staff of, or retained by, the local (county or city) department of mental health. CPL 730.10(4); 730.20(1) and (2).

If the examiners are of the opinion that the defendant is incapacitated, the proceeding is founded on a local criminal court accusatory instrument, and the charge is other than a felony, a Final Order of Observation must be issued. If the charge is a felony, then a Temporary Order of Observation is issued, unless the District Attorney consents to a Final Order being issued. CPL 730.40(1).

The statute prescribes that both the Final and the Temporary Order can require the defendant to remain in the custody of the Commissioner of Mental Health or the Commissioner of Mental Retardation for a period not to exceed 90 days. The statute also dictates that when the court issues a Final Order, the local accusatory instrument is dismissed with prejudice. When the court issues a Temporary Order, the felony complaint remains open for the duration of the Order, and then must be dismissed upon certification that the defendant was in the custody of the Commissioner at the time the order expired. CPL 730.40(2).

If there is an indictment for a non-felony, then a Final Order of Observation would be issued, and the indictment dismissed. If the indictment is for a felony, then a Commitment Order is issued for a period of up to one year. CPL 730.50.

On its face, the resolution of such a proceeding appears to be that, in exchange for the defendant receiving treatment in a hospital for 90 days, the charges against the defendant are dismissed. However, those parts of CPL Article 730 that permitted the Commissioner of Mental Health and the Commissioner of Mental Retardation to retain a defendant in a hospital have been held to be unconstitutional, unless there is a separate finding that the defendant suffers from a mental illness requiring inpatient hospitalization. *Ritter v Surles*, 144 Misc2d 945, 545 NYS2d 962 (NY Sup. Ct. Westchester Co. 1988). As a result, the Office of Mental Health has instituted a policy that requires a defendant to be discharged within 72 hours unless he/she can be admitted pursuant to MHL Article 9. *See, Charles W. v Maul,* 214 F3d 350 (2d Cir., 2000). The Office of Mental Retardation and Developmental Disabilities has not adopted any published policy on this issue.

Despite the policy of the Office of Mental Health, admitting physicians, when reviewing a defendant placed into the custody of the Commissioner pursuant to Article 730, will err on the side of admitting the individual. Once someone is committed to a hospital pursuant to Article 730, their continued treatment is subject to an extensive process set forth by regulation, which is not applied to other civilly admitted patients. 14 New York Codes, Rules and Regulations (NYCRR) Part 540. Although the Mental Hygiene Legal Service has challenged the practice of extending these regulations to those individuals subsequently converted to a civil status under *Ritter*, *supra*, the practicality is that these individuals are treated using different protocols than other individuals civilly admitted to a hospital.

Another consideration is that a defendant committed pursuant to Article 730 will be admitted to a regional State hospital. This practice goes against the prevalent philosophy among mental health practitioners. There are significant advantages to having mental illness treated in local facilities, where the inpatient and outpatient services can be better coordinated to address the needs of the individual. As most communities now have at least one general hospital with a psychiatric ward, admission to the

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regional State hospital may deprive the defendant of more effective care and treatment.

Thus, in matters involving a local criminal court accusatory instrument, as well as non-felony indictments, the defense attorney should consider all the facts and related medical evidence. If the defense attorney concludes that the preferred disposition of the criminal charge is dismissal, and in conjunction, treatment of the defendant as an in-patient, defense counsel should consider the disadvantages of relying on Article 730 to achieve this result. The defense attorney should consider all dismissal options, for example a motion to dismiss in the interest of justice pursuant to CPL 210.40, in combination with one of the civil admission procedures in the MHL.

Assuming that issues of pre-trial incarceration and bail can be resolved, one of the simplest ways to seek in-patient hospitalization is through voluntary admission. This process, found at MHL 9.13 for Mental Illness and MHL 15.13 for Mental Retardation and Developmental Disabilities, can be initiated through a psychiatric emergency room, a local crises intervention service, or the defendant's personal physician or psychiatrist. Of significance is that under these sections of law the term "voluntary" is a misnomer. If a voluntary patient requests his/her release, the hospital can hold the patient up to 72 hours and seek a court order for continued retention. MHL 9.13(b), 15.13(b).

In the event that an individual does not meet the requirements for voluntary hospitalization, but is in need of in-patient care and treatment, then a number of other civil proceedings may be applicable. On application of a specified family member or public official listed in MHL 9.27 or 15.27, along with the certification of two physicians, an individual can be admitted involuntarily to an in-patient facility.

Another option for civil admission is the certification of the Director of Community Service (County Director of Mental Health). Under this option, an individual can be admitted for up to 72 hours upon the certification alone. Follow-up procedures are available to extend the time if necessary. MHL 9.37. Alternately, upon information from any licensed psychologist, psychiatrist, professional nurse, or the individual's family, the Director of Community Service can order an individual transported to an psychiatric emergency room for evaluation for admission. MHL 9.45. These sections regarding the Director of Community Service are of particular importance in criminal proceedings. As noted previously, the psychiatrists or psychologists appointed to complete an examination ordered pursuant to CPL 730.30 are typically either on the staff of or retained by the local Director of Mental Health. These same individuals have the authority and responsibility to assist in a civil admission, particularly when the civil admission would be more appropriate than a criminal commitment.

The MHL also has provisions for the court itself to initiate a civil admission. MHL 9.43(a) provides a procedure to bring an individual before a court, and then, if appropriate, order the individual transported to a psychiatric emergency room for examination and possible admission. Section 9.43(b) additionally gives the court the authority to dismiss criminal charges in specific situations.

Not Guilty by Reason of Mental Disease or defect — CPL 330.20

As with the determination of incapacity pursuant to CPL Article 730, a finding or plea of Not Guilty by Reason of Mental Disease or Defect may appear to simply substitute hospital time for prison time, while obtaining some valuable treatment for a mentally ill defendant. However, once a person has been committed after a finding or plea pursuant to CPL 330.20, the statute mandates ongoing court review of any decision involving the type of facility, access to furloughs, the length of treatment, and the conditions of treatment. Also, analogous to the regulations developed for Article 730, the treatment for a defendant committed to the custody of the Commissioner of Mental Health is subject to an extensive process set forth by separate regulation. 14 NYCRR Part 541. As a result, otherwise simple changes in an individual's treatment may take many months to process, resulting in longer hospitalizations.

After a defendant is found not responsible by reason of mental disease or defect, the court directs an order to the Commissioner of Mental Health or Mental Retardation and Developmental Disability requiring that the defendant submit to a psychiatric examination. The purpose of the exam is to determine if the defendant has a dangerous mental disorder, or, if the defendant does not, if the defendant is mentally ill. After the exam, the Commissioner reports back to the court, and at a hearing the court will make one of three findings, each leading to specified actions:

(a) If the court finds that the defendant has a dangerous mental disorder, it must issue an order of commitment of the defendant to a secure facility for the purpose of care and treatment.

(b) If the court finds that the defendant is mentally ill, it must issue an order of conditions and an order committing the defendant to the custody of the Commissioner, and these orders are deemed

made pursuant to the MHL, and subsequent retention and release of the defendant is governed by MHL Articles 9 and 15.

(c) If the court find that the defendant neither has a mental disorder nor is mentally ill, it must discharge him either unconditionally or subject to an order of conditions. CPL 330.20(7).

The first scenario above, (a), is the most restrictive hospitalization. Not only will the defendant initially be placed in the most secure unit, even if, eventually, the court sees fit to approve a transfer to a less restrictive unit where civilly admitted patients are treated, the defendant will always be subject to different treatment protocols than a civilly admitted patient. The second scenario above, (b), gives the appearance of being civil in nature. However, there is no restriction on what can be included in the order of conditions, and the order of conditions remains in place until affirmatively terminated by the court, even if the time period prescribed by the order has lapsed. *See Matter of Jill* "ZZ," 83 NY2d 133, 608 NYS2d 161 (1994); *Matter of Lloyd "Z."*, 575 NYS2d 327 (2d Dept. 1991). Furthermore, the court can renew an order of conditions on a simple showing of "good cause." CPL 330.20(1)(o). Only in the third scenario above, (c), can the defendant be completely free from the court's ongoing oversight, and even then it is likely that a court would issue an initial order of conditions. If the court does order conditions, the defendant remains under the supervision of the court for an indefinite amount of time.

In matters where the defendant's mental condition at the time of the commission of a criminal act is at issue, the defense attorney should consider all the facts and related medical evidence. The defense attorney should clearly distinguish the medical evidence on the defendant's mental condition at the time of the criminal act from the medical evidence that goes to the defendant's present mental condition. The fact that a defendant presently suffers from a mental illness that requires hospitalization does not establish that the defendant is not guilty by reason of mental disease or defect.

Similarly, hospitalization in an in-patient psychiatric facility should not be viewed as a less restrictive setting than a correctional facility. A disposition under CPL 330.20 could potentially keep the defendant confined forever, and if released, keep the person's daily activity under the court's control for life. In cases where, in actuality, it is the defendant's present mental condition that is at issue, the better alternative may be to dispose of the criminal charges by plea, with a definitive sentence. The defendant's present mental condition can be addressed by use of the civil voluntary or involuntary admission procedures described previously for inpatient hospitalization. If ongoing monitoring of the defendant's treatment by the court is thought to be necessary, defense counsel should also suggest that traditional probation programs be considered.

More recently, the legislature has created a similar court monitoring of civil patients. MHL 9.60. On petition of family, a qualified psychiatrist, a probation officer, or other specified person, a court may order Assisted Outpatient Treatment in accordance with a properly formulated treatment plan. The court may tailor the order to the specific concerns of all involved, and the orders can be renewed for ongoing one-year periods. A significant difference from the criminal process in this regard is that the civil outpatient order expires on its own terms if not renewed, and thus, once the psychiatrist overseeing the individual's treatment determines that court assistance in the treatment is no longer of value, then the psychiatrist need not re-petition the court. [Ed. Note: For current information or developments regarding "Kendra's Law," see the "Mental Illness" page of the "Hot Topics" section of NYSDA's web site www.nysda.org.]

In situations where disposition of criminal charges results in confinement in a correctional institution, inpatient mental health treatment within the correctional system is also available. For individuals sentenced to state prison, the Commissioner of Corrections may petition the court to order a defendant it has imprisoned to be transferred to an inpatient mental health unit. Correction Law 402, 439. For individuals confined to jails and local correctional facilities, the local mental health director has authority to order an individual transferred to an inpatient psychiatric hospital. Correction Law 508.

Conclusion

Provisions of the CPL have been enacted to address issues related to the competency of a defendant to face criminal charges, as well as to any mental disability of the defendant at the time a criminal act was committed. These provisions, however, were not intended to, nor are they well suited to, address equitable considerations of a defendant obtaining care and treatment for a mental disability in lieu of facing criminal charges.

In cases where the resolution of a charge turns on the defendant's ability to obtain care and treatment of a mental disability, defense counsel should explore the use of traditional criminal dispositions in combination with the civil provisions of the MHL. Not only does the combination permit development of a treatment plan better tailored to the needs of the defendant, but it also may avoid unintended consequences, such as long hospitalizations in locations distant from the defendant's family, physicians, and community. ⚖