

XII. JUDGMENT AND SENTENCING

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CHAPTER XII

JUDGMENT AND SENTENCING

12.1 SCOPE OF CHAPTER

This chapter explores sentencing considerations such as statutory penalty limits, the defendant's background, and the availability of alternative sentences, including probation, parole, traffic offender programs, mandatory and optional alcohol and drug rehabilitation programs, and restitution. The chapter also explains the judge's options when a defendant is unable to pay or refuses to pay a fine.

SENTENCING CONSIDERATIONS

12.2 PENALTY LIMITS

In response to the Supreme Court's decision in *Turner v. State*, 245, S.W.3d 826 (Mo.2008), the legislature amended yet again the definition of and penalty provisions for "prior," "persistent," "chronic," or "aggravated" alcohol-related offenders to include municipal or county ordinance violations in determining the number of prior alcohol-related convictions.

[§577.023, RSMo 2008](#), effective July 1, 2009, now provides that municipal court judges may no longer suspend the imposition of sentence or fine or place on probation or parole a prior offender unless he/she has served a minimum of five days imprisonment or 30 days of community service, a persistent offender until he/she has served a minimum of 10 days imprisonment or 60 days community service, an aggravated offender until he/she has served a minimum of 60 days imprisonment or a chronic offender until he/she has served a minimum of two years imprisonment. §577.023.6, RSMo 2008. The community service option for prior offenders requires the municipality to "have a recongnized program for community service." There is no such requirement for persistent offenders, only that the minimal 60 days community service be performed "under the supervision of the court." Chronic or aggravated offenders are required to serve the statutory minimum sentences set forth above without possibility of community service in lieu thereof.

The county or municipal court is required to find the offender prior, persistent, chronic, or aggravated if the information pleads all facts necessary to support such a finding. §577.023.6, RSMo 2008. In the author's experience, it is unlikely that law enforcement officers would file such charges in a county or municipal court rather than seeking warrants in state court. If warrants were refused at the state level, a municipal prosecutor could theoretically prosecute such offenders at the county or municipal level, but in order to invoke the mandatory minimums set forth above, the prosecutor must plead and prove th prior alcohol related contacts. Absent such allegations, the municipal judge is not bound by the mandatory incarceration language of §577.023.6. Furthermore, the three month jail limitation imposed on third and fourth class cities for municipal ordinance violations would preclude a municipal judge from assessing the statutory minimum required of aggravated offenders. §§77.590 and 79.470.

Driving While Suspended/Revoked

A common question for municipal judges is whether or not an individual convicted of a municipal offense of driving while suspended or revoked may be placed on probation or parole. State law provides that any “person convicted of driving while revoked is guilty of a class A misdemeanor,” and that “no court shall suspend the imposition of sentence as to such a person nor sentence such person to pay a fine in lieu of a term of imprisonment, nor shall such person be eligible for parole or probation until such person has served a minimum of 48 consecutive hours of imprisonment, unless as a condition of such parole or probation, such person performs at least 10 days involving at least 40 hours of community service under the supervision of the court in those jurisdictions which have a recongnized program for community service.” [§302.321, RSMo 2005](#). Unlike the statute related to driving while intoxicated, §577.023, which imposes mandatory sentences for those charged in municipal or county courts, the state law pertaining to driving while suspended or revoed makes no similar directive to municipal courts.

It is the author’s position that the mandatory sentencing language contained in §302.321 only applies to those charged with a violation of state law as opposed to a municipal offense.

12.3 OTHER CONSIDERATIONS

In December 2003, the Supreme Court amended Rule 37.67 by adding sub-section (c), which provides that “clerical mistakes in the record and errors in the record arising from oversight or omission may be corrected by the court any time on the motion of any party and after such notice, if any, as the court orders. Previously, the court lost jurisdiction 10 days after rendition of judgment to vacate its judgement. Rule 37.67(c). Effective July 1, 2004.

12.4 FINES/PARTIAL PAYMENT/FAILURE TO PAY

Effective July 1, 2004, Rule 37.65 was amended to permit payment of fines on an installment basis, “under such terms and conditions as the judge may deem appropriate.” Rule 37.65(a). Many of the municipal courts in the St. Louis metropolitan area now use “payment dockets” to enable defendants to make regular monthly payments towards their assessed fines and costs in order to avoid. Alternatively, the judge may order a stay of execution on the fine “and grant the defendant a specified period of time within which to satisfy the same.” Rule 37.65(b). “If a defendant defaults in the payment of the fine, the judge may order the defendant to show cause why the defendant should not be held in contempt of court.” Rule 37.65(c).

12.5 PRESENTENCE INVESTIGATIONS

Supreme Court of Missouri Rule 37.64(a) recognizes the value of a presentence investigation for a judge who has a probation or parole officer available, and it is logical that such use would be made where necessary because of the severity of the offense. Such an investigation may be ordered and submitted for examination only after a plea of guilty or a finding of guilty by the judge. A judge can further limit the presentence investigation to specific information as

requested, but must, in all circumstances, allow the defendant or his or her attorney access to the report.

Most municipal judges who do not have a presentence investigation available to them still have tools that give valuable information to aid in sentencing. At a minimum, the judge should be able to obtain the defendant's criminal record from the police department or the defendant's driving record from the State of Missouri. The judge should also ask the defendant about prior offenses. Similar questions should be posed to the defendant's attorney if there is one. Where there is a victim in court, the judge should find out about the effect of the crime on the victim — injury, financial loss, insurance, and so forth.

Section 559.607 RSMo (1994) permits municipal divisions of any circuit court acting through the presiding judge to contract with a private entity for probation or rehabilitation services for individuals placed on probation for violation of city ordinances. This is a tremendous tool for municipal divisions to have probation services available to it. The city is not required to pay for the probation services cost. That burden is born by the defendant pleading guilty or found guilty per the court order. The court ordered entity then acts as the city's probation office. The court is required to notify the state board of probation and parole of the existence of this entity by forwarding the contract to it. There are certain requirements provided by subsequent sections to Chapter 559 of the Missouri Revised Statutes with respect to implementing this process. Section 559.609, RSMo (1994) lists the factors to consider in choosing the private entity. Section 559.612, RSMo (1994) requires solicitation of bids and that the contract be for a period of at least three years. Finally, Section 559.615, RSMo (1997 Supp.) puts restrictions on the relationship of the entity to the judge to prevent nepotism and conflicts of interest.

12.6 CONSECUTIVE OR CONCURRENT SENTENCES

If the defendant is found guilty or pleads guilty to multipleailable offenses, the judge may have the sentences run consecutively or concurrently. Supreme Court Rule 37.64 provides that the judge shall so state, and if the judge fails to do so, the charges will be held to run concurrently.

ALTERNATIVE SENTENCES

12.7 GENERAL CONSIDERATIONS

Chapter 557 of the Missouri Revised Statutes deals generally with sentencing provisions. This section will deal specifically with different types of alternative sentences, particularly with application to the municipal divisions.

12.8 PROBATION

Chapter 559 of the Missouri Revised Statutes deals generally with probation and allows the judge to impose probation and attach conditions to it as well as enlarge or modify the terms of probation if certain due process requirements are met. An SIS also tolls the deadline for a defendant to apply for a trial de novo, since the case has not been reduced to final judgment. State ex rel. Streeter v. Mauer, 985 S.W.2d 954 (Mo.App. W.D. 1999). See section 14.14 (new

section) for further discussion of this case.

Rule 37.64(e) allows the judge to suspend execution of sentence and place the defendant on probation or parole as authorized by law up to two years. The statutory basis for the rule is Section 479.190, RSMo (1994).

A court generally can impose conditions of probation as seen fit by the court so long as the conditions are not illegal, immoral or impossible. State v. Brantley, 353 S.W.2d 793, 796 (Mo. 1962). Thus, the court has broad discretion in the area of probation.

A. SUSPENDED IMPOSITION OF SENTENCE

The suspended imposition of sentence (S.I.S.) is a suspension of active proceedings in the case. Not being a final judgment, it is not appealable nor, absent statutory provisions to the contrary, is it a conviction. State ex rel. Peach v. Tillman, 615 S.W.2d 514, 517 (Mo. App. E.D. 1981). In contrast to a suspended execution of sentence where the sentence is imposed but payment or jail is not executed, there is no sentence imposed at all with an SIS.

There is no direct state statutory authority for a municipal judge to suspend imposition of sentence. As a result, the city must have an ordinance allowing the judge to do so. State v. Motley, 546 S.W.2d 435, 437 (Mo. App. 1976). By contrast, associate and circuit divisions, by virtue of Section 557.011, RSMo (1994) may suspend imposition of sentence and criminal prosecutions unless otherwise prohibited by law.

The S.I.S. is a matter of grace for the judge and is generally used where the judge feels the circumstances do not warrant the "stigma" of a conviction.

Certain mandatory requirements relating to alcohol and drug offenses where suspended imposition of sentence is imposed are now required by state statute. These will be discussed in more detail in Section 12.11.

B. SUSPENDED EXECUTION OF SENTENCE

Missouri Supreme Court Rule 37.64(e) allows the judge to suspend execution of sentence (S.E.S.) and place the defendant on probation or parole for a term not to exceed two years. In contrast to an SIS where sentence is not imposed at all, with an SES, sentence is imposed (resulting in a conviction), but payment of fine or service of jail sentence (execution) is suspended.

C. TERMS AND CONDITIONS

Probation and parole are not matters of right. The terms and conditions of probation or parole are within the discretion of the judge. State v. Keller, 685 S.W.2d 605, 606 (Mo. App. S.D. 1985). The actions of the court in granting or denying parole and in setting terms or conditions are not reviewable in the absence of extreme abuse of discretion. State v. Austin, 620 S.W.2d 42, 43 (Mo. App. E.D. 1981). The court retains continuing jurisdiction over the defendant during the

entire probationary period.

Thus, the court can impose terms and conditions on the defendant that, in its discretion, would be reasonably necessary to insure the defendant will not again violate the law (alcohol treatment programs, drug education school, restitution, community service work, and so forth).

D. MODIFICATION

The judge may enlarge or modify conditions of probation and parole before completion of the term. However, if the modification enlarges or expands the terms of probation or parole or their conditions, the defendant is entitled to appropriate due process requirements of notice and hearing.

Section 558.046, RSMo (1994) permits reduction of sentence upon petition if the crime did not involve violence and threats of violence, involve alcohol or illegal drugs, the defendant has successfully completed a detox or rehabilitation program and is not a prior or persistent offender under Sections 558.016, 558.018, or 558.019 (1994 and Supp. 1997). In addition, Section 577.054 (1994) also allows the originating court to expunge a DWI or DUI record after 10 years only on the condition it was a first offense and there were no subsequent or prior alcohol-related offenses.

Section 302.304.14 and Section 302.540.1 permit an associate circuit court or circuit court upon Motion of Hearing to waive or modify an assignment or recommendation for a SATOP Program based on the determination the program is unwarranted. Factors for the reviewing court include the needs assessment, driving record, circumstances of the offense and likelihood of future offenses. However, a court cannot waive but only modify the conditions if the defendant, in an alcohol-related offense, is a prior or persistent offender or had a BAC test of .15 or more.

E. REVOCATION

Supreme Court of Missouri Rule 37.70 governs revocation of probation or parole and requires compliance with Section 559.036, RSMo (Supp. 1997). This Section lists specific procedural requirements that must be met as a condition of revocation. The statute requires notice and an opportunity to be heard on the issues of violating probation or parole conditions. Unlike Section 559.036, Rule 37.70 permits such notice to be mailed rather than personally served. The notice must apprise the defendant of the specific conditions of probation or parole he or she has allegedly violated or any other basis for the action.

To make a finding of revocation, the judge need only be "reasonably satisfied" that the terms of the probation or parole have been violated. State v. Wilhite, 492 S.W.2d 397, 399 (Mo. App. S.D. 1974).

The case of Moore v. Stamps, 507 S.W.2d 939, 949 (Mo. App. E.D. 1970), consistent with Section 559.036, states that the defendant is entitled to notice of the claimed violation, disclosure of the evidence against him or her, the opportunity to be heard and present witnesses and evidence, the right to confront adverse witnesses, and a written statement of the grounds for

revocation of probation or parole.

In Abel v. Wyrick, 574 S.W.2d 411, 418 (Mo. 1978), the Supreme Court of Missouri held that the court must consider alternative responses to revoking the probation and that probation revocation must not be "automatic." Section 559.036(3), RSMo (Supp. 1997) specifies that the judge has the option of continuing the defendant on the existing conditions, "with or without modifying or enlarging the conditions or extending the term...."

12.9 PAROLE

Supreme Court of Missouri Rule 37.64 and Section 479.190, RSMo (1994) govern parole as well as probation. The conditions governing revocation or granting of parole are the same as those discussed in Section 12.8, A-E as dealing with probation. The distinction between probation and parole is that parole includes: (1) a release from confinement if the parolee meets certain conditions required by the judge; and (2) suspension of the execution of the balance of the sentence so long as the conditions are met.

12.10 TRAFFIC OFFENDER PROGRAMS

In certain traffic cases, Section 302.302.4, RSMo (Supp.1997) permits a court to order the completion of a driver improvement program in lieu of assessment of points. If the offender satisfactorily completes the program within 60 days of the court order, points are not assessed. The stay provisions are restricted to an individual who has not had a similar stay within the previous three years. The stay applies to all one-, two-, three-, and four-point violations except that of permitting an unlicensed operator to drive an automobile. The school completed must be one on the state-approved list of traffic offenders' schools. (See approved format following this chapter.)

A court is not limited to stay provisions to order traffic school. Such programs can be ordered at the discretion of the court and as a condition of probation in any traffic offense case in which the court deems the program necessary.

12.11 ALCOHOL AND DRUG PROGRAMS

Section 577.049, RSMo (Supp. 1997) mandates that upon a plea or finding of guilty to any alcohol- or drug-related traffic offense, a court must order participation in SATOP (Substance Abuse Traffic Offender Program). The same is also true per Section 577.525, RSMo (Supp. 1997) for offenders convicted of possession or use of alcohol while under the age of 21. The definition of SATOP is included in Section 302.010(21), RSMo (Supp. 1997) and Section 577.001, RSMo (Supp. 1997).

The "Abuse and Lose Law" also puts greater constraints on the courts in dealing with alcohol and drug offenders. Offenders under the age of 21 convicted of violating state statutes relating to drug offenses or alcohol offenses could lose their driver's licenses for up to one year. Section 577.500, RSMo (1994). The law further requires that any person under the age of 21 who violates a state, county, or municipal law involving possession or use of alcohol complete an

alcohol-related education program that meets or exceeds requirements promulgated by the Department of Mental Health. Section 577.525, RSMo (Supp. 1997). In addition, the court is required to enter an order revoking the driving privilege of any person who violates state, county, or municipal law involving possession or use of a controlled substance (as defined in Chapter 195, RSMo (Supp. 1997)) while operating a motor vehicle, and who at the time of the offense was 21 years of age or older. Section 577.505, RSMo (1994).

There are additional mandatory requirements, besides those relating to SATOP as listed in the first paragraph, that are now imposed on courts when dealing with drug and alcohol offenders. Section 577.023(3).4, RSMo (1994) provides that a court cannot give a suspended imposition of sentence to any individual who is a prior or persistent offender nor can such person be eligible for probation or parole unless he or she serves 48 hours in jail or performs 10 hours of community service. The definition of prior and persistent offender is included in Section 577.023(2) and (3), RSMo (1994). A persistent offender is an individual with two or more intoxicated related traffic offenses within 10 years. A prior offender is an individual with one prior intoxicated related traffic offense within 5 years. Furthermore, Section 577.600, RSMo (Supp. 1997), has been added requiring that on a first offense, a court may, but on a second offense of an intoxicated related traffic offense a court shall, as a condition of granting probation, require an individual convicted to equip his or her vehicle with a certified ignition interlock device. Before doing so, the court must make findings of no hardship and that there is an available installation service within 50 miles of the county seat wherein the court lies. The court may reduce the individual's fine because of the additional cost associated with the interlock device. The Department of Revenue has forms for an order requiring the device as a condition of probation and these can be requested from it.

Section 577.600 now mandates that on a second or subsequent offender of an intoxicated related traffic offense that for a period of not less than one month from the date of reinstatement of license the offender shall not operate any vehicle unless it is equipped with an ignition interlock device.

The court must keep abreast of mandatory requirements that are imposed upon it. More of these requirements may be added in the future. It is likely the court will be kept aware of these through educational programs through various state agencies.

RESTITUTION/COMMUNITY SERVICE

12.12 RESTITUTION

Ordering restitution is clearly within the authority of a judge in ordering probation or parole. However, a judge must always consider the practical problems of restitution such as the defendant's ability to pay, the monitoring of payment, and the method of payment. In addition, if a complaining party wishes no contact with the defendant, the court must decide whether to order the restitution paid through the court.

In dealing with state charges, the situation is easier because state probation and parole officers can monitor and conduct the restitution process. By contrast, on the municipal level, few courts

have the time or ability to insure that restitution is made.

Restitution raises a number of difficult questions. For example, should restitution be restricted to intentional violations such as assault and disorderly conduct, or should the court enter the civil arena by ordering restitution in automobile accident cases where there is no insurance?

There are no clear-cut answers. However, the court should proceed carefully into the area of restitution, particularly when there is a civil remedy available for the injured party.

12.13 COMMUNITY SERVICE PROGRAMS

Section 479.190, RSMo (1994) which permits a judge hearing municipal cases to grant probation or parole, was revised in 1990 to specifically allow for restitution and community service as terms of probation. A provision in the law relating to community service gives immunity from suit to "Any county, city, person, organization, or agency, or employee of a county, city organization, or agency charged with the supervision of such free work or who benefits from its performance . . . except for intentional torts or gross negligence."

Liability used to be a concern when working with community service programs. However, Section 217.437, RSMo (Supp. 1997) now provides that any city or agency charged with supervision of free work per court order are immune from suit for supervision of the performance of those individuals except for intentional torts or gross negligence. As a result, this is a far greater tool for courts to use and can be used in conjunction with a court contracted probation program as outlined in Section 12.8.