

DVSJA Sentencing: A New Challenge for Judges

In May, 2019, the New York Legislature enacted the Domestic Violence Survivors Justice Act (DVSJA) which authorizes alternative sentences for defendants who were victims of domestic abuse. This article takes a look at the judicial knowledge and analysis that must now be brought to bear in the course of this new sentencing determination.

By **Alan Rosenthal** | April 15, 2020 at 11:15 AM

Effective May 14, 2019, the New York Legislature enacted the Domestic Violence Survivors Justice Act (DVSJA), thus authorizing alternative sentences for defendants who were victims of domestic abuse and for whom the abuse was a “significant contributing factor” to their “criminal behavior.” (Penal Law §60.12). A corollary provision of the Act, CPL §440.47, (effective Aug. 12, 2019), provides for resentencing relief for certain victims of domestic abuse.

A Welcome Challenge

The recently enacted DVSJA adds a new level of analysis to the already difficult judicial duty of sentencing. Yet it should be a welcome challenge, if what we seek to impose on our fellow citizens is a just sentence informed by what we have learned from the rapidly developing behavioral sciences and a growing awareness about the dynamics of domestic violence. This article takes a look at the judicial knowledge and analysis that must now be brought to bear in the course of this new sentencing determination. But before doing

so, let's review what has previously been required for a judicial sentencing determination.

Sentencing Prior to the DVSJA

It is generally agreed that sentencing is the most difficult and delicate decision that a judge is called upon to perform. In a Dec. 18, 2018 New York Law Journal article, Joel Cohen suggested that “[v]irtually every judge would agree that sentencing is the most solemn and difficult decision they must make.” Cohen posited that “almost every one of them, though, truly struggles with it every time.” In response, Judge Leon Polsky agreed that “sending someone to prison should be the hardest thing a judge sitting in a criminal term should ever have to do.” But the bigger concern, he wrote, “is not when [judges] struggle, it’s when they don’t.”

Undoubtedly, many judges grapple with the impact imprisonment has on the human beings they sentence. As Judge Kaufman observed, “every judge is aware that five years in a penitentiary is a long time. He well knows that in many cases a prison term not only withers the life of the prisoner but spreads like a stain in an ever-widening circle, blighting the lives of innocent members of the family. Every judge is painfully aware of what five years without a father may mean to a prisoner’s son.” *Sentencing: The Judge’s Problem*, Atlantic Monthly (January 1960). Some judges struggle with the need to provide a rationale for the sentence. Other judges consider most critical the individual factors of the defendant when arriving at the proper individualized sentence, fitting the punishment to the person and not merely to the crime. And some judges labor over identifying an incarcerative sentence that is a sufficient minimum amount, but not greater than necessary.

But the most difficult aspect of sentencing is “the sensitive balancing of the objectives and criteria.” *People v. Notey*, 72 A.D.2d 279, 283 (2d Dept. 1980).

The objectives and criteria to be balanced are generally acknowledged to be “the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction.” *People v. Farrar*, 52 N.Y.2d 302, 305 (1981). The four traditional objectives or purposes of sentencing that must be considered are (1) retribution, (2) incapacitation, (3) deterrence, and (4) rehabilitation. They are established by the Legislature in Penal Law §1.05(6).

In 2006 a fifth sentencing purpose was added by the Legislature, amending Penal Law §1.05(6) to include “the promotion of their successful and productive reentry and reintegration into society.” This amendment has been recognized as a move to a Reintegration-Focused Sentencing Model. A sentencing judge is now obliged to give due consideration to the five purposes of sentencing. One or more factors cannot be disregarded entirely. *People v. Burgh*, 89 A.D.2d 672 (3d Dept. 1982). The weighty responsibility placed on the sentencing judge is to determine what relative priority to attach to each objective or purpose.

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The DVSJA requires judges to do all of this and more.

A Trauma-Informed Approach

The emergence of trauma theory over the past several decades has created a significant shift in the way we understand the role of domestic abuse and trauma’s effects on the behavior of survivors.

There is nothing new about a trauma-informed approach. Over the last decade this concept has been developed for use in many different programs, organizations, and systems by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services (SAMHSA). It has applicability in the fields of healthcare, education and mental health to name a few. It has been recognized as having applicability to the criminal legal system by both SAMHSA and by the Center for Court Innovation, both promoting the concept that trauma-informed responses can help improve the criminal legal system. The emergence of trauma theory has led to adoption of a trauma-informed approach in many judicial settings including Veterans Courts, Treatment Courts, Mental Health Courts, Divorce and Family Courts.

Lamentably, criminal laws in New York have not kept up with behavioral science. The first attempt by New York to adopt a more compassionate and contextual approach to sentencing in domestic violence cases was an abysmal failure. An exception to Jenna's Law, former Penal Law §60.12, was designed to provide relief for some survivor-defendants. Because it was too narrowly drafted, it provided too little benefit for too few survivors. The DVSJA captures the shift in society's sense of justice and fairness and advances in science and research. The time has come to apply the same trauma-informed approach in our criminal courts. The DVSJA not only invites it; it implicitly requires it in many cases.

Here is how this trauma-informed approach works in practice under the DVSJA. After conducting a hearing, the sentencing court must make a determination that three statutory factors are present in order to impose an alternative sentence pursuant to Penal Law §60.12. First, the judge must decide whether the defendant was the victim of domestic abuse, and second,

whether the domestic abuse was a “significant contributing factor” to the defendant’s “criminal behavior.”

In some DVSJA cases, a showing that the domestic abuse was a “significant contributing factor” may be made without regard to trauma. On the other hand, many DVSJA cases will involve establishing that the survivor suffered trauma. This calls for one level of analysis, requiring more than just applying the law to the facts. The sentencing judge must first determine if the defendant suffered domestic abuse prior to the time of their criminal conduct, and then undertake an interdisciplinary approach to determine whether the domestic abuse resulted in trauma, and finally, whether that trauma affected the defendant’s functioning and behavior so as to be a “significant contributing factor” to the defendant’s “criminal behavior.” In other words, the sentencing judge is required to take a trauma-informed approach to determine whether the defendant is eligible for alternative sentencing and to determine an appropriate sentence.

A second level of analysis arises from the statute’s third factor. The sentencing judge must determine whether a sentence within the range of the traditional sentencing scheme would be unduly harsh, so as to warrant a less punitive sentence. The statute requires the judge to consider “the nature and circumstances of the crime and the history, character and condition of the defendant.”

In order to undertake both levels of analysis, a judge should be both trauma-informed and fully familiar with the dynamics of domestic violence.

When judges are trauma-informed they understand that domestic abuse can cause trauma. They understand what trauma is. They understand that trauma can be pervasive, re-shaping a person’s worldview and affect many aspects of

life including altering how they function, perceive danger and react, abuse alcohol and drugs, and engage in problematic behavior that may include criminal actions. Being trauma-informed will help the sentencing judge avoid reliance on misconceptions and myths about domestic abuse and survivors, and avert misinterpreting the significance of confusing or counterintuitive survivor behavior. Trauma-informed judges are better equipped to use the tools of sentencing and resentencing to respond once the effects of trauma resulting from domestic abuse are recognized and to take on the added complexity of the already difficult task of sentencing.

Being trauma-informed and familiar with the dynamics of domestic violence simply asks judges to approach DVSJA sentencing in a fair, just and knowledgeable way. There are several steps that the judiciary can take to encourage judges to prepare for DVSJA cases. The New York State Judicial Institute can provide statewide training for judges on sentencing in general and on the specific topics of trauma and domestic violence. We should expect our judges to be intellectually inquisitive. The Judicial Institute should provide judges with resource materials on trauma and domestic violence. In many communities, advocates, survivors and behavioral health professionals have become trauma-informed and well-versed in the dynamics of domestic violence. Judges should be invited to local education programs on trauma and domestic violence where they can become informed about these issues.

As Judge Kaufman recognized more than 60 years ago, “[t]he task of improving our sentencing techniques is so important to the nation’s moral health that it deserves far more careful attention than it now receives from the bar and the general public.” Kaufman urged his fellow judges to make use of the developments in behavioral science to do a better job of sentencing. “We

must re-examine in the light of modern scientific knowledge some of our sentencing axioms.”

There is much for judges to learn about the effects of trauma resulting from domestic abuse. The research and literature from the various fields of behavioral science help clarify the process by which trauma can lead to a host of devastating psychological and behavioral consequences including violence and other criminal conduct. It helps place the behavior of survivors in a context, not to excuse, but to allow for a fully balanced perspective.

To ensure that the sentences imposed on criminalized survivors are just, we must insist that our judges are prepared with knowledge and information from the most current advances in the medical and behavioral sciences and that they prepare themselves for the challenge of trauma-informed and reintegration-focused sentencing under the DVSJA. Unquestionably, the sensitive balancing of objectives and criteria while taking a trauma-informed approach makes the process of sentencing the most difficult and delicate decision that a judge is called upon to make. However, if such a balancing effort is not made, then any sentence passed, while it may be legal, will not be a just one.

Alan Rosenthal *is a criminal defense and civil rights attorney with over 40 years of experience.*

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