

## **BASICS OF NEGOTIATING A DRUG CASE**

Every case is different, but here are some of the tips I've learned over the years for negotiating drug cases in Madison County. This outline is going to layout some strategies I use to achieve better non-trial dispositions in drug cases (besides drug court and PTIP). Most of the veterans know these strategies (and probably more), but I thought it could be helpful for some of the younger lawyers.

### **I. Generally, the First Offer isn't the Best Offer**

- a. Generally, the first offer isn't the best offer. You can almost always get something more for your client if you ask: an amendment to a lesser charge, a shorter sentence or probationary period, etc. So, don't be afraid to encourage your client to push back for a better offer.
- b. Of course, there are exceptions. For example, if your client is charged with trafficking and POCS for a dope in a house and a pill in her pocket and the ADA offers IPPD, you normally advise her to jump on that offer. Experience will let you know what is a good offer.

### **II. Don't Be Afraid to go Back to the Well**

- a. Just because an ADA rejects your original counteroffer, don't be afraid to try again later. Wait a while and come up with a new reason for the ADA to offer the deal your client would take: "client is poor, so can't do diversion; no new charges in the past six months, will take a drug test" whatever. Sometimes you have to work the ADA multiple times to get the deal.
- b. But be cool when you go back. "I hate to bug you. But my client would really like to work this case out, but he just can't plead to a felony or he'll lose his security clearance," etc.
- c. On a related note, the offer will often get much better the closer you get to the plea cutoff (especially if the ADA knows you are willing to try the case if your client doesn't get a reasonable offer). So, don't be afraid to push it to the end. Some of the ADAs will give dramatically better offers the closer you get to the plea cutoff; others don't move that much.

### **III. Homemade Diversion**

A lot of our clients are poor and cannot afford PTIP. On misdemeanors like POM2nd and Drug Paraphernalia, ask the ADA if your client can just take an online drug course or, if that doesn't work, a course at family services and agree to pay court costs, rather than participate in PTIP, which can be prohibitively expensive.

#### IV. Common Amendments to Charges

- a. **Amend POM2 to PODP:** If your client is charged with POM2<sup>nd</sup> and wants to plea, always push hard to amend to possession of drug paraphernalia. A POM 2<sup>nd</sup> conviction is setting your client up for a felony the next time they smoke weed (and they will). POM2<sup>nd</sup> also requires a CRO; PODP does not.
  - i. **Warning** if your client pleads to PODP or any controlled substance crime, be sure to advise them that they will be placed in an electronic database for seven years and not able to buy pseudoephedrine or ephedrine for that period of time. *See* Alabama Code 20-2-190.2. It is a Class A misdemeanor to attempt to obtain. The City of Madison actually enforces this lesser known statute.
- b. **POCS to Illegal Possession of a Prescription Drug (Ala.Code 34-23-7):** You should push for this misdemeanor on every POCS case where the substance is also a prescription drug. Most of the time you can get this if you just ask (and sometime keep asking).
- c. **POCS to PODP:** For street drugs like cocaine, meth or whatever, ask the ADA to amend the charge to possession of drug paraphernalia. Those drugs were in something. They won't always agree, but you can sometimes get it.
- d. **POMI to POM2<sup>nd</sup>:** Always push for the misdemeanor.
- e. **Possession with Intent to Distribute to POCS:** Can get fairly regularly, but not always. Nice because POCS is a class D felony, to which the habitual offender act doesn't apply.
- f. **Trafficking to Possession with Intent:** Getting harder to get ADAs to agree to this one, but they will sometimes. Big deal because avoid mandatory 3 years to serve.

#### V. Misdemeanor District Court Drug Sentences

- a. **Time served.** On some marijuana cases and the like, some of the ADAs will sometimes offer time served with costs, etc. That can be a good deal if you amend the charge as discussed above.
- b. **“Standard Offer.”** On other occasions, maybe because of your client's record or the particular ADA's practice, the ADA will offer your client 180 days suspended for two years and tell you it is their “standard offer.” I almost always advise my client to reject that deal.

- i. Unlike JPS who routinely cuts the time to 45 to 90 days when revoking on a misdemeanor, some of the district court judges will revoke your client to serve the full 180-day sentence.
- ii. So, push hard for one year of probation and as short of sentence as possible, something like 30 days. Who cares about restitution and recovery fees; it'll be a miracle if your client makes it two years on probation. Also, the shorter the sentence the better. There is no standard plea deal. You can get better if you negotiate
- iii. If the ADA sticks to an unreasonable sentence, try the case. Could get a dismissal if the officers don't show. If they do, you might win the trial. But even if you lose, the judge might give you something better than the "standard offer." If the judge doesn't, appeal to circuit court. You can't lose.

## **VI. Misdemeanor Statute of Limitations and Speedy Trial**

Statute of limitations on misdemeanors is normally one year. But even if the warrant was cut in time for the statute, don't forget to look for speedy trial issues if they sat on the warrant. *See Steeley v. City of Gadsden*. 533 So.2d 671, 680 (Ala.Crim.App. 1988) (holding a delay beyond the one-year statute of limitations for misdemeanors is presumptively prejudicial)

## **VII. City Appeals**

- a. Check to make sure the City filed the case with the Circuit Clerk within 14 days of your client perfecting his appeal at the City. Go with the date the Circuit Court stamped it in, not when the City Clerk certified it. If the Circuit Clerk's record doesn't show the case was filed in time, move to dismiss under Ala.R.Crim.P. 30.4.

**VIII. Class D Felonies:** It is almost impossible for the judge to send your client to jail or prison on a D, so push hard for a misdemeanor and encourage you client to reject the felony offer. Offer the ADA every legitimate reason you can think of why your client should get the misdemeanor. If the ADA still won't give it, announce for trial and prepare to try the case. Often the ADA will then give you the misdemeanor because they don't want to fool with a D felony. But if they don't, who cares. You might win. Regardless, you'll get more trial experience and your client won't go to prison, even if you lose. I am not saying there aren't D's that need to be plead, because there are. But in most cases, we need to be getting the misdemeanor.