

AFTER HEARN AND AB '22:

A PARTICIPANT'S PERSPECTIVE ON VETERANS COURT

BY KENDRA G. BERTSCHY, ESQ.

When Jack¹ returned home from war, he struggled to reintegrate into civilian life. **He returned with wounds that he hid from everyone, especially his family: invisible scars from what he experienced while fighting to protect our lives.** However, he was one of the lucky ones; he returned. Unfortunately, far too many veterans do not seek needed treatment on their own. Some veterans feel that they are undeserving because they made it home safely while others did not.

Even though he was honorably discharged and received service-connected disability, Jack did not enroll in the Veterans Affairs (VA) services on

his own. He self-medicated by using alcohol and illegal substances. He alienated himself from his entire family and became homeless.

A few years ago, Jack went into a grocery store and stole \$15.34 worth of food: specifically, peanut butter and jelly. That resulted in a verbal altercation with the store's loss prevention employee in the parking lot that involved a threat of force and ended with Jack leaving the items and the area. He was arrested shortly thereafter and ultimately entered a plea of guilty to a felony charge of robbery. However, because he is a veteran, Jack was eligible for Veterans Court, a program that gave him a second chance.

Veterans Court Offers a Lifeline

Specialty courts were created to provide a sentencing option that allows individuals to have additional judicial oversight while they are engaged in evidence-based treatment

rather than incarceration. "The goal of a Specialty Court is to break the cycle of the 'revolving door' syndrome ... which in return reduces criminal recidivism and provides for better, healthier communities."² Participants can be assigned to a specialty court on a diversionary basis or as a condition of probation. If they are assigned as a diversion, their conviction is sealed when they successfully complete the program.

Veterans Court is such a program. To qualify, a defendant must be a veteran. Depending on the jurisdiction, the client may not qualify if he or she did not receive an honorable or general discharge. The Second Judicial District Court's process is illustrative of how Veterans Court works.

The process starts with the defense counsel completing a program application and providing the program with an evaluation regarding the client's substance use and/or mental health. The application is then reviewed by a multi-disciplinary team, including

staff members of the specialty court, VA staff, a judge, a district attorney and a public defender. This review includes considering whether there is a nexus between the charge, the service and the substance use and/or mental health disorder. The Veterans Court will then file a letter of acceptance or rejection. The decision is ultimately at the discretion of the sentencing judge after hearing a sentencing argument from the defense, prosecution, victim and the client.

Limits on Access for “Violent” Offenders

For some individuals accused of a crime, access to Veterans Court can be challenging due to the nature of the underlying alleged offense. Though a recent assembly bill has eased restrictions on access to Veterans Court, challenges still remain. Jack’s story illustrates both these challenges and the transformative effect of Veterans Court for those who are able to participate.

Pursuant to NRS 202.876, the charge of robbery is by definition a crime of violence. As such, Jack was labeled a “violent offender.” For veterans involved in the criminal justice system, the label of a “violent offender” meant that admittance to Veterans Court on a diversionary basis could be completely barred as a sentencing option. At the time of Jack’s arrest, NRS 176A.280 (2014) required a stipulation from the district attorney for admittance if the person was charged with a crime of violence. If a district attorney declined to stipulate, for whatever reason, or no reason, the veteran was categorically ineligible for the specialty court program. Unfortunately, the district attorney in Jack’s case did not stipulate.

Jack was not the only veteran in this position. On December 6, 2018, the Nevada Supreme Court decided *State v. Second Judicial Dist. Court*, 134 Nev. Adv. Op. 96 (2018) (Hearn). In *Hearn*, the Nevada Supreme Court ruled that the district attorney’s veto power to preclude assignment of a veteran into Veterans Court violated the Nevada’s Constitution’s separation of powers

doctrine and severed the prosecutor’s veto power from the statute.³ The court, however, also severed the language allowing a veteran with a charge of violence, the threat of violence or a previous felony conviction for a charge of violence to be assigned to the program.⁴ The court recognized that this decision “impedes the Legislature’s secondary goal of allowing some violent offenders to the veterans court” noting that “it is for the Legislature, not this court, to remedy this impediment.”⁵

This ruling sent shockwaves throughout the criminal legal community. It precluded veterans with a history of a violent offense – even as result of post-traumatic stress disorder linked to their service – from engaging in a program designed to enhance community safety. In 2019 Assemblyman

Steve Yeager responded to *Hearn* by championing Assembly Bill 222 (AB 222). AB 222 resolved the eligibility issue for veterans by clarifying that any veteran charged with an offense other than a category A felony, a category B sexual offense, or one that carries a mandatory prison sentence, is eligible for a judge to determine assignment to the program.⁶

Veterans Court Pays Off

Jack needed the opportunity and the right structured environment to overcome his addiction. That structure was the Second Judicial District Court’s Veterans Court. The court granted him the opportunity of Veterans Court as a condition of probation, not diversion since it was not a legally permissible sentencing option. For more than a year, Jack participated in this demanding program. Jack describes the program as hard, “but it wasn’t as hard as the things [he] did to stay high or survive on the streets.”

Veterans Court is an individualized program that consists at a minimum of weekly court appearances, three counseling meetings per week, daily testing and constant check-ins with the Division of Parole and Probation as well as VA staff. The success rate for individuals involved in specialty court programs is astonishing. The Second Judicial District Court reports that Veterans Court had one of the highest success rates of the specialty

court programs, with a 77 percent successful completion rate for the year 2018-19.⁷ Even individuals who started a specialty court program but did not finish it still benefitted from the program. According to a study conducted in 2018, even if an individual failed to complete a specialty court program, the fact of their participation in a specialty court program substantially reduced the likelihood

that an individual would commit another offense.⁸

Jack completed a “perfect program,” without any sanctions. Due to the passage of AB 222, the parties agreed to modify his sentence to allow him the benefit of the new law. He was the first veteran to graduate from Washoe County with the benefit of the diversion program despite his “violent” charge. This means that he does not have a felony conviction. He attributes his success to the consistency of the staff and support, his peers and the accountability of the program. The balance of the pace and the pressure from the people involved helped to reduce his stress and anxiety. To him, it was “a big deal that [he] wasn’t thought of as disposable ... that [he] was worth the time and effort.” He believes that the unique aspect of this court is the strong bonds that are formed between participants. Not only do the participants

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have a lot in common due to their military service, but because they participate in additional VA classes together that provide enhanced accountability, loyalty and helps ensure success both during and after the program ends.

Some Challenges Remain

In Nevada, an individual accused of a crime must enter a plea and then wait until his or her sentencing hearing to be assigned into Veterans Court.

For many, this delay causes significant issues. Pending his sentencing hearing, Jack did not have the support or structure to maintain stable housing, sobriety or control of his mental health issues. He struggled to maintain his mental health, used illegal substances and failed to appear for hearings. When he first started the program, he thought he would fail. Jack's situation is exactly why several states allow veterans to start the Veterans Court Program *before* their sentencing hearing.

If Nevada authorized pre-prosecution diversion on felony charges, a judge could assign someone into a specialty court and connect them with services at the beginning of their interaction with the criminal justice system rather than months later at the time of sentencing.

Allowing veterans to benefit from this program earlier could result in many more success stories like Jack's. Jack describes himself as being like a "kaleidoscope" when he started the program. He felt that he was just an image of himself made up of broken glass. Veterans Court worked to put back every part of him. It was a "complete mind, body and spirit" transformation—everything from helping him get new teeth, resolving health issues, to even assisting him in reuniting with his family. Today, Jack is a part of the lives of his children and grandchildren, something that he never felt was possible. When asked if he would do the program again, without hesitation he stated: "without a second thought. ... The program was such a blessing to even get in. I really thought that I was going to prison. I was resigned to that fact. Something opened my eyes and I knew in my heart that this was my last chance."

ENDNOTES:

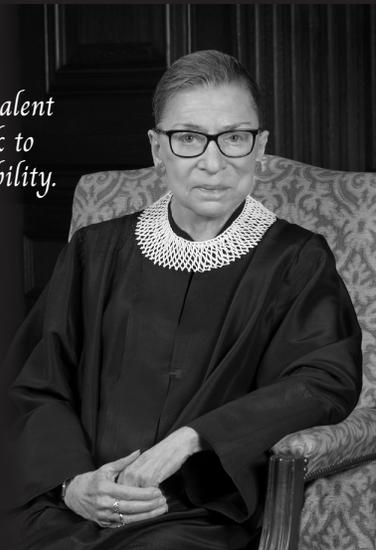
1. The individual in this article has given permission for the author to share his story. Since his criminal case was sealed, this article does not contain his legal name. This article is based on an interview with "Jack." Interview with Jack (June 23, 2020) (notes on file with author).
2. Administrative Office of the Courts, Nevada Supreme Court, *Specialty Court Program Overview*, available at https://nvcourts.gov/AOC/Programs_and_Services/Specialty_Courts/Overview/ (last visited Sept. 21, 2020).
3. *State v. Second Judicial Dist. Court (Hearn)*, 134 Nev. 783, 789-90, 432 P.3d 154, 160-61 (2018).
4. *Id.*
5. *Id.* at 789.
6. 2019 Nevada Assembly Bill No. 222, Nevada Eightieth Regular Session.
7. Email from Julie Vann, Specialty Courts Coordinator, Second Judicial District Court (Aug. 14, 2020, 11:19 PST) (on file with author).
8. Nevada Legislature, Interim Committee 2017-2017, Advisory Commission on the Administration of Justice, Presentation by James Popovich, Specialty Court Manager, Second Judicial District Court (Mar. 28, 2018), <https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/11424> (last visited Aug. 28, 2020).

*In Memoriam of
Justice Ruth Bader Ginsburg
1933 — 2020*

*She used all the vast talent
she had to do her work to
the very best of her ability.*

*May her memory be a
blessing.*

*State Bar of Nevada
Appellate Litigation Section*



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