

CHAPTER IX. – TRIALS

Judge Celeste Leritz Endicott

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CHAPTER IX TRIALS

9.1 SCOPE OF CHAPTER

This chapter describes each stage of a typical municipal trial, from the judge's opening remarks to the attorneys' closing arguments. It also discusses judgment, sentencing, and post-trial motions.

9.2 PRESENCE OF DEFENDANT

Rule 37.57 compels the presence of the defendant at all times during the course of the trial unless the defendant's presence is waived by both the defense and the prosecutor with the consent of the judge.

9.3 OPENING REMARKS CALLING THE CASE FOR TRIAL

After the bailiff opens court in the usual manner, the court first announces the case (City v. Doe) and asks if the parties are ready for trial. Rule 37.56 states that both parties to the case have a right to a speedy trial and that continuances may be granted for good cause shown. A trial continuance should be granted only if the non-ready party convinces the court that substantial injustice would otherwise result. Parties should be advised at arraignment that they will be expected to try their case on the day and time set for trial. If they wish to have an attorney, present witness testimony or other evidence at the trial, they should be told to bring all of the above to court on the day of trial. It is wise to suggest that the parties subpoena witnesses well in advance of the trial.

The mere absence of a witness is not, in and of itself, sufficient reason for the court to grant a continuance. The court should consider what the testimony would be if the witness were in fact present. If such testimony is immaterial, irrelevant, redundant or merely cumulative, then the court should refuse the continuance request and order the trial to proceed. If, however, the court believes that the party made a good faith effort to procure the witness and the absence of the testimony would result in the loss of material and relevant evidence necessary to a fair and impartial determination of guilt or innocence, then a continuance should be granted.

If both parties agree, the testimony of the absent witness may be submitted to the court through affidavit. The court may consider the facts set forth in the affidavit as evidence as if the witness were personally present.

One common attempt to obtain a trial continuance is a defendant's request for a trial by jury. Often such request is made on the day set for trial. Rule 37.61(d) requires that a motion for a jury trial be filed at least 10 days prior to the trial date, unless the designation of the trial judge occurs less than 10 days prior thereto. Therefore, if a defendant attempts to avoid going to trial by demanding a jury trial at the last minute, the trial judge can advise him or her that they are "out of time" and the trial must proceed.

Another common method of attempting to obtain a last minute continuance is to request a change of judge on the day of trial. Rule 37.53(c) provides that a party has a right to a change of judge, and need not allege any reason therefore. However, an application for change of judge must be made no later than ten days after the initial plea. However, if the trial judge is designated less than ten days prior to the trial date, the defendant has the right to a change of judge on the day of

trial. And while a party is entitled to only one change of judge, he or she may make the request at any time for just cause. Of course, a judge must recuse him or herself if he or she is related to a defendant or has an interest in or has been counsel in the case. Rule 37.53(b).

Rule 37.61(f) provides “If the defendant files a written notice so requesting and attaches thereto a waiver of the right to a jury trial, the case may be remanded to the municipal division for trial.” In other words, if a defendant changes his mind about wanting a jury trial, he can do so in writing and the case comes back to municipal court; it does not stay in associate circuit court for trial.

ORDER OF TRIAL/PRESENTATION OF EVIDENCE

9.4 PRO SE LITIGANTS

Many of the defendants appearing for trial in municipal divisions are not represented by attorneys and have no knowledge of trial procedure or the required order of trial. Although judges are prohibited from aiding or assisting either the defendant or the city in the presentation of their respective cases, the court must at least acknowledge and consider the pro se defendant's lack of knowledge. It is therefore recommended that, before the trial commences, the court advise the pro se defendant as to the order of the trial. An example of such a statement is as follows:

Mr. Doe, you are charged with (name of the offense, such as peace disturbance, careless and imprudent driving, etc.) The case will now be tried. The city attorney may make an opening statement, outlining what evidence he or she expects to present at trial. You may, if you wish, make an opening statement after the city's, or you may present your opening statement later in the case. You are not required to give an opening statement. The city will present their evidence. Witnesses will be sworn and will be questioned by the city. You will then have the right to cross examine those witnesses, that is to ask any questions of those witnesses that you feel is important to your side of the case. The city may offer other evidence, such as photographs, maps, or objects pertaining to the offense. You have the right to object to any evidence presented by the city that you feel is unfair, inappropriate or irrelevant. I will rule on those objections as they arise. After the city has rested, that is, finished its side of the case, you have a right to call witnesses on your own behalf and ask them questions; they will be subjected to cross examination by the city. You may also present other physical evidence that supports your case. The city has the right to raise objections to your questions or evidence as well.

You have the further right to testify on your own behalf, that is to tell your side of the story. If you testify you will be placed under oath and subject to cross examination by the city. However, the law does not compel you to testify, you have the right to remain silent and this court will not consider your failure to testify as any indication of guilt. The burden of proving you guilty rests entirely with the city, and this burden of proof is beyond a reasonable doubt. You do not have to prove yourself innocent. After all the evidence has been heard the court will make a determination as to your guilt or innocence.

If at any time you have a question concerning the proceedings, please so indicate. I will stop the proceedings and attempt to answer your questions.

ORDER OF TRIAL – PRESENTATION OF EVIDENCE – RULE 37.62

9.5 GENERAL CONSIDERATIONS

Either party may request the court to exclude witnesses from the courtroom during the course of the trial. The purpose of this rule is to insure the purity of the testimony. One witness may very innocently and subconsciously favor or change his or her impression of the facts because of a previous witness' testimony. To guard against this, the court may, on its own motion or on the motion of either party, invoke the rule of exclusion of witnesses. In the event the exclusionary rule is invoked, the court should announce:

All witnesses, excluding the defendant, are to leave the courtroom until you are called to testify. You will remain in close proximity but under no circumstances will you listen to or attempt to hear the testimony of any other witness. While you are excluded, you will not discuss the case with anyone other than the attorneys for the parties. This admonition is given under the penalty of contempt of court if you disobey.

9.6 OPENING STATEMENTS

Opening statements for the city or the defendant should be limited in scope. The purpose of an opening statement is to inform the court of the nature of the case, outline the anticipated proof, and inform the defendant of the contemplated course of prosecution. Opening statements that include arguments about the respective parties' theories of the case or interpretation of the facts are objectionable.

Neither the city attorney nor the defendant are required to give opening statements. Either party may choose to give a statement but there are no sanctions for failing to do so. However, if the city elects to give an opening statement, the court must direct a judgment of acquittal at the close of such statement if the prosecutor fails to state facts which, if proven, would fail to convict the defendant. See, e.g. State v. Whites, 538 S.W.2d 70 (Mo. App. 1976).

So, for example, if the defendant was charged with possession of marijuana and the city's opening statement only referred to the defendant's possession of drug paraphernalia, the court must direct a judgment of acquittal at the close of the city's opening statement. However, such dismissals are unusual and should only be granted if the city presents no facts, along with inferences most favorable to the city, which support the elements of the offense charged.

The defendant has the choice of making an opening statement immediately after the conclusion of the city's statement, reserving the opening statement until the conclusion of the city's case in chief, or waiving the opening statement entirely. Rule 37.62.

9.7 EVIDENCE FOR THE CITY

After the opening statement stage of the trial, the city will present its evidence to support the ordinance violation charged in the information. As noted, the defendant has the right to cross examine the city's witnesses and object to evidence submitted by the city.

9.8 MOTION FOR DIRECTED JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE CITY'S CASE—IN--CHIEF

At the close of the city's case, the defendant may move for a directed judgment of acquittal. Rule 37.62(c). This is similar to a motion for judgment of acquittal after the conclusion of the city's opening statements. If the court determines that the city has not offered sufficient evidence to support the charges against the defendant, the court should sustain the motion of acquittal, and the defendant should be discharged. Conversely, if the defendant's motion is overruled by the court, the defense then proceeds with its testimony and evidence.

At this point in the trial, the court should not concern itself with the ultimate burden of proof - "beyond a reasonable doubt." The test is not guilt or innocence but whether there has "been evidence admitted as to each and every distinct element of the offense charged." If the court determines that the city has failed to prove an element of the offense, then, of necessity, the defendant is acquitted.

9.9 OPENING STATEMENT BY THE DEFENDANT

If the defendant elected to preserve his or her opening statement, that statement can be presented immediately after the city finishes presenting its evidence. As previously discussed, the defendant's opening statement must also be restricted to facts and the reasonable inferences to be drawn from those facts. The defense cannot argue its case, and the limitations placed on the prosecutor apply equally to the defendant.

9.10 EVIDENCE FOR THE DEFENDANT

After its opening statement, the defense may present its testimony and evidence. When the defendant is not represented by an attorney, often the only evidence presented is the testimony of the defendant. In such cases, before the actual trial commences, the court should advise defendants that they are not compelled to testify on their own behalf and that there is no inference of guilt in the event they elect not to testify. This is also applicable to spouses. Rule 37.63(a) specifies that: "If the defendant shall not avail himself or herself of the right to testify or of the testimony of the wife or husband on the trial in the case, it shall not be construed to affect the innocence or the guilt of the defendant nor shall the same raise any presumption of guilt, nor be referred to by any party or attorney in the case, nor be considered by the court or jury before whom the trial takes place."

The defense, in lieu of offering evidence, may elect to stand on or re-offer its motion for a directed judgment of acquittal. If this occurs, the case is closed and rather than determining only if the city has made a prima facie case (presented evidence covering each element of the offense charged), the court must decide the defendant's guilt or innocence. To do that, the court must determine whether the city has presented credible evidence that convinces the court the

defendant is guilty beyond a reasonable doubt. [See Section 9.14 for further discussion of guilt beyond a reasonable doubt.]

9.11 REBUTTAL EVIDENCE

If the court has sustained the defendant's motion for a directed judgment of acquittal, the defendant is immediately discharged, and the remainder of the trial is aborted. However, if the court has overruled the motion, then, and only then, are the parties permitted to offer rebuttal evidence; the city first and the defense second. The parties may waive. If the city chooses not to offer rebuttal, the defense is prohibited from offering further evidence.

The rebuttal evidence rule is not designed to automatically reopen the case for any and all evidence. Rebuttal evidence is that which tends to explain, counteract, repel or disprove evidence offered by the other party. The scope of such evidence rests within the broad discretion of the trial court. State. v Caldwell, 695 S.W.2d 484 (Mo. App. 1985).

Rule 37.62(f) provides that “the parties, respectively, may offer evidence in rebuttal.” If either party requests leave to reopen its case, the court should determine why this evidence was not previously offered. If the court determines that there was good cause, the request to reopen should be granted. An example would be where either of the parties announces the discovery of a formerly unknown witness whose testimony is essential to the party's case.

9.12 MOTION FOR JUDGMENT OF ACQUITTAL AT CLOSE OF EVIDENCE

While Rule 37.62(g) provides that a defendant may offer a motion for a judgment of acquittal at the close of all evidence, the motion is a carry-over from previously jury-tried municipal cases and serves no real purpose in a court-tried case other than to avoid the final stage of the trial reserved for closing argument. The rule was designed to take the case away from the jury if the court believed that as a matter of law the defendant is not guilty. However, if such a motion is offered, the court must decide the guilt or innocence of the defendant based upon the evidence heard, as the court would do at the conclusion of the entire trial. If the court finds in favor of the defendant, the court sustains the motion and discharges the defendant.

9.13 CLOSING ARGUMENTS

Subject to the comments above, the parties are entitled to offer "closing arguments" to the court but are not required to do so. Quite often in municipal non-jury cases, closing arguments will be waived because the case has been short, the evidence is fresh, and argument would be superfluous. The court may limit the time that each party has for argument, with the city arguing first, the defendant second, and the city having the right of closing by final rebuttal argument. When the court limits the time for argument, each party has an equal time limit; however, the city prosecutor must announce in advance how the city's time will be divided, how many minutes for the opening final argument and how many for the rebuttal argument.

The scope of final argument can include any statement based upon the facts in evidence and all reasonable inferences to be drawn from those facts. However, the argument cannot include evidence that was excluded by the court during trial or any inferences drawn from the excluded evidence. The most common objections raised during final arguments are: (1) that the argument

is not supported by facts in evidence; and (2) that the argument is inflammatory. Because there is no jury, the judge has latitude in restricting or allowing broad final arguments.

THE JUDGMENT – RULE 37.64

9.14 GENERAL CONSIDERATIONS

After closing arguments, the case is concluded, and the court must determine the facts, the credibility of the witnesses, and the weight of the evidence to decide whether the defendant is guilty beyond and reasonable doubt. Reasonable doubt has been defined in Missouri as follows: "A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt." MAI-CR3d 302.04.

If the court believes that the city has not sustained this burden of proof, that there is a reasonable doubt as to the defendant's guilt, the court is charged with finding the defendant not guilty. The court is not obligated to make an on the spot decision. It may take the case as fully heard and submitted and continue it to a date certain for adjudication. This is commonly done to enable the court to reflect on the evidence just as a jury (if present) would do during its deliberations. The court may also take a case under submission to research a question of law. The judge should expedite all cases under submission .

9.15 ACQUITTAL

If the court determines the defendant is not guilty, the court announces, "The court finds and adjudges that the defendant is not guilty and is herewith discharged."

9.16 FINDING OF GUILTY

If the court determines that the defendant is guilty, it announces, "On the evidence heard and adduced, the cause having been fully submitted, the court finds and adjudges the defendant guilty as charged." A finding and adjudication of guilt must be done without unreasonable delay, and the defendant must be present in court unless excused by both the city and the defendant with the consent of the judge. Rule 37.57.

9.17 SENTENCE

The court may immediately impose sentence or may defer sentencing for a reasonable period, either to reflect on what it considers to be proper punishment, or to order a presentence investigation and report for sentencing or probation purposes. In either instance, the court should set a sentencing date, ordering the defendant to reappear on that date.

The court should never presume the range of penalty and should take care to learn what the range of penalty is for the particular offense for which the defendant has been convicted. Usually the court should ask the prosecutor what the penalty range is and which ordinance provides for the penalty, and then personally review the sentencing provisions of the ordinance. The prosecutor should have access to the defendant's prior record, if any, and may have a

recommendation to make to the court concerning sentencing. Of course, the judge is not obligated to follow the prosecutor's recommendation.

The court has great latitude in sentencing and should take care to learn what the range of penalty is for the particular offense for which the defendant has been convicted. The court should ask the prosecutor what the penalty range is and which ordinance provides for the penalty, and then personally review the sentencing provisions of the ordinance.

The court may impose the minimum to the maximum penalty provided for in the ordinance. The court may impose a sentence and suspend execution thereof; or may suspend imposition of any sentence if not prohibited by ordinance. If a defendant receives a suspended execution of sentence or suspended imposition of sentence, he or she must be placed on probation for a specific period of time, not to exceed two years. Rule 37.64(e). The court may impose conditions of probation, the violation of which may cause defendant's probation to be revoked. In the case of a suspended execution of sentence, the previously imposed sentence would be executed. In the case of a suspended imposition of sentence, the court is free to impose any sentence within the applicable range of punishment in the event that probation is revoked.

The court also has jurisdiction to stay execution of payment of a fine or jail sentence for a period not to exceed six months from the date the sentence is imposed. This stay is commonly granted to allow the defendant additional time to obtain the money to pay the fine, or in case of a jail sentence, to allow time to place his or her affairs in proper order before being committed to jail. The judge may require the defendant to post a bond conditioned on the defendant appearing on a specified date and surrendering in execution upon the sentence. Rule 37.64 (f).

On occasion a defendant shall be convicted of two or more charges. In such event, the court should state whether the sentences shall run consecutively or concurrently. If the court fails to so state, the sentences shall run concurrently. Rule 37.64 (g).

9.18 DUTY TO ADVISE DEFENDANT OF RIGHT TO TRIAL DE NOVO

Immediately after sentencing, the court must inform the defendant of the right to a trial de novo. Rule 37.71. **An application for trial de novo shall be filed as provided by law. No judge may order an extension of time for filing or perfecting an application for trial de novo.**

Subsection (b) prohibits the filing of such an application if the defendant has paid any portion of the fine or costs. The court may make a statement such as the following to the defendant:

Mr. Doe, the court has found you guilty and sentenced you to pay a fine of \$200.00 and to pay court costs. You have ten days from today's date to file an application for a trial de novo, that is, a new trial in front of the circuit court of this county. If you intend to seek a trial de novo, do not pay the fine and costs because if you do pay any part of the fine and costs, you waive your right to a new trial.

Once an application for trial de novo has been filed, execution of the judgment is suspended, and the defendant is not required to pay the fine or go to jail. However, if the defendant changes his mind about wanting a trial de novo or if the court enters a finding that the defendant has "abandoned" the request, the judgment shall be executed and the defendant must pay the fine or go to jail. Rule 37.72

9.19 SETTING ASIDE JUDGMENT

The court has jurisdiction to set aside the judgment within a period of ten days from the date it is entered. Rule 37.67. After the ten-day period, the court loses its jurisdiction and cannot interfere with the judgment. The court, once an application for trial de novo has been filed, also loses all further jurisdiction to set aside the judgment. Within these restrictions, the court may, on its own application, or on the motion of the defendant, entertain a motion to set aside the judgment upon any one or more of the following grounds:

1. The facts set forth in the information and upon which the case was tried do not constitute a violation of the ordinance;
2. The court did not have jurisdiction of the ordinance violation charged; or
3. Setting aside judgment is necessary to correct a manifest injustice.

In the event the judgment is set aside, the court must also issue a written order to this effect setting forth the reasons for so ruling.

9.20 MOTION TO WITHDRAW A PLEA OF GUILTY

The court has the further jurisdiction, either on its own application or by motion of the defendant, to withdraw a plea of guilty. While technically this can be done only before sentence has been imposed or after the court has suspended the imposition of sentence, the court, at any time within the ten-day period, may set aside the guilty plea, regardless of sentencing, to correct a “manifest injustice.” Rule 37.67(b).