The New Missouri Criminal Code:

A Manual for Court Related Personnel

Prepared by the University of Missouri-Columbia
School of Law, Office of Continuing Legal Education
and
The Institute of Public Safety Education,
College of Public and Community Services
and
University Extension Division

Acknowledgment

This manual was made possible by the efforts of the Missouri Supreme Court through the Office of the State Courts Administrator. Funds to develop uniform training materials on Missouri's new Criminal Code (effective January 1, 1979) for use by police, courts and corrections personnel were granted to the Missouri Supreme Court by the Law Enforcement Assistance Administration and the Missouri Council on Criminal Justice. The grant monies are administered by the Office of the State Courts Administrator.

This project was supported by Grant Numbers 76-ACE 2-SC13 and 78-DF-AX-0079 awarded by the Law Enforcement Assistance Administration, United States Department of Justice. Points of view or opinions stated in this publication are those of the authors and editors and do not necessarily represent the official position of the United States Department of Justice.

Foreword

On January 1, 1979, the effective date of Missouri's newly revised Criminal Code, all members of the criminal justice system in Missouri must deal with the most comprehensive revision of the criminal laws in this state since 1835. In view of the impact that such a major revision will have on the criminal justice system in Missouri, the Missouri Supreme Court (through the office of the State Courts Administrator) contracted with the University of Missouri-Columbia to develop training materials on the new Code for use by the judiciary, police, prosecutors, public defenders and corrections personnel. In turn the University through its School of Law, Extension Division and Institute of Public Safety Education, with assistance from all segments of the criminal justice system, experts in the field of criminal law and review committees, prepared four manuals: one for use by police officers, one for use by police training personnel, one for use by the courts, prosecutors and public defenders, and one for corrections personnel.

To insure the development of effective and useful materials, invitations to participate as members of the Advisory Committee were extended to individuals involved in all segments of the criminal justice system. Those agencies invited to participate were: The Missouri Supreme Court, the Attorney General of Missouri, the Missouri Association of Prosecuting Attorneys, the Public Defender's Association, the Division of Corrections, the Department of Public Safety, the Missouri State Board of Probation and Parole, various state and local police agencies, and citizens.

On May 24, 1978, the Advisory Committee met in Columbia to acquaint themselves with the task of preparing all four training manuals. The Advisory Committee provided overall guidance in the preparation of the manuals as well as review of the contents of each manual after sub-committee review. A sub-committee for each manual (police, courts and corrections) was organized with representatives from respective segments of the criminal justice system. Working with rough drafts prepared by the project staff at the University of Missouri-Columbia and its consultants, the sub-committees made suggestions for the best format for each manual and reviewed the contents of each manual. The respective sub-committees and the Advisory Committee met several times in order to accomplish the necessary review so that each manual could be put in final form. These manuals would not exist without the work of the members of all the committees and the project staff.

Special recognition in the preparation of these materials goes to Professor Edward H. Hunvald, Jr. and Associate Professor William A. Knox of the law faculty at the University of Missouri-Columbia and Gary Anderson, Associate Professor of Law at the University of Tennessee. Professor Hunvald was the Executive Director of the Committee to Draft a Modern Criminal Code of which Gary Anderson served as Executive Secretary. Special thanks should also go to Melody Bryan, Steve Callahan, Nancie Divilbiss, Lew Kollias and Pat Starke who assisted in drafting the materials and performed numerous other tasks essential to the preparation of the materials.

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CHAPTER 1

Preliminary Provisions (§§556.011—556.061)

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1.1 Introduction

In 1977, the Missouri Legislature passed Senate Bill 60, the Criminal Code, a revision and codification of most of the Missouri laws defining crimes. The major purposes of this bill were to organize Missouri's criminal laws into a coherent body of statutes, eliminate archaic language, provide consistent and complete provisions regarding sentencing, and provide clear statements not only of the elements of the particular crimes, but also of the general principles and defenses which affect criminal liability. While reformation of the criminal law was not a primary object, considerable changes and improvements were made.

Senate Bill 60, however, did not cover all of the criminal laws of Missouri. The major areas omitted from the bill were the homicide offenses, narcotics offenses and weapons offenses. In addition, many criminal statutes located outside the chapters on Crimes and Punishments were not repealed by Senate Bill 60 and remain in effect.

However, even as to these non-code offenses, the Code will have an effect as of January 1, 1979. The nature of the effect is discussed in particular sections of this manual.

Senate Bill 60 was based on a draft called "The Proposed Criminal Code for the State of Missouri" prepared by The Committee to Draft a Modern Criminal Code and published in October, 1973. While there are substantial differences between Senate Bill 60 and the Proposed Code, most of Senate Bill 60 is based on the Proposed Code. The Proposed Code contains committee comments on each section giving the background and an explanation of each section. The committee in preparing the Proposed Code relied extensively on similar criminal code revisions in other states and in particular on the work done by the American Law Institute in the Model Penal Code (Proposed Official Draft 1962). The American Law Institute has also published the Tentative Drafts of the Model Penal Code and these drafts contain extensive comments.

1.2 Organization of the Criminal Code

The Code is divided into four parts of unequal size.

Part I Introductory Provisions (Chapter 556)
Part II Disposition of Offenders (Chapters 557-561)
Part III General Provisions (Chapters 562-564)
Part IV Specific Offenses (Chapters 565-577)

The heart of the Code is Parts II and III. These contain the provisions relating to sentencing and classification of offenses and the general provisions which apply to the specific offenses. In order to understand the provisions dealing with the specific offenses, it is necessary to understand Parts II and III.

This manual follows the Code on a section by section basis.

1.3 Short Title (§556.011)

This code shall be known and may be cited as "The Criminal Code".

1.4 Classes of Crimes (§556.016)

Code

1. An offense defined by this code or by any other statute of this state, for which a sentence of death or imprisonment is authorized, constitutes a "**crime**". Crimes are classified as felonies and misdemeanors.

2. A crime is a "**felony**" if it is so designated or if persons convicted thereof may be sentenced to death or imprisonment for a term which is in excess of one year.

3. A crime is a "**misdemeanor**" if it is so designated or if persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is one year or less.

Comments

This section makes only minor changes. Pre-Code §556.010, which has been repealed, defined "crime" and "offense" in terms of the possibility of punishment by fine or imprisonment. The code distinguishes between "offense" and "crime", and defines crime only by reference to the possibility of imprisonment. The change is because of the creation of a new class of offense called an infraction which is, by definition, not a crime.

The Code continues the classification of crimes into felonies and misdemeanors and basically follows pre-Code §§556.020 and 556.040 which have been repealed. The only difference is that the Code definition is in terms of the length of the sentence rather than by the place of confinement.

1.5 Infractions (§556.021)

Code

1. An offense defined by this code or by any other statute of this state constitutes an "**infraction**" if it is so designated or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction.

2. An infraction does not constitute a crime and conviction of an infraction shall not give rise to any disability or legal disadvantage based on conviction of a crime.

Comments

This section creates a new category of offense. It is not a crime and a "conviction" does not carry with it any of the disabilities of a criminal conviction. Thus, for example, it could not be used as a means of impeachment under a showing of prior conviction. The category of infraction is designed for those laws

which use fines as a means of regulation. Such offenses have been called "public welfare laws" and often involve strict or absolute liability. While there is a legitimate function for these regulatory offenses, they are not "true crimes" in the sense of involving the moral condemnation which is implicit in the concept of "crime". This section provides a means for the legislature to explicitly distinguish between purely regulatory offenses and crimes. Since the Code deals with criminal offenses, one would not expect to find many (if any) infractions in the Code offenses. There are only two Code offenses classified as infractions, Trespass in the Second Degree, §569.150, and Failure to Give a Tax List, §576.060. Note, however, that the recently enacted bicycle regulations specifically provide that violations are infractions. See §307.193 RSMo 1977 Supp.

1.6 Offenses Must be Defined by Statute (§556.026)

Code

No conduct constitutes an offense unless made so by this code or by other applicable statute.

Comments

This section provides that all offenses must be based on a statutory provision. There can be no more common law crimes in the sense of an unwritten law. Pre-Code §556.110 which provided the punishment for "common law" crimes has been repealed. The common law, of course, may still be very important in determining the meaning of a given statute (as, for example, it is essential with second degree murder which is defined by statute only as "all other kinds of murder at common law") but there must be a specific statute declaring the offense.

1.7 Application to Offenses Committed Before and After Enactment (§556.031)

Code

1. The provisions of this code shall govern the construction and punishment for any offense defined in this code and committed after January 1, 1979, as well as the construction and application of any defense to a prosecution for such an offense.

2. Offenses defined outside of this code and not repealed shall remain in effect, but unless otherwise expressly provided or unless the context otherwise requires, the provisions of this code shall govern the construction of any such offenses committed after January 1, 1979, as well as the construction and application of any defense to a prosecution for such offenses.

3. The provisions of this code do not apply to or govern the construction of and punishment for any offense committed prior to January 1, 1979, or the construction and application of any defense to a prosecution for such an offense. Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted, the provisions of section 1.160 RSMo, notwithstanding.

Comments

This section deals with the application of Code provisions to Code offenses (those defined in the Code), pre-Code offenses (those committed prior to the effective date of the Code), and non-Code offenses (those committed after the effective date of the Code but which are defined by statutes outside of the Code).

The effective date of the Code is January 1, 1979. Paragraph 1 states the obvious, that the Code provisions are effective as of that date and not before. Thus the Code provisions are applicable to conduct occurring as of January 1, 1979, and which conduct constitutes an offense defined by the Code.

Paragraph 3 deals with pre-Code offenses, those based on conduct occurring prior to January 1, 1979. As to the pre-Code offenses, the statutes and law in force as of the time the offense is committed control whether or not the trial occurs before or after January 1, 1979. Thus, statutes which have been repealed

as of January 1, 1979 by the Code will be applicable to criminal prosecutions occurring after January 1, 1979 based on conduct occurring prior to January 1, 1979. Section 1.160 RSMo provides in general that when the penalty for an offense is reduced by any alteration of the law creating the offense, the reduced penalty provision controls even as to conduct occurring prior to the amendment. The Code specifically provides that this provision is not applicable to pre-Code offenses where the trial occurs after the Code goes into effect.

Paragraph 2 deals with the more complex problem of the applicability of the Code provisions to non-Code offenses, that is, offenses which are committed after the effective date of the Code but which are defined by statutes outside of the Code. One of the purposes of the Code was to make the criminal law consistent and thus some Code provisions will be applicable as to non-Code offenses. However, the Code does not affect the definition of the non-Code offenses, that is, the elements (the conduct and mental states) of the non-Code offenses are determined by the statute defining the non-Code offense. If the statute defining the non-Code offense sets out the specific range of punishment that may be imposed upon conviction, that penalty provision and not the Code provisions apply. No specific language of the statute defining the non-Code offense can be changed by a provision of the Code. See **State ex rel. McNary v. Stussie**, 518 S.W.2d 630 (Mo. banc 1974). However, the Code provisions which are not inconsistent with the wording of the non-Code offense will apply to the non-Code offense.

For example, the following Code provisions could be applicable to a non-Code offense.

a. If the non-Code offense does not specify the range of punishment that may be imposed upon conviction, but simply declares the offense to be a felony or a misdemeanor, then the offense is treated, if a felony, as a class D felony under the code, or, if a misdemeanor, as a class A misdemeanor under the code. See §557.021.1 and 2.

b. The Code provisions on justification, Chapter 563, apply to non-Code offenses.

c. The conditional release provisions apply to terms of imprisonment imposed for non-Code offenses. See §557.011.1.

d. The extended term provisions of the Code apply in prosecutions for non-Code offenses. See §557.021.3 for the classification of non-Code offenses to be used in applying the extended term provisions.

e. The definitions and penalties for attempts to commit non-Code offenses and conspiracies to commit non-Code offenses will be determined by the Code provisions of Chapter 564. Note, however, that if the non-Code offense is itself an attempt or a conspiracy or provides a specific penalty for an attempt or conspiracy, the language of the non-Code offense controls. But if there is no specific mention of attempt or conspiracy in the non-Code offense then an attempt or conspiracy to commit a non-Code offense is itself a Code offense. See §557.021.3 for the classification of non-Code offenses in determining the penalties for attempt and conspiracy.

f. In general, all the sentencing provisions which are not inconsistent with the terms of the statute defining the non-Code offense are applicable in a prosecution for a non-Code offense. For example, the Code provisions on the roles of judge and jury in sentencing (§557.036) and the use of detention as a condition of probation (§559.026) apply in prosecutions for non-Code offenses. In other words, while the specific penalty provisions of the non-Code offense control the penalty that can be imposed, the Code provisions on sentencing otherwise are applicable.

g. The general provisions of Chapter 562 also apply to non-Code offenses, unless inconsistent with the non-Code offense, keeping in mind that the elements of the non-Code offense (the conduct and the mental state) are determined by the statute defining the non-code offense. However, the Code provisions on mistake (§562.031), responsibility for the conduct of others (§§562.036, 562.041, 562.046, 562.051), liability of corporations and unincorporated associations (§§562.056, 562.061), entrapment (§562.066), duress (§562.071), and intoxicated or drugged condition (§§562.076) can apply to a non-Code offense.

h. The preliminary provisions of Chapter 556 dealing with time limitations (§556.036) and on convictions for multiple and included offenses (§§556.041 and 556.046) also can apply to non-Code offenses.

1.8 Time limitations (§556.036)

Code

1. A prosecution for murder or any class A felony may be commenced at any time.
2. Except as otherwise provided in this section, prosecutions for other offenses must be commenced within the following periods of limitations:
   (1) For any felony, three years;
   (2) For any misdemeanor, one year;
   (3) For any infraction, six months.
3. If the period prescribed in subsection 2 has expired, a prosecution may nevertheless be commenced for:
   (1) Any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation by more than three years; and
   (2) Any offense based upon misconduct in office by a public officer or employee at any time when the defendant is in the public office or employment or within two years thereafter, but in no case shall this provision extend the period of limitation by more than three years.
4. An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.
5. A prosecution is commenced either when an indictment is found or an information filed.
6. The period of limitation does not run:
   (1) During any time when the accused is absent from the state, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years; or
   (2) During any time when the accused is concealing himself from justice either within or without this state; or
   (3) During any time when a prosecution against the accused for the offense is pending in this state.

Comments

With some minor changes, this section maintains the same periods of limitation as pre-Code §§541.190, 541.200, 541.210, 541.220 and 541.230 which have been repealed. Pre-Code §541.190 provided there would be no limitation as to prosecutions for an "offense punishable with death or by imprisonment in the penitentiary during life." The Code follows this idea but applies it to "murder or Class A felony". Pre-Code §541.200 provided for a three year period for other felonies with a possible two year extension for "bribery or for corruption in office." Subsections 2(1) and 3(2) of this section are similar and in addition provide a possible extension in cases of fraud where the fraud is not discovered until some time after the offense. The one year period for misdemeanors is the same as in pre-Code law. Subsection 6 provides for the tolling of the period when the accused is not within the state, when he is concealing himself from justice or when a prosecution is pending. This is similar to pre-Code §§541.220 and 541.230 except that under the Code absence from the state cannot toll the statute for longer than three years, and the phrase "concealing from justice" is used rather than "flee from justice."

1.9 Limitation on Conviction for Multiple Offenses (§556.041)

Code

When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if
(1) One offense is included in the other, as defined in section 556.046; or
(2) Inconsistent findings of fact are required to establish the commission of the offenses; or
(3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(4) The offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Comments

This section states the general proposition that the state may prosecute and convict for several different offenses even though they arise out of the same conduct. The exceptions are those that are usually recognized as a limitation on this proposition, that one cannot be convicted of both an offense and an included offense; of two offenses which arise out of the same conduct but require inconsistent findings of fact; of both a general offense and a specific offense which falls within the conduct covered by the general offense; and, unless the legislature specifies otherwise, a continuing offense is only one offense and cannot be broken down into more than one.

Note that there may be specific provisions dealing with multiple convictions with regard to a particular offense. For example, note the limitation on multiple charging and conviction under the conspiracy statute. See §546.016.7.

Note also that this section is not intended to be a statement of the rules regarding double jeopardy and the constitutional protection against double jeopardy may prevent multiple convictions in situations other than those listed here. See **Ashe v. Swenson**, 397 U.S. 436, 90 S.Ct. 1189 (1970); **State v. Richardson,** 460 S.W.2d 537 (Mo. 1970).

1.10 Conviction of Included Offenses (§556.046)

Code

1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when
   (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
   (2) It is specifically denominated by statute as a lesser degree of the offense charged; or
   (3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.
2. The court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

Comments

This is similar in effect to pre-Code §§556.220 and 556.230 which have been repealed in allowing conviction of an included offense of the offense charged, a lesser degree of the offense charged, or an attempt to commit the offense charged.

Subsection 2 follows the general rule that instructions on an included offense are not required unless there is a basis for finding the accused innocent of the higher offense *and* guilty of the lesser included offense. Note that this is a joint requirement. There will in every case be a basis whereby the jury could acquit the defendant of the offense charged, that is, the jury does not have to believe the state's evidence, no matter how convincing it may appear. Thus, the question of when the included offense instruction is required is, in a sense, deciding whether if the jury were not to believe any part of the state's evidence, would there still be remaining in the case sufficient evidence to justify submission of the included offense, that is, sufficient evidence remaining to support a jury finding of guilt of the included offense. If so, then the included offense instruction should be given.

Although this section of the Code will apply to such non-Code offenses as murder (for conduct occurring after the effective date of the Code), this section should not affect the automatic submission rule with regard to the giving of an instruction on the lesser offense of manslaughter, as this rule is based on the definition of the crime of manslaughter and the application of Code provisions to non-Code offenses is controlled by the statute defining the non-Code offense.

1.11 Burden of Injecting the Issue (§556.051)

Code

When the phrase "*The defendant shall have the burden of injecting the issue*" is used in the code, it means

(1) The issue referred to is not submitted to the trier of fact unless supported by the evidence; and

(2) If the issue is submitted to the trier of fact any reasonable doubt on the issue requires a finding for the defendant on that issue.

Comments

This and the next section on affirmative defense deal with the procedural questions of when certain issues are "in the case" and which side has the "burden" of convincing the jury on the issues.

For almost all of the issues in a criminal prosecution, the state has the burden of introducing the evidence supporting the issue and the burden of convincing the jury beyond a reasonable doubt. In a few instances, however, one or both of these "burdens" are placed on the defendant. The Code uses the phrase "The defendant shall have the burden of injecting the issue" to indicate those issues where *only* the burden of producing evidence is put on the defendant, the burden of persuasion remaining on the state. The Code uses the phrase "affirmative defense" to indicate those issues where the defendant not only has the burden of producing evidence but also of convincing the jury. The term "burden" is somewhat misleading. It is more accurate to describe them as "risks". That is, when one party has the risk of the non-production of evidence, that party loses on that issue (it is not even in the case) unless some evidence supporting that issue is introduced. However, it does not matter which side actually produces the evidence or from whose witnesses it comes. The question is whether or not there is evidence supporting the issue in the case. If there is not, then the issue is not in the case and the party with that "risk" in effect loses on that issue.

For example, in an assault case, if there is no evidence of self-defense, then self-defense is not in the case and the jury is not instructed as to that possibility. The defendant has the burden of injecting that issue (or, more accurately, bears the risk of the non-production of evidence on that issue). If there is evidence supporting self-defense introduced, then self-defense is in the case and the jury will be given an instruction on that possibility. The burden of persuasion, however, is on the state, once self-defense is in issue, to convince the jury beyond a reasonable doubt that the assault was *not* committed in self-defense. Note it does not matter whether the evidence supporting self-defense comes from the state's witnesses or the defense witnesses. It is simply a question of whether there is evidence in the case supporting the possibility of self-defense. Self-defense (and almost every other type of justification) is, under the Code, an issue as to which the "defendant has the burden of injecting the issue."

By adopting this terminology of injecting the issue and defining it so that it puts the burden of producing evidence on the defendant but leaves the burden of persuasion on the state, the Code provisions defining various offenses and defenses can designate those issues which are not in the case until there is some evidence of them introduced.

Of course, when a statute lists the elements of an offense and does not specify that the defendant has the burden of injecting a particular issue or that the issue is an affirmative defense, then the state has the normal burdens of producing the evidence and convincing the jury beyond a reasonable doubt. The code uses the phrases of "burden of injecting the issue" and "affirmative defense" only to designate those particular issues as to which the normal burdens do not apply.

Also note that designating an issue as being one where the defendant has the burden of injection or as an affirmative defense also has a consequence with regard to pleading, in that the state is not required to plead the existence or non-existence of the issue in the information or indictment.

1.12 Affirmative Defense (§556.056)

Code

When the phrase "affirmative defense" is used in the code, it means

(1) The defense referred to is not submitted to the trier of fact unless supported by the evidence; and

(2) If the defense is submitted to the trier of fact the defendant has the burden of persuasion that the defense is more probably true than not.

Comments

See comments on preceeding section on burden of injecting the issue. When an issue (a defense) is denominated an affirmative defense, this means that such an issue is not in the case until there is evidence supporting it in the case. If there is no evidence on the issue it is not in the case and no instruction on the issue is given to the jury. To this extent there is no difference between an issue being an affirmative defense and one as to which the defendant has the burden of injecting the issue. However, once evidence on the issue has been introduced, then as to an affirmative defense the defendant has the burden of persuasion, unlike "the burden of injecting the issue" where the burden of persuasion is on the state.

With an affirmative defense, once it is in the issue, the defendant has the burden of persuasion. However, the standard for that burden is not beyond a reasonable doubt but only that the defendant convince the jury that the defense is more probably true than not.

There are very few affirmative defenses in criminal law. The Code includes only the following as affirmative defenses:

Abandonment of purpose- §562.041.2(3)

Duress-§562.071

Lack of responsibility because of mental disease or defect-§562.086. Note this merely continues the present law where this issue is an affirmative defense. See Chapter 552. RSMo.

General Justification-§563.026. Note that this is the doctrine of necessity as an emergency measure. All other types of justification are *not* affirmative defenses, but the defendant does have the burden of injecting the issue.

Mistake as to age in certain sex offenses-§566.020.3.

It should be noted that placing either the burden of injecting the issue on the defendant or making something an affirmative defense is the exceptional situation, and there are constitutional limitations on placing these burdens on the defendant, particularly in the case of affirmative defenses. See **In re Winship,** 397 U.S. 358, 90 S.Ct. 1068 (1970); **Mullaney v. Wilbur,** 421 U.S. 684, 95 S.Ct 1881 (1975); **State v. Commenos,** 461 S.W.2d 9 (Mo. 1970); but see **Patterson v. New York,** 432 U.S. 197, 97 S.Ct. 2319 (1977).

1.13 Code Definitions (§556.061)

In this code, unless the context requires a different definition, the following shall apply:

Comments

The definitions in this section apply throughout the code. In addition, there are often chapter definitions at the beginning of particular chapters.

(1) "**Affirmative defense**" has the meaning specified in section 556.056.

(2) "**Burden of injecting the issue**" has the meaning specified in section 556.051.

Comments

See comments to §§556.056 and 556.051, supra.

(3) **"Confinement"**, a person is in confinement when he is held in a place of confinement pursuant to arrest or order of a court, and remains in confinement until

(a) A court orders his release; or

(b) He is released on bail, bond, or recognizance, personal or otherwise; or

(c) A public servant having the legal power and duty to confine him authorizes his release without guard and without condition that he return to confinement;

(d) A person is not in confinement if

a. He is on probation or parole, temporary or otherwise; or

b. He is under sentence to serve a term of confinement which is not continuous, or is serving a sentence under a work-release program, and in either such case is not being held in a place of confinement or is not being held under guard by a person having the legal power and duty to transport him to or from a place of confinement.

Comments

This definition of confinement and the definitions of "custody" (6), and "place of confinement" (20) are particularly applicable to Chapters 575 and the offenses relating to escape (see §§575.200, 575.210 and 575.220) and to Chapter 563, Justification (see §§563.046 and 563.056).

Note that subsection (3) (d) stating when a person is not in confinement should be read as a separate paragraph and not as a part of the first sentence.

(4) **"Consent"**, consent or lack of consent may be expressed or implied. Assent does not constitute consent if

(a) It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifest or known to the actor; or

(b) It is given by a person who by reason of youth, mental disease or defect, or intoxication, is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) It is induced by force, duress or deception.

Comments

This definition attempts to state the usual meaning of the term consent as to certain situations which do not constitute consent. The definition is applicable to the sexual offenses in Chapter 566. Note that the code also contains specific sections on consent in relation to crimes involving physical injury, see §565.080 on consent as a defense to assault crimes, and in relation to crimes involving restraint, see §565.100 on lack of consent in kidnapping and related crimes.

(5) **"Criminal negligence"** has the meaning specified in section 562.016.

Comments

See comments to §562.016. This is one of the terms used to cover the culpable mental states. See Purposely (22), Knowingly (15) and Recklessly (23).

(6) **"Custody"**, a person is in custody when he has been arrested by has not been delivered to a place of confinement.

Comments

See comments on "confinement" (3). Note that "custody" as used in §565.150, Interference with Custody, is obviously used in a different context and clearly has a different meaning.

(7) **"Dangerous instrument"** means any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.

Comments

This definition and that of "deadly weapon" (9) are based on New York Penal Law §10.00 (12) and (13). They are used in the Code with reference to several crimes, including the assault offenses, burglary and robbery. The distinction between the two is not significant in crimes against the person but is in robbery and burglary. Note that practically anything can be a dangerous instrument since it is defined according to its being used in a manner capable of causing death or serious physical injury. Conversely, nothing is inherently a dangerous instrument since whether it falls within this definition turns on "the circumstances in which it is used."

(8) "**Dangerous felony**" means the felonies of murder, forcible rape, assault, burglary, robbery, kidnapping or the attempt to commit any of these felonies.

Comments

The term dangerous felony is significant in the application of the extended term provisions to "dangerous offenders" under §558.016.3. One part of the definition of dangerous offender is a person who has a prior conviction for a class A or B felony or a dangerous felony.

(9) "**Deadly weapon**" means any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of producing death or serious physical injury may be discharged, or a switchblade knife, dagger, billy, blackjack or metal knuckles.

Comments

See comments on dangerous instrument (7). Note also terms used in §564.610 RSMo 1969 dealing with concealed weapons,which is not repealed.

(10) "**Felony**" has the meaning specified in section 556.016.

Comments

See comments on §556.016.

(11) "**Forcible compulsion**" means either

(a) Physical force that overcomes reasonable resistance, or

(b) A threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of himself or another person.

(12) "**Incapacitated**" means that physical or mental condition, temporary or permanent, in which a person is unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act. A person is not "incapacitated" with respect to an act committed upon him if he became unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act, after consenting to the act.

Comments

"Forcible compulsion" and "Incapacitated" are related to the concept of consent and are particularly involved in the sexual offense of Chapter 566. The terms are also used in §565.100 dealing with lack of consent in kidnapping and related offenses.

(13) "**Inhabitable structure**" has the meaning specified in section 569.010.

Comments

See comments to §569.010 (2) and (4). The term is used in relation to the crimes of arson and burglary and related offenses.

(14) "**Infraction**" has the meaning specified in section 556.021.

Comments:

See comments to §556.021.

(15) "**Knowingly**" has the meaning specified in section 562.016.

Comments

This, along with Purposely, Recklessly and Criminal Negligence are terms used for the culpable mental states. See comments to §562.016.

(16) "**Law enforcement officer**" means any public servant having both the power and duty to make arrests for violations of the laws of this state.

Comments

This is a general term designed to cover the wide variety of terms used in pre-Code and non-Code statutes. Cf. Ill. Rev. Stat. Ch. 38 §2-13.

(17) "**Misdemeanor**" has the meaning specified in section 556.016.

Comments

See comments to §556.016.

(18) "**Offense**" means any felony, misdemeanor or infraction

Comments

See comments to §§556.016 and 556.021. Offense includes felony, misdemeanor and infraction. Note that "crime" includes only felony and misdemeanor.

(19) "**Physical injury**" means physical pain, illness, or any impairment of physical condition.

Comments

The definitions of physical injury and serious physical injury (24) need to be read together. Cf. §210.0 Model Penal Code (P.O.D. 1962). Note that serious physical injury is aggravated physical injury so that a crime requiring "physical injury" as an element is satisfied by either physical injury or serious physical injury.

(20) "**Place of confinement**" means any building or facility and the grounds thereof wherein a court is legally authorized to order that a person charged with or convicted of a crime be held.

Comments

See comments to "confinement" (3).

(21) "**Public servant**" means any person employed in any way by a government of this state who is compensated by the government by reason of his employment. It includes, but is not limited to, legislators, jurors, members of the judiciary and law enforcement officers. It does not include witnesses.

Comments

This is a general term covering a wide variety of government employees. The term is used particularly in defining offenses against the administration of justice and affecting government. See Chapters 575 and 576.

(22) "**Purposely**" has the meaning specified in section 562.016.

(23) "**Recklessly**" has the meaning specified in section 562.016.

Comments

Purposely and reckless, along with knowingly and criminal negligence are terms used for the culpable mental states. See comments to §562.016.

(24) "**Serious physical injury**" means physical injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

Comments

See comments on physical injury (19). In addition note that the definition of serious physical injury makes it unnecessary to have a separate crime of mayhem.

(25) **"Voluntary act"** has the meaning specified in section 562.011.

Comments

See comments to §562.011.

CHAPTER 2

General Sentencing Provisions (§557.011-557.036)

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2.1 Introduction

The Code puts all provisions dealing with disposition of persons convicted of crimes in five chapters. Chapter 557 deals with the general provisions and sets out the authorized dispositions that are available as well as general provisions regarding sentencing. It is followed by chapters dealing with specific aspects of sentencing: Imprisonment in Chapter 558, Probation in Chapter 559, and Fines in Chapter 560. Chapter 561 deals with collateral consequences of conviction. Except where inconsistent with the language of the statute dealing with non-Code offenses, the sentencing provisions of the Code apply to non-Code offenses as well as to Code offenses.

2.2 Authorized dispositions (§557.011)

Code

1. Every person found guilty of an offense shall be dealt with by the court in accordance with the provisions of this chapter, except that for offenses defined outside this code and not repealed, the term of imprisonment or the fine that may be imposed is that provided in the statute defining the offense; however, the conditional release term of any sentence of a term of years shall be determined as provided in subsection 4 of section 558.011.

2. Whenever any person has been found guilty of a felony or a misdemeanor the court shall make one or more of the following dispositions of the offender in any appropriate combination. The court may:

(1) Sentence the person to a term of imprisonment as authorized by chapter 558, RSMo.;
(2) Sentence the person to pay a fine as authorized by chapter 560, RSMo.;
(3) Suspend the imposition of sentence, with or without placing the person on probation;
(4) Pronounce sentence and suspend its execution, placing the person on probation;
(5) Impose a period of detention as a condition of probation, as authorized by section 559.026 RSMo.;

3. Whenever any person has been found guilty of an infraction, the court shall make one or more of the following dispositions of the offender in any appropriate combination. The court may:

(1) Sentence the person to pay a fine as authorized by chapter 560, RSMo.;
(2) Suspend the imposition of sentence, with or without placing the person on probation;
(3) Pronounce sentence and suspend its execution, placing the person on probation.

4. Whenever any organization has been found guilty of an offense, the court shall make one or more of the following dispositions of the organization in any appropriate combination. The court may:

(1) Sentence the organization to pay a fine as authorized by chapter 560, RSMo.;

(2) Suspend the imposition of sentence, with or without placing the organization on probation;

(3) Pronounce sentence and suspend its execution, placing the organization on probation;

(4) Impose any special sentence or sanction authorized by law.

5. This chapter shall not be construed to deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. An appropriate order exercising such authority may be included as part of any sentence.

Comments

1. A person found guilty of an offense committed after the effective date of the Code will be dealt with as follows:

a. **If the offense is defined in the Code** he will be dealt with in accordance with the provisions of the Code.

b. **If the offense is defined outside the Code,** that is a non-Code offense, he will still be dealt with in accordance with provisions of the Code *except* that the term of imprisonment or the fine that may be imposed is that specified in the statute defining the offense and if there is any language in the statute defining the non-Code offense which is inconsistent with the provisions of the Code then the language of the non-Code offense governs.

In particular, note that the following Code provisions will apply as to the disposition of persons convicted of non-Code offenses:

(1) The conditional release provisions of the Code will apply to all sentences for a term of years. See §558.011.

(2) If the statute defining the offense does not specify a penalty for the offense, the Code classifies the offense and thus the range of punishment is set by the Code provisions. See §557.021(1) & (2).

(3) A person convicted of a non-Code offense may still be a candidate for an extended term under the provisions of the Code. See §558.016 and see §557.021 for the method of classifying the non-Code offense.

(4) The penalty for attempting to commit a non-Code offense or conspiracy to commit a non-Code offense will be determined by the Code provisions. See §557.021 for the method of classifying the attempt or conspiracy to commit a non-Code offense. Note that if the non-Code offense specifically provides a penalty for attempting to or conspiracy to commit it, then the express provision of the non-Code statute will control.

(5) Special range of punishment rules apply with respect to fines for corporations for non-Code offenses. See §560.021.

2. Subsection 2 lists the authorized dispositions available to the court and provides the court with considerable flexibility in structuring an appropriate disposition after a finding of guilt in any felony or misdemeanor case. Note that §557.036 gives the jury the power to declare the maximum term of imprisonment. However, in most cases the court will be the only sentencing authority, because a jury will not be involved when the defendant pleads guilty or "requests in writing that the court assess the punishment" (see §557.036(2)). Even when the jury makes an initial sentencing assessment, the court must still "decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly." See §557.036(1).

Thus, the court makes the ultimate decision as to the extent or duration of sentence, even after a jury assessment of an appropriate maximum term of imprisonment. This is a change from the pre-Code language of §546.430 (which is repealed) where the court had the "power, in all cases of conviction, to reduce the extent or duration of punishment assessed by a jury if . . . the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted."

The code provisions require the court to structure an appropriate disposition in each case whether or not the jury is involved in sentencing.

The sentencing court must make one or more of the following dispositions of a convicted offender in any appropriate combination.

a. The court may **sentence the person to a period of imprisonment** as authorized by the classification of the offense and subject to the maximum term set by the jury. See Chapter 558.

b. The court may **sentence the person to pay a fine** as authorized by the classification of the offense and as subject to the provisions of Chapter 560. Note that Chapter 560

(1) imposes limits on the size of fines
(2) distinguishes between fines imposed on persons and on corporations
(3) indicates certain conditions that must be met
  (a) if the court wishes to impose a fine alone on a person when there is another authorized disposition. See §560.026(2).
  (b) if the court wishes to impose a fine in addition to any other sentence. See §560.026(3).
(4) prohibits fines in amounts which will prevent the offender from making restitution or reparation to the victim of the offense. See §560.026(1).
(5) indicates alternative modes of payment which the court may authorize. See §560.026(4).
(6) points out that the court may *not*, when imposing a fine, impose an alternative sentence to be served in the event of nonpayment.
(7) allows for fines to be based on the "gain" the offender made from the offense. See §560.011.

c. The court may **suspend imposition of sentence** in all cases, including those where the jury verdict has declared a maximum term of imprisonment. The court is given the discretion to place the defendant on probation in addition to suspending imposition of sentence.

This alternative of suspended imposition of sentence was available under pre-Code law, and is well established and often been used especially with youthful offenders with no prior record. The effect of the suspended imposition of sentence is that there has been no judgment and for the record, no conviction. The purpose of this disposition is primarily rehabilitative and to this end the court is given discretion to impose or not to impose probation, considering the "nature and circumstances of the offense" and "the history and character of the defendant" §559.012.

Note that even with a suspended imposition of sentence, if the defendant is placed on probation, a period of "shock detention" can be used as a condition of that probation.

d. The court may **pronounce sentence and suspend its execution placing the person on probation.** This disposition differs from the suspended imposition of sentence in that under this alternative the defendant has a record of a conviction. Note also that under this alternative the defendant must be placed on probation.

See Chapter 559 for specific provisions dealing with probation.

If probation after a suspended execution of sentence is revoked and the suspended sentence brought into operation, it does not appear in principle that a hearing *as to the sentence* will have to be held. However, in certain situations it may be desirable to have a further hearing on possible sentence reduction as a result in changes in the defendant's circumstances, particularly if the sentence included a fine.

Note that if a court sentences a defendant to pay a fine and to a term of imprisonment, but suspends execution only of the term of imprisonment and places the defendant on probation, it may not be a condition of probation that in the event of non-payment of the fine, the defendant will have to serve the term of imprisonment. See §560.026(5).

Note also that the court may *not* suspend execution of only a *part* of a term of imprisonment. Of course, the court may impose a period of "shock detention" as a condition of probation.

3. The court may impose a period of detention as a condition of probation. This provides authority for the use of "shock detention" as a condition of probation. **State ex rel St. Louis County v. Stussie,** 556 S.W.2d 186 (Mo. banc 1977) prohibited such a disposition under pre-Code law because there was no statutory authorization for such a disposition. The opinion noted that this section of the Code would authorize this disposition.

Section 559.026 sets out the conditions under which such a period of detention may be used. Note it is not available in infraction cases, and the maximum period of such detention is limited to 15 days in misdemeanor cases and 60 days in felony cases.

Note also that the detention time need not be consecutive but may be divided into a number of periods and distributed over the period of probation. Thus such detention could be weekends, or overnight so that the offender can continue to work.

Special Notes

"Person"

Subsection 2 applies only to natural persons. See subsection 4 for alternative dispositions as to organizations.

"Felony or misdemeanor"

These terms are defined elsewhere (see §556.016) and are defined according to the length of imprisonment terms that may be imposed upon conviction. According to this subsection, all persons convicted of a felony or misdemeanor must be dealt with as this section provides. However, there is no provision in the section for the death penalty which is a permissible penalty for capital murder. Capital murder is a non-Code offense and thus, its provisions with regard to penalty will control when inconsistent with the provisions of this section.

"One or more . . . dispositions . . . in any appropriate combination."

Whether or not more than one disposition is appropriate and whether or not the combination is appropriate should be determined by the court, having regard to at least three sets of factors:

(1) The nature of the disposition itself. E.g. suspending the imposition of sentence is obviously incompatible with some other disposition.

(2) The other provisions of the Code. Specific provisions of the Code may indicate in what circumstances a particular disposition would be appropriate. In particular note the provisions in Chapter 560 on fines indicating when a fine alone is appropriate and when a fine should be imposed in addition to another sentence. Also see §559.012 as to when a person should be placed on probation.

(3) Such factors as courts have traditionally considered in determining the appropriateness of combinations of dispositions, insofar as these are not inconsistent with the provisions of the Code.

"Suspend the imposition of sentence, . . . probation

Note that probation under this provision is not a sentence. In the event of a probation revocation, the revocation procedures of §559.036 apply, and upon revocation the court may "impose any sentence available under §557.011" (§559.036(3)).

"Pronounce sentence . . . suspend its execution, . . . probation"

Under this alternative, the court suspending execution of the sentence must place the offender on probation. If probation here is revoked the sentence previously imposed is then executed, §559.036(3).

"Impose a period of detention . . . condition of probation"

This disposition is not independent but must be used in conjunction with subsection 2(3) or 2(4). This disposition is not a "sentence" even though detention is involved. It is a "*condition of probation*". Note that pre-Code §549.058, which is not repealed, defines probation as including release "without imprisonment". To the extent that this is arguably inconsistent with the Code provision providing for detention as a condition of probation, the Code provision controls. Note that other sections in Chapter 549 dealing with probation were not repealed. For the most part these are consistent with the Code and are not needed as regards

their provisions dealing with probation. However, they are needed with regard to their provisions dealing with parole.
Note that the provisions here dealing with detention as a condition of probation do not apply to confinement for purposes of physical or mental treatment, and do not prevent condition of probation involving the obtaining, for example, of psychiatric treatment which could involve confinement in an institution.

3. Subsection 3 sets out the dispositions available after conviction of an infraction. The alternatives are limited to:

a. a sentence to pay a fine
b. a suspended imposition of sentence with or without placing the person on probation
c. a suspended execution of sentence placing the person on probation.

A person convicted of an infraction is not subject to any sentence other than a fine, or a fine and forfeiture or other civil penalty. No jail or prison term may be imposed for an infraction, nor may the court impose any period of detention as a condition of probation.

Special Notes

"Person" — Subsection 3 applies only to natural persons. See Subsection 4 as to organizations.

"One or more of the following dispositions . . .in any appropriate combination" — Note that there are no appropriate combinations of the alternative disposition for infractions. Each is inconsistent with the others, and thus only one could be selected. Note, however, that the use of probation is available with two of the alternatives and this provides some flexibility.

"Infraction" — Note that the definition of "infraction" in §556.021 allows only for a sentence of a fine, "or fine or forfeiture or other civil penalty". The Code provisions provide only for fines upon conviction of infractions. Authority for imposing forfeitures or other civil penalty must be based on other statutory provisions.

4. Subsection 4 sets out the alternative dispositions after an organization (which will usually be a corporation) has been found guilty of an offense. In this situation the court may:

a. sentence the organization to pay a fine
b. suspend the imposition of sentence with or without placing the organization on probation
c. pronounce sentence and suspend its execution, placing the organization on probation
d. impose any special sentence or sanction authorized by law.

In the nature of things, a jail or prison term or a detention period as a condition of probation are not sentencing possibilities for organizations, and thus the alternatives available are limited.

Special Notes

"Organization" — This term is not defined in the Code. See however §562.056 on liability of corporations and unincorporated associations. Note that the possibility of finding criminal liability for an unincorporated association is dependent upon the language of the specific statute defining the offense which must either place a duty on the association or clearly indicate a legislative intent to impose criminal liability on the association. Criminal liability for corporations under §562.056 is broader.

5. This subsection preserves the court's power to impose "special" penalties primarily civil in nature when such are permitted by law, notwithstanding that such penalties are not authorized dispositions

under §557.011. Note for example the provisions dealing with forfeiture of public office upon conviction of certain offenses under §561.021.

2.3 Classification of Offenses (§557.016)

Code

1. Felonies are classified for the purpose of sentencing into the following four categories:
   (1) Class A felonies;
   (2) Class B felonies;
   (3) Class C felonies; and
   (4) Class D felonies.
2. Misdemeanors are classified for the purpose of sentencing into the following three categories:
   (1) Class A misdemeanors;
   (2) Class B misdemeanors; and
   (3) Class C misdemeanors.
3. Infractions are not further classified.

Comments

One of the major objectives of the Code was to simplify Missouri sentencing laws by eliminating the 280 different types of penalties previously authorized. Following the approach of the Model Penal Code, for purposes of sentencing the new Code classifies felonies into four categories - classes A, B, C, and D, and misdemeanors into three categories - classes A, B, and C. Infractions are not further classified.

The Model Penal Code contains three felony categories. The class D felony category was added to take account of the fact that existing Missouri felony penalties tended to fall readily into four categories. Similarly, misdemeanors were divided into three categories, as against the two categories recommended by the Model Penal Code.

For a discussion of the need for this system of classification of crimes, see Anderson, "Sentencing Under the Proposed Missouri Criminal Code—The Need for Reform," 38 Mo. L. Rev. 549, 553-54, 558-59 (1973).

A variety of offenses which are punishable by a fine, or a fine and forfeiture or other civil penalty are now grouped together under the Code in the category of infractions. The infraction is a noncriminal offense and does not give rise to any disability or legal disadvantage associated with conviction of a crime. [§556.021 RSMo.] Conviction of an infraction only results in imposition of a *civil* sentence (usually a fine) or other disposition specifically authorized for infractions. See §557.011(3). Thus, a person convicted of an infraction is not subject to any of the legal disqualifications or disabilities flowing from conviction of a crime.

2.4 Classification of Offenses Outside this Code (§557.021)

Code

1. Any offense defined outside this code which is declared to be a misdemeanor without specification of the penalty therefor is a class A misdemeanor.
2. Any offense defined outside this code which is declared to be a felony without specification of the penalty therefor is a class D felony.
3. For the purpose of applying the extended term provisions of section 558.016, RSMo., and for determining the penalty for attempts and conspiracies, offenses defined outside of this code shall be classified as follows:
   (1) If the offense is a felony
      (a) It is a class A felony if the authorized penalty includes death, life imprisonment or imprisonment for a term of twenty years or more;
      (b) It is a class B felony if the maximum term of imprisonment authorized exceeds ten years but is less than twenty years;
      (c) It is a class C felony if the maximum term of imprisonment authorized is ten years;
      (d) It is a class D felony if the maximum term of imprisonment is less than ten years;

(2) If the offense is a misdemeanor
(a) It is a class A misdemeanor if the authorized imprisonment exceeds six months in jail;
(b) It is a class B misdemeanor if the authorized imprisonment exceeds thirty days but is not more than six months;
(c) It is a class C misdemeanor if the authorized imprisonment is thirty days or less;
(d) It is an infraction if there is no authorized imprisonment.

Comments

1. Code offenses are classified according to the categories of §557.016. It is anticipated that any new offenses created by the legislature will be classified according to these categories. However, the offenses outside of the code which were not repealed—the non-Code offenses—are not so classified. But, as discussed in ¶2.1, many of the sentencing provisions of the Code apply to non-Code offenses, and this section deals with the classification of the non-Code offenses when such classification is needed in order for the Code provisions to apply.

2. When a non-Code offense contains its own penalty provision, that provision and not the Code provision determines the possible penalties that may be imposed. However, if the non-Code statute does not specify the penalty, then under this section, if the offense is declared to be a felony (by the non-Code statute) it is a class D felony and the Code provisions applicable to class D felonies apply. If the offense is declared to be a misdemeanor but no penalty is specified in the non-Code statute, then the offense is a class A misdemeanor and the Code provisions applicable to class A misdemeanors apply. *Cf.* pre-Code §§546.500 and 556.270 which are repealed).

3. Attempting to commit a non-Code offense and conspiracy to commit a non-Code offense are Code offenses as the Code contains a general attempt provision and a general conspiracy provision (see Chapter 564) applicable to all offenses. For the purpose of determining the sentence for such attempts and conspiracies to commit non-Code offenses, it is necessary to classify the non-Code offenses using the Code categories.

Similarly the operation of the extended term provisions depends on the classification of the offense for which the defendant is being prosecuted for and in some instances the classification of the offenses for which the defendant was previously convicted. See §558.016. The extended term provisions apply to convictions for non-Code offenses and thus it is necessary to classify them using the Code categories.

The following table indicates the classification of non-Code offenses for the purpose of determining the penalty for attempts and conspiracies and for the application of the extended term provisions.

TABLE I

Sentence Authorized Outside the Code	Classification Assigned
Felonies:	
(i) Death, life imprisonment, 20 years or more	(i) Class A felony
(ii) Maximum term of imprisonment exceeds 10 years, less than 20	(ii) Class B felony
(iii) Maximum term of imprisonment is 10 years	(iii) Class C felony
(iv) Maximum term of imprisonment is less than 10 years	(iv) Class D felony
Misdemeanors and Infractions:	
(i) Maximum jail term exceeds 6 months	(i) Class A misdemeanor
(ii) Maximum jail term exceeds 30 days, not more than 6 months	(ii) Class B misdemeanor
(iii) Maximum jail term is 30 days or less	(iii) Class C misdemeanor
(iv) No authorized imprisonment	(iv) Infraction

Note that these classifications of non-Code offenses apply only when there is question of *extended terms*, or of an *attempt* or *conspiracy* to commit a non-Code offense. In all other cases the range of punishment is governed by the penalty provisions contained in the non-Code statute defining the offense.

2.5 Presentence Investigation and Report (§557.026)

Code

1. When a probation officer is available to any court, such probation officer shall, unless waived by the defendant, make a presentence investigation in all felony cases and report to the court before any authorized disposition under section 557.011. In all other cases before the court a probation officer shall, if directed by the court, make a presentence investigation and report to the court before any authorized disposition under section 557.011. The report shall not be submitted to the court or its contents disclosed to anyone until the defendant has pleaded guilty or been found guilty.

2. The presentence investigation report shall be prepared, presented and utilized as provided by rule of court except that no court shall prevent the defendant or the attorney for the defendant from having access to the complete presentence investigation report and recommendations before any authorized disposition under section 557.011.

3. The defendant shall not be obligated to make any statement to a probation officer in connection with any presentence investigation hereunder.

Comments

1. This section requires a presentence investigation and report in **all felony cases** before the court can make an authorized disposition unless:

a. a probation officer is not available to the court, or

b. the defendant waives the requirement of a presentence investigation and report.

In all other cases the court may require a probation officer to make a presentence investigation and report.

This extends the pre-Code provisions under which an investigation and report was mandatory in felony cases unless the court directed otherwise. The option is no longer with the court and under this section there must be an investigation and report in all felony cases unless the defendant waives the requirement. Note, however, that the defendant, by waiving the investigation and report, cannot preclude the court from ordering the report on its own. The court has discretion to order an investigation and report in any case.

This section retains the pre-Code provision against disclosure of the report to the court or to anyone until the defendant has pleaded guilty or been found guilty.

Subsection 2 makes it clear that the entire presentence report, including its recommendations, must be made available to the defendant or the defendant's attorney before the court makes any authorized disposition.

Subsection 3 provides that the defendant is not obligated to make any statement to a probation officer in connection with any presentence investigation. This does not prevent a defendant from providing information and cooperating in the investigation but simply provides that if the defendant decides not to make any statement, he should suffer no penalty or adverse consequences from not making statements as he is under no obligation to make any statements.

Special Notes

"Probation officer . . . available"	Probation officers are "available" when assigned to a particular court under §§549.245 or 549.371.
"In all other cases"	This refers primarily to misdemeanor cases and infraction cases. It also includes cases in which no probation officer is available (assigned) to the court. Note in all such cases, the court may still order a probation officer to make a presentence investigation and report. In such cases the probation officer can be made "available" under §§549.245 or 549.371.
"rule of court"	This covers both rules of the Supreme Court and local court rules.

2.6 Presentence Commitment for Study (§557.031)

Code

1. In felony cases where the circumstances surrounding the commission of the crime or other circumstances brought to the attention of the court indicate a strong likelihood that the defendant is suffering from a mental disease or disorder, and the court desires more detailed information about the defendant's mental condition before making an authorized disposition under section 557.011, it may order the commitment of the defendant for mental examination.

2. The court may commit the defendant to a facility of the department of mental health or to a hospital and order the defendant examined by such person or persons as the court or that department or hospital may designate. The cost of guarding and transporting any confined defendant to and from any such facility or other place of examination shall be borne by the county. Any commitment shall be for a period not exceeding thirty days unless extended by the order of the court.

3. Within forty days after the order the person or persons making such examination or examinations shall transmit to the court a report thereof including answers to any specific questions submitted by the court. The clerk of the court shall immediately supply copies of the report to the prosecuting attorney and to the defendant or his attorney.

4. Any period of commitment to a facility of the department of mental health or to a hospital for the purpose of this section shall be credited against any term of imprisonment imposed upon the defendants.

Comments

1. Subsection 1 provides a means for a court to acquire information regarding a convicted defendant's mental condition as an aid to the court in determining the appropriate disposition in sentencing. Note this examination is not to determine competency to stand trial, nor lack of responsibility because of mental disease or defect. Those matters are governed by Chapter 552, and mental examinations for those purposes will occur before trial.

Under this section a court may order a presentence commitment for mental examination provided the following conditions are met:

(a) it is a felony case;
(b) the circumstances, either those surrounding the commission of the crime or brought to the attention of the court, indicate a strong likelihood that the defendant is suffering from a mental disease or disorder; *and*
(c) the court desires more detailed information about the defendant's mental condition before making an authorized disposition.

The aim of this section is to provide the court with more information relevant to the sentencing decision so that the appropriate disposition can be made in the particular case before the court.

Special Notes

"brought to the attention of the court"	This does not require any action by a third party. The "circumstances" leading to such commitment may be brought to the court's attention by the evidence in the case or by the defendant's behavior in court. Of course, either party may bring the circumstances to the attention of the court.
"strong likelihood"	This indicates that such commitments for mental examination should not be made as a matter of course but only when there is good reason to believe the defendant is suffering from a mental disease or disorder.
"mental disease or disorder"	Note this language differs from that found in §552.010 which uses the terms "mental disease or defect". Mental disease or disorder includes any abnormal condition of the mind and is not intended to be restrictive to certain types of diseases or disorders.

2. Subsection 2 defines the options available to the court. The court may
   (a) commit the defendant to a facility of the department of mental health, or
   (b) commit the defendant to a hospital selected by the court.

In addition, the court may
   (c) designate the person or persons who shall conduct the examination; or
   (d) permit the department of mental health or the hospital to designate the examiner(s).

This section also provides that the county bears the cost of guarding and transporting any confined defendant.

The initial period of confinement may not exceed 30 days, although the court may grant extensions of time.

Subsection 3 requires the report of the results of the examination be submitted to the court within 40 days after the order. Note that the court may submit specific questions to the examiner(s) who must answer them in the report. Note also that copies of the report are to be supplied to both the prosecuting attorney and the defense counsel.

Subsection 4 provides that any period of commitment must be credited against any term of imprisonment imposed on the defendant. See §558.031 for rules regarding time to be credited against a term of imprisonment.

Special Notes

"confined defendant"	A defendant who is not free on bond or other type of release after a finding of guilt. A defendant who is not a confined defendant would have to bear the cost of transportation. Presumably there would be no cost of guarding a person who is on some form of release.
"forty days after the order"	The report is to be made within this period. If the court grants an order extending the original commitment period of thirty days, the report would be due within forty days of the order extending the period.

2.7 Role of court and jury in sentencing (§557.036)

Code

1. Subject to the limitations provided in subsection 3 upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.

2. The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless the defendant requests in writing that the court assess the punishment in case of a finding of guilt. If the jury finds the defendant guilty but cannot agree on the punishment to be assessed, the court shall proceed as provided in subsection 1 of this section. If there be a trial by jury and the jury is to assess punishment and if after due deliberation by the jury the court finds the jury cannot agree on punishment then the court may instruct the jury that if it cannot agree on punishment that it may return its verdict without assessing punishment and the court will assess punishment.

3. If the jury returns a verdict of guilty and declares a term of imprisonment as provided in subsection 2 of this section, the court shall proceed as provided in subsection 1 of this section except that any term of imprisonment imposed cannot exceed the term declared by the jury unless:

   (1) The term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term of imprisonment greater than the lowest term provided for the offense; or

   (2) The defendant is found to be a persistent or dangerous offender as provided in section 558.016, RSMo., in which case:

      (a) If he has been found guilty of a class B, C, or D felony, the court shall proceed as provided in section 558.016, RSMo.; or

      (b) If he has been found guilty of a class A felony, the court may impose any sentence authorized for a class A felony.

Comments

This section maintains the Missouri practice of jury sentencing but with some modifications. The major modifications are:

A. The section makes it clear that the ultimate decision as to the sentence is to be made by the trial judge. The jury has a definite role but this is to declare the maximum term of imprisonment that may be imposed. Subject to some specific limitations, the court may not impose a longer term of imprisonment. However, it is up to the court to decide what disposition is appropriate in the given case and the court must consider all the dispositions available in deciding the proper sentence.

B. The option of whether the jury has any role in the sentencing process is with the defendant. If he wishes, no issue of the punishment will be submitted to the jury.

C. The court may not give an instruction to the jury on what happens if the jury cannot agree on the punishment when the jury is first sent out. Such an instruction, if given at all, can be given only "if after due deliberation by the jury the court finds the jury cannot agree on punishment." This effectively changes the result of **State v. Brown,** 443 SW2d 805 (Mo. Banc 1969).

D. No determination of whether the defendant can be subjected to an "extended term" is made until after the jury returns a verdict of guilt.

1. Subsection 1 makes it clear that subject to certain limitations the court decides what the sentence shall be, and makes the determination taking into account all the circumstances.

In most instances, the court will be the sole authority in determining the sentence. No jury will be involved in the sentencing decision of a guilty defendant:

(a) when the defendant pleads guilty.

(b) when the defendant is tried without a jury.

(c) when the defendant is tried by a jury but requests in writing that the court assess the punishment.

The only instance in which the jury will be involved is when there is a trial by jury and no request for court assessment of the punishment is made by the defendant.

In such cases where the court is the sole authority involved in sentencing the court will select the appropriate disposition or dispositions as are available for the particular offense. If there is a possibility of an extended term being imposed, the decision will not be made until after the hearing on the extended term.

2. When there is a jury and the defendant has not requested court assessment of the punishment, then the court must submit the issue of the term of imprisonment to the jury using the MAI-CR approved form of submitting the issue.

3. If the jury with their verdict of guilt include a finding as to the term of imprisonment, the court still must decide what disposition is appropriate in the particular case. However, in such a situation, the court if it decides to impose a term of imprisonment cannot impose a term which is longer than was included in the jury's verdict. The jury's determination of the term of imprisonment thus restricts the court in assessing the term of imprisonment (with two exceptions discussed below). However, the court may impose any other authorized disposition that is available for the offense, including fines, suspended imposition of sentence, suspended execution of sentence and probation.

The two exceptions to the court being limited by the term of imprisonment set by the jury are

(a) if the term declared by the jury is less than the lowest authorized term for the offense. In such an instance, if the court decides to impose a term of imprisonment it can only impose the lowest term provided. For example, if the jury were to return a verdict of guilty of a class B felony (which carries an authorized range of imprisonment of from 5 to 15 years) but declared a term of only three years (which is lower than the lowest authorized term) then the court, if it decided to impose a term of imprisonment, could only impose a term of 5 years (the lowest term authorized).

(b) if the defendant is found to be a persistent or dangerous offender, then the court is not limited by the term of imprisonment declared by the jury, but must make the determination on its own. See §558.016. Of course, the court could take into account the jury's verdict as to sentence as an indication of how seriously the jury viewed the offense on the basis of the evidence they heard.

4. The court thus is the primary authority in determining the sentence or disposition to be made in a given case whether or not there is a jury verdict containing a term of imprisonment.

Under the Code provisions, after a finding of guilt, the court should first consider which of the authorized dispositions set out in §557.011 are available for the particular offense or offenses, keeping in mind the limitations on these dispositions both by offense and by particular provisions of the Code (such as those dealing with fines).

Then the court should determine which of these dispositions or which combination of these dispositions is appropriate in the given case. The only limitation on the use of the available dispositions is that if the jury has returned a verdict containing a term of imprisonment, any term of imprisonment set by the court cannot exceed that contained in the jury's verdict (subject to the two exceptions mentioned above.)

Special Notes

"subject to the limitations provided in subsection 3"	The only limitation on the court's authority in determining the appropriate disposition is the authority of the jury to declare a maximum term of imprisonment, and that limitation applies only to the length of the term of imprisonment, if any, that is decided upon by the court.
"nature . . . character of the defendant"	This is a statement of the basic factors which the court, in exercising its sentencing authority, should consider. In making its decision, the court will have available to it information concerning the history and character of the defendant—information that would not be available to the jury.
"shall instruct the jury"	The instructions, of course, will follow the MAI-CR forms.

CHAPTER 3

Imprisonment (§§558.011-558.031)

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3.1 Introduction

This chapter deals with imprisonment. Included are the authorized terms for each category of crime and the extended terms for persistent and dangerous offenders.

3.2 Sentence of Imprisonment - Incidents (§558.011)

Code

1. The authorized terms of imprisonment, including both prison and conditional release terms are:
   (1) For a class A felony, a term of years not less than ten years and not to exceed thirty years, or life imprisonment;
   (2) For a class B felony, a term of years not less than five years and not to exceed fifteen years;
   (3) For a class C felony, a term of not to exceed seven years;
   (4) For a class D felony, a term of years not to exceed five years;
   (5) For a class A misdemeanor, a term not to exceed one year;
   (6) For a class B misdemeanor, a term not to exceed six months;
   (7) For a class C misdemeanor, a term not to exceed fifteen days.
2. In cases of class C and D felonies, the court shall have discretion to imprison for a special term not to exceed one year in the county jail or other authorized penal institution, and the place of confinement shall be fixed by the court. If the court imposes a sentence of imprisonment for a term longer than one year upon a person convicted of a class C or D felony, it shall commit the person to the custody of the department of corrections for a term of years not less than two years and not exceeding the maximum authorized terms provided in subdivisions (3) and (4) of subsection 1 of this section.
3. (1) When a regular sentence of imprisonment for a felony is imposed, the court shall commit the defendant to the custody of the division of corrections for the term imposed under section 557.036, RSMo., or until released under procedures established elsewhere by law.
   (2) A sentence of imprisonment for a misdemeanor shall be for a definite term and the court shall commit the defendant to the county jail or other authorized penal institution for the term of his sentence or until released under procedures established elsewhere by law.

4. (1) A sentence of imprisonment for a term of years shall consist of a prison term and a conditional release term. The conditional release term of any term imposed under section 557.036, RSMo., shall be:
   (a) One-third for terms of nine years or less;
   (b) Three years for terms between nine and fifteen years;
   (c) Five years for terms more than fifteen years, including life imprisonment; and the prison term shall be the remainder of such term.
   (2) **"Conditional release"** means the conditional discharge of a prisoner by the division of corrections subject to conditions of release that the state board of probation and parole deems reasonable to assist the offender to lead a law-abiding life, and subject to the supervision under the state board of probation and parole. The conditions of release shall include avoidance by the offender of any other crime, federal or state, and shall prohibit technical violation of his probation and parole.

Comments

This section sets out the normal ranges of authorized terms of imprisonment for all classes of crimes and indicates the length of sentences which may be imposed for each class. See the Table of Sentencing Ranges under the Criminal Code following ¶3.2. Note that the penalty for non-Code offenses is that set out in the statute defining the non-Code offense. For example, see the homicide offenses §§565.001 to 565.016 which include capital murder which can carry the death penalty.

1. The judge who decides that imprisonment is an appropriate sentence for the offender is required to fix a term of imprisonment within the authorized range for the class of offense committed. If a jury is involved in sentencing the offender, the jury's verdict determines *only the maximum* term of imprisonment that may be imposed and the court must decide on the term to be imposed. See §557.036.

The term of imprisonment fixed by the court is the maximum term that the defendant could serve for that offense. Note that in felony cases in which the offender is sentenced to a term of years, the term imposed automatically includes both a "prison term" and a "conditional release term" which together add up to the term imposed. Subsection 1 sets the authorized terms of imprisonment according to the classification of the offense.

Subsection 1(1), permits the judge to impose either life imprisonment or to fix a sentence within the range of 10 to 30 years for a class A felony.

Subsection 1(2) authorizes a sentencing range of 5 to 15 years for class B felonies.

Subsection 1(3) authorizes a term of years of not more than 7 years for class C felonies. Note that the court does not have a continuous range of seven years within which to fix the term of imprisonment. If the court decides not to fix a term between 2 and 7 years, under subsection 2, the court may impose a jail term of not more than one year. If a jury is involved in sentencing, they will be instructed to set a maximum term of between 2 and 7 years with the division of corrections, *or* a maximum jail term of not to exceed one year.

Subsection 1(4) authorizes a sentencing range of not more than 5 years for class D felonies. As in the case of class C felonies, the court again has discretion to impose a jail term of not to exceed one year. See subsection 2.

Subsections 1(5), (6) and (7) basically reflect pre-Code maximum sentences authorized for misdemeanors.

Special Notes

1(3) "a term of not to" should be read "a term *of years* not to", see subsection 1(4), where "of years" was included.

2. Subsection 2 gives the court the choice of imposing a so-called "special term" in the case of class C and D felonies of up to one year in the county jail or other authorized penal institution to which the court has authority to sentence for a misdemeanor. **The division of corrections is not an authorized penal institution within the meaning of this subsection.** If the court imposes a special term, it **must specify** the place of confinement. Alternatively the court may select a term of years within the range from 2 years

up to the maximum length of terms of imprisonment authorized for that class of felony. If a term of years is the sentence, the court must commit the offender to the custody of the division of corrections. Note that as a consequence of this provision, it is not possible to impose a term of imprisonment for a class C or D felony of more than one year and less than two years.

This subsection follows the approach of many pre-Code statutes which allowed for misdemeanor sentences for some felonies. It allows for appropriate sentences for the less serious felonies.

Special Notes

"Special term"	This expression is employed simply to distinguish it from a term in prison. A special term may be imposed by the court exercising exactly the same discretionary powers as it would exercise in imposing any other term of imprisonment, and a jail term imposed under this subsection will be served in exactly the same manner as any jail term imposed for a misdemeanor for an equivalent period.
"Authorized penal institution"	Any institution authorized by law to serve as a penal institution for misdemeanors but not including the division of corrections facilities. Included would be penal farms, half-way houses, and other penal institutions not under the jurisdiction of the division of corrections. Regional facilities to serve as jails for several counties may be established and so, would be authorized for these special terms.

3. Under subsection 3(1) whenever the court imposes a sentence of imprisonment of a term of years for any felony, the offender must be committed to the custody of the division of corrections for this period, subject to possible release earlier under procedures established elsewhere by law. The "term of imprisonment" for which the court commits the offender includes both prison and conditional release terms. See subsections 1 and 4. Nothing in the Code, however, prevents a release prior to the expiration of the "prison term" under the parole powers of the Board of Probation and Parole. See §549.261. Note that the lengths of the prison term and conditional release terms are determined by the term of imprisonment imposed. The court, in setting a term of imprisonment states only the term of imprisonment and does not specify the length of the prison term or the conditional release term.

Under subsection 3(2) the court sentencing the offender to imprisonment for a misdemeanor must fix a definite term and commit the defendant to a specific institution, either the county jail or another authorized penal institution, for the period of the term. The offender may be released earlier under procedures established elsewhere by law. See, e.g., §549.061 and related statutes.

Special Note

"Definite term"	A term of days or months specified by the court within the range authorized for class A, B, or C misdemeanors.

4. Subsection 4 introduces an entirely new approach to the sentencing of felons. It provides that whenever an offender is sentenced to a term of two years or more, the Code automatically breaks that term down into two distinct periods, namely, a "prison term" and a "conditional release term".

The **"prison term"** is the maximum amount of time a person can be held in prison before conditional release. All prisoners are required to leave prison at the end of the prison term, even those who do not wish to be conditionally released.

The **"Conditional release term"** is the maximum length of time a person must satisfactorily serve on conditional release or parole before he is finally discharged, regardless of the point in time when he is released from prison. Proposed Code §3.010(4) Comment.

The length of the conditional release term is determined automatically under the statutory formula:

(a) One-third for terms of 9 years or less (between 2 and 9 years);

(b) Three years for terms of between 9 and 15 years; and

(c) Five years for terms of more than 15 years, including life imprisonment.

The idea behind "conditional release" is that every offender's release from prison should involve a transitional process. Under pre-Code law many felony offenders were released from prison without any parole supervision or control. The supervision on conditional release may be effective in keeping the person from returning to crime and assist in the offender's general rehabilitation. Violations of conditions of his release will result in being sent back to prison and this should be a deterrent against further crime or misconduct.

In order to achieve the objectives outlined above, subsection 4(2) indicates that conditional release of the offender is to take place subject to such conditions as the state board of probation and parole deems reasonable to assist the offender to lead a law-abiding life. Such conditions should in part be oriented to the circumstances of the individual offender. However, other standard conditions will be imposed on most or all prisoners being released. E.g., the Code *requires* the imposition of the conditions that the offender shall avoid any other crime, federal or state, and shall not commit technical violations of his parole.

SENTENCING RANGES UNDER THE CRIMINAL CODE

Sentence to:	Division of Corrections	County Jail	Extended Term	Individual Fine*	Corporation Fine*
For felony					
Class A	10 - 30 years or life		Same		$10,000
Class B	5 - 15 years		30 years		$10,000
Class C	2 - 7 years	1 year	15 years	$5,000	$10,000
Class D	2 - 5 years	1 year	10 years	$5,000	$10,000
For misdemeanor					
Class A		1 year		$1,000	$ 5,000
Class B		6 months		$ 500	$ 2,000
Class C		15 days		$ 300	$ 1,000
For Infraction				$ 200	$ 500

Note: All penalties listed are maximum penalties

*The Code also provides for an alternative fine of double the amount of "gain" with a limitation of $20,000 in the case of individuals.

Every sentence to the Division of Corrections includes a "prison term" and a "conditional release term"
The conditional release term is

One-third of sentences of from 2 to 9 years

3 years for sentences of from over 9 to 15 years

5 years for sentences of from over 15 years

3.3 Extended Terms for Persistent and Dangerous Offenders (§558.016)

Code

1. The court may sentence a person who has pleaded guilty to or has been found guilty of a class B, C, or D felony to an extended term of imprisonment if it finds the defendant is a persistent offender or a dangerous offender.

2. A **"persistent offender"** is one who has been previously convicted of two felonies committed at different times and not related to the instant crime as a single criminal episode.

3. A **"dangerous offender"** is one who:

(1) Is being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person; and

(2) Has been previously convicted of a class A or B felony or of a dangerous felony.

4. The total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are:

(1) For a class B felony, a term of years not to exceed thirty years;

(2) For a class C felony, a term of years not to exceed fifteen years;

(3) For a class D felony, a term of years not to exceed ten years.

Comments

1. This section replaces the pre-Code second offender statute (§556.280 repealed). However, it differs significantly from the pre-Code law in that it permits a longer sentence of imprisonment to be imposed. The court *may* sentence a person to an extended term, if the following findings are made *and* the defendant has been charged with being a persistent or dangerous offender (See §§558.021 RSMo.):

(a) If the defendant has pleaded guilty to, or been found guilty of, a class B, C, or D felony (an extended term is not needed for a class A felony as a life sentence may be imposed for a class A felony; *and*

(b) the court finds the defendant to be a "persistent" or "dangerous" offender.

2. Subsection 2 defines a "persistent offender" as a person who has previously been convicted of two felonies committed at different times and not related to the instant crime as a single criminal episode. The effect of this definition, coupled with the substantive provisions of the section, is to make §558.016 into a "habitual offender" statute with enhanced punishment possibilities. Thus it differs from pre-Code §556.280 RSMo. [repealed], which simply provided for judicial sentencing, but no enhanced penalties, for any person previously convicted of a felony. Note that an offender may be labelled "persistent" although his previous two felonies may have been committed in the distant past and were not of the same or a similar kind when compared to each other or to the current felony. These, however, are factors which the court can take into account in determining whether to impose an extended term. There is no requirement that the court impose a longer sentence than would otherwise be allowed simply because the defendant is a "persistent offender." The extended term provision simply allows the court to impose an extended term, it does not require it.

3. Subsection 3 defines a "dangerous offender" as a person who "has been previously convicted of a class A or B felony or of a dangerous felony." As with a persistent offender, the court is not required to impose an extended term. The section simply allows the court to impose an extended term, but it does not require it.

4. Subsection 4 sets out the *maximum* term of imprisonment which may be imposed on a persistent or dangerous offender. The maxima vary depending on the class of offense for which the defendant is presently being sentenced. It should be noted that the ability to apply the provisions on extended terms is dependent on the classification of the present charge and previous convictions. Particular problems arise as to non-Code offenses. §557.021 provides the method of classifying the non-Code offenses in order to apply the extended term provisions.

Special Notes

"The court may sentence" — Although normally a sentencing jury will set the maximum length of sentence which the court may impose, the court is not limited by the jury verdict as to sentence in cases of persistent or dangerous offenders. The court has *discretion* to impose or not to impose an extended term after finding the offender to be persistent or dangerous. Thus the effect of a finding that the defendant is a persistent or dangerous offender is two fold: 1) The Range of the terms of imprisonment for class B, C and D felonies are increased and 2) The court is not limited by a jury verdict as to sentence in all classes of felonies, including class A felonies.

"Felonies" — Although "felony" is defined in §556.016 RSMo. to include any crime for which a convicted person may be sentenced to death or to a term in excess of one year, the Code does not expressly state that it includes federal or sister state felony convictions. A repealed pre-Code provision, §556.290, specifically provided for inclusion of such convictions in applying the prior habitual offender provision.

"Knowingly Endanger" — To "knowingly endanger" the life of another for purposes of labeling the defendant as a "dangerous offender", the defendant must be aware that his conduct is practically certain to expose another person to serious bodily harm or loss of life; reckless conduct is not sufficient.

"Knowingly inflicted or attempted or threatened to inflict serious physical injury" — "Knowingly" must qualify the key words in the phrase - "inflicted" and "attempted" and "threatened to inflict - in order to properly determine if the defendant is a "dangerous offender". Thus if the defendant was aware that serious physical injury was "practically certain" to result from his conduct, he "knowingly inflicted" it. He is just as dangerous if he attempted to inflict serious physical injury but failed for some reason.

"Dangerous felony" — This is confined by the Code to the felonies of murder, forcible rape, assault, burglary, robbery, kidnapping, or the attempt to commit any of these felonies. §556.061(8) RSMo. These will generally be serious crimes. However, "assault includes assault in the second degree [§565.060 RSMo.], a class D felony which may be based on a finding that the defendant attempted to kill or cause serious physical injury because he believed, although unreasonably, that the killing or injury would be justified. The various levels of seriousness and the nature of a "dangerous felony" should be considered by the prosecutor in making charge decisions and by the court in deciding whether to impose an extended term.

3.4 Extended Term Procedures (§558.021)

Code

1. The court shall not impose an extended term under section 558.016 unless
(1) The indictment or information, original, amended or in lieu of an indictment, pleads all essential facts warranting imposition of an extended term; and
(2) After a finding of guilty or a plea of guilty, a sentencing hearing is held at which evidence establishing the basis for an extended term is presented in open court with full rights of confrontation and cross-examination, and with the defendant having the opportunity to present evidence; and
(3) The court determines the existence of the basis for the extended term and makes specific findings to that effect.

2. Nothing in this section shall prevent the use of presentence investigations or commitments under sections 557.026 and 557.031, RSMo.

3. At the sentencing hearing both the state and the defendant shall be permitted to present additional information bearing on the issue of sentence.

Comments

This section sets out the procedure which *must* be followed in the event that the prosecution wishes to have the defendant sentenced to an extended term of imprisonment. It is clear that the initiative for such a sentence lies exclusively with the prosecution and not with the court.

The procedure outlined is designed to ensure the constitutionality of the extended term provisions. Since the imposition of an extended term goes beyond a finding of guilt of the commission of a felony and involves making "new findings of fact", the requirements of **Specht v. Patterson,** 386 U.S. 605 (1967) must be met. The provisions of this section are intended to meet these requirements and should be interpreted accordingly.

1. The subsection 1(1) requirement is designed to give the defense notice of the intention to seek an extended term.

Although the indictment or information must plead all essential facts warranting imposition of an extended term, the facts may not be relevant to the trial on the current felony charge. The jury *must not be informed* about the possibility of an extended term because of the highly prejudicial effect that this is likely to produce.

Subsection 1(2) sets out the requirements for a special sentencing hearing in which competent evidence establishing the basis for an extended term is presented in open court, with full rights of confrontation and cross-examination, and with the right of the defendant to present evidence on the issue of whether there is a basis for imposing an extended term and, if so, whether or not the court ought to impose an extended term. See subsection 3. This is not a hearing before a jury.

Subsection 1(3) requires the court to determine whether there is a basis for imposing an extended term. This basis must be found to exist beyond a reasonable doubt. The court is required to make specific findings on the issues. These findings will be on all issues of law and fact involved in making the final determination.

2. Subsection 2 preserves the ability of the court to employ presentence investigation reports and the report from a presentence commitment for mental study under the cited sections. Once the court has found the existence of the basis for an extended term, these reports may be employed in precisely the same manner and for the same purposes as they would be in imposing a "normal" sentence.

3. Subsection 3 grants both the state and the defendant the right to present additional information bearing on the issue of sentence, at the sentencing hearing, beyond "evidence [about] the basis for an extended term" [subsection 1(2)]. The information may be relevant to the issue of whether the court, in its discretion, should impose an extended term when the law and the facts permit it, and to the issue of what extended term would be appropriate in the particular case. A finding that the defendant is a "dangerous" or "persistent" offender is only the first step in the extended term hearing procedure and should be followed by the presentation of additional information bearing on the issue of the final appropriate sentence.

Special Notes

"Indictment or information, original, amended or in lieu of an indictment"

Ordinarily the prosecution will plead the essential facts warranting the imposition of an extended term from the outset; however, there is no objection to the pleading of these facts in the course of amending an indictment or substituting an information pleading these facts, provided that the substantial rights of the defendant are not prejudiced [see Supreme Court Rule 24.02]. In particular, since no "additional or different offense is charged", this requires providing the defense with sufficient time to formulate and present a response, supported by evi-

dence. Considering the possible serious consequences of any late amendment or substitution asking for imposition of an extended term, ordinarily a court should not permit this after the beginning of the trial. See **State v. Shumate,** 516 S.W.2d 297 (Mo. App. 1974) (amendment invoking §556.280 does not charge different offense, permitted on day of trial after 2 days notice).

"Establishing the basis for the extended term" — This basis for an extended term must be established beyond a reasonable doubt.

3.5 Concurrent and Consecutive Terms of Imprisonment (§558.026)

Code

1. Multiple sentences of imprisonment shall run concurrently unless the court specifies that they shall run consecutively.

2. If a person who is on probation, parole or conditional release is sentenced to a term of imprisonment for an offense committed after the granting of probation or parole or after the start of his conditional release term, the court shall direct the manner in which the sentence or sentences imposed by the court shall run with respect to any resulting probation, parole or conditional release revocation term or terms. If the subsequent sentence to imprisonment is in another jurisdiction, the court shall specify how any resulting probation, parole or conditional release revocation term or terms shall run with respect to the foreign sentence of imprisonment.

Comments

1. This section creates a presumption that multiple sentences of imprisonment will run concurrently unless the court specifies that they are to run consecutively. The court still has the discretion to impose a consecutive sentence if "under all the circumstances, having regard to the nature and circumstances of the offense[s] and the history and character of the defendant" [§557.036(1) RSMo.] a consecutive sentence is the appropriate disposition. (*cf* **State v. Baker,** 524 S.W.2d 122 (Mo. 1975) holding pre-Code §546.480 unconstitutional). It may be advisable that the court should continue to indicate in the record, whenever consecutive sentences are imposed, that they are doing so in the exercise of their sentencing discretion.

Subsection 1 in part replaces pre-Code §222.020 [repealed] which provided that if a convict committed a crime "while under sentence", then any sentence for the crime which he had committed would only commence when the sentence which he was "under" expired. If this is not a subsection 2 case where the court *must* direct how the sentences will run, the presumption is that the sentences of the convict will run concurrently unless the court specifies that they will run consecutively.

2. Subsection 2 provides that if a person commits an offense while on probation, parole or conditional release, which results in his having to serve or complete a jail or prison term after revocation of the probation, parole or conditional release, then the *court must direct* whether the sentence for the offense which led to the revocation is to run concurrently or consecutively with the revocation term.

Subsection 2 goes on to provide that if the later sentence to imprisonment is in another jurisdiction, the Missouri sentencing court *must direct* whether any residual Missouri term(s) to be served following revocation of probation, parole or conditional release as a result of the foreign sentence is (are) to be served concurrently or consecutively with the foreign sentence. To postpone the decision until the offender has served a substantial part or all of the foreign sentence would appear to be a decision that the Missouri revocation term will run consecutively, and that the foreign corrections authorities should treat the offender accordingly.

The Code contains no criteria for the imposition of a consecutive sentence. However, see the criteria for imposition of an extended term, §558.016 RSMo. From the standpoint of treatment of the ordinary offender, not "persistent" or "dangerous", the concurrent sentence is preferred by most correctional administrators. In any case in which the court is contemplating a possible consecutive sentence, the court should order a presentence investigation and report, §557.026 RSMo., before deciding whether a consecutive term is required because of the exceptional features of the case.

Special Notes

"Multiple sentences" — This applies to the situation where all of the sentences are imposed by a Missouri court or courts, or where only one or some of the sentences are so imposed, and the remainder originate in a foreign jurisdiction. Note that the concurrency presumption does not apply in the subsection 2 situation involving multiple sentences.

"Resulting probation, parole or conditional release revocation term" — The jail or prison term which must be served because of revocation of probation, parole, or conditional release, which revocation is based on a "sentence to a term of imprisonment" for an offense committed while the person is serving a probation, parole, or conditional release term. The *length* of such a term is determined in various ways and controlled by different Code provisions, viz.:

(a) Probation - the court determines - §559.036(3) RSMo.
(b) Parole - length fixed by statute - §558.031(5) RSMo.
(c) Conditional release - length fixed by statute - §558.031(5) RSMo.

3.6 Calculation of Terms of Imprisonment - Credit for Jail Time Awaiting Trial (§558.031)

1. A person convicted of a crime in this state shall receive as credit toward service of a sentence of imprisonment all time spent by him in prison or jail both because awaiting trial for such crime and pending transfer after conviction to the division of corrections or the place of confinement to which he was sentenced. Time required by law to be credited upon some other sentence shall be applied to that sentence alone, except that
   (1) Time spent in jail or prison awaiting trial for an offense because of a detainer for such offense shall be credited toward service of a sentence of imprisonment for that offense even though the person was confined awaiting trial for some unrelated bailable offense; and
   (2) Credit for jail or prison time shall be applied to each sentence if they are concurrent.
2. The officer required by law to deliver a convicted person to the division of corrections shall endorse upon the commitment papers the period of time to be credited as provided in subsection 1 of this section.
3. If a sentence of imprisonment is vacated and a new sentence is imposed on the defendant for the same offense, the new sentence is calculated as if it had commenced at the time the vacated sentence was imposed, and all time served under the vacated sentence shall be credited against the new sentence.
4. If a person serving a sentence of imprisonment escapes from custody, the escape interrupts the sentence. The interruption continues until the person is returned to the institution in which the sentence was being served, or in the case of one committed to the custody of the department of corrections, to any institution administered by the department.
5. If a person released from imprisonment on parole or serving a conditional release term violates any of the conditions of his parole or release, he may be treated as a parole violator under the provisions of section 549.265, RSMo. If the board of probation and parole revokes the parole or conditional release, the paroled person shall serve the remainder of his prison term and all the conditional release term, as an additional prison term, and the conditionally released person shall serve the remainder of the conditional release term as an additional prison term, unless he is sooner released on parole under section 549.261, RSMo.

Comments

1. Subsection 1 is based on pre-Code §546.615(1) and (2) RSMo. [repealed] and extends this prior law by permitting imprisonment credit to be earned in cases of persons convicted of *any crime*, not just a felony. Such credits may be earned both awaiting trial in jail or prison and pending transfer after conviction to the division of corrections or to the place of confinement to which the defendant is sentenced.

In addition to extending the concept of time credits to misdemeanors, the provision also attempts to clarify the way in which it will operate in certain specific instances.

First, subsection 1 makes it clear that pre-conviction time credits can only be earned if the defendant is in jail or prison *because* he is awaiting trial. Thus if he is in jail or prison for some other reason, e.g., to serve another sentence, and would have to continue to remain in jail or prison if he was no longer awaiting trial for the offense in question, this provision would not apply.

Subsection 1(1) contains an important qualification to the general rule that a prisoner receives credit only for the time spent in jail or prison awaiting trial for a particular crime. The prisoner is also entitled to credit for this pretrial time toward any sentence of imprisonment for another unrelated bailable offense, if he was held in jail *because* of a detainer to hold him for this other offense. Once the detainer is lodged against the defendant, he is treated as if he were serving time awaiting trial for both the crime upon which the detainer is based and the principal crime for which he was put in the jail or prison to await trial. In addition, in cases where concurrent sentences for various offenses are imposed, credits earned in respect of each offense must be credited to each of the other sentences, under subsection 1(2). In order to provide a rational interpretation to this provision, it is necessary to understand that credits earned concurrently can only be counted once, but credits earned independently are cumulative in their effect.

Special Notes

"Credit toward"	The credit operates toward the length of any jail term or "prison term". The length of the conditional release term remains unaltered [§558.011(4) RSMo.].
"Awaiting trial"	Includes the time spent in jail custody during trial but before conviction.
"After conviction"	After a finding that the defendant is guilty of the offense charged. Thus there are no time gaps in credit awarded, from the day of arrest through the time of trial and on to the date of transfer to the division of corrections or the place of confinement, assuming the defendant has not been out on bail during that time. Credit is given for time spent "in trial" and awaiting sentence after a finding of guilt.
"Because of a detainer"	Means while subject to a written request of any kind which is honored by jail or prison authorities, requesting that a defendant already in custody on one charge be held to answer another charge.

2. The officer required by law to deliver the convicted person to the division of corrections [generally the county sheriff, §546.610 RSMo.] is required to endorse upon the commitment papers the amount of time required to be credited to the prisoner's sentence under subsection 1. If no time is to be credited he should make an endorsement to this effect on the papers [the situation if the defendant has been out on bail since arrest.] This subsection takes the place of pre-Code §546.615(3) RSMo. [repealed], which simply required the officer to "endorse . . . the length of time spent by the person in prison or jail prior to his delivery to the division." Under the subsection 1 definitions of "awaiting trial" and "after conviction" above, the officer will continue to use the same length of time spent by the person in prison or jail prior to his delivery as the *primary* basis for calculating the credit; however, subsections 1(1) and 1(2) impose additional requirements on the officer in calculating the total amount of credit to be granted by the division of corrections.

3. Subsection 3 provides that if a sentence of imprisonment is vacated and a new sentence is imposed on the defendant for the same offense, the new sentence is considered to have commenced at the time the vacated sentence was imposed, and all time served under the vacated sentence will be credited toward the new sentence. It should be remembered that any time credits earned toward the vacated sentence will count toward the new sentence, because it is for the same offense. However, if the defendant who had his sentence of imprisonment vacated is then convicted of a *different* offense (not a lesser included offense), none of the time served under the vacated sentence will be credited against the new sentence.

Special Notes

"Same offense" This includes lesser included offenses as to which the defendant was in jeopardy when he was convicted and sentenced. A defendant whose sentence is vacated should not be penalized by losing his credit if a subsequent conviction is for a lesser included offense rather than for "some unrelated offense", see subsection 1(1). Thus a defendant who served 5 years on a murder conviction, whose sentence was vacated because his conviction was set aside, and who subsequently was convicted of manslaughter, would receive full credit for the 5 years in prison toward completion of any sentence for the lesser included offense of manslaughter.

4. Time served under a sentence ceases to run upon the escape of the prisoner. If the offender was committed to the custody of the division of corrections time will commence to run again once the prisoner is returned to *any* institution administered by the division. In every other case time will commence to run only when the person is returned to the institution in which the sentence was being served, e.g., the county jail, even though the escaped prisoner may have spent substantial time in some other jail after arrest and before being returned to the place of escape. *Physical return* is required before the time of the sentence will continue to run. Merely placing the prisoner in the custody of an officer of that institution will not cause the time of the sentence to begin running again.

5. A sentence of imprisonment for a term of years consists of a prison term and a conditional release term [§558.011(4) RSMo.]. A person in prison may be released on parole prior to the completion of his prison term, and before the conditional release term begins, in the discretion of the State Board of Probation and Parole [§549.261 RSMo.]. The power to revoke parole lies with the state board under §549.265 RSMo., which defines the procedures for parole revocation. Subsection 5 sets out the consequences that will follow in the event of the Board of Probation and Parole deciding to revoke either the defendant's parole or his conditional release.

If the defendant's parole is revoked he is required to serve the **remainder of his "prison term"** and **all of his "conditional release term"** as an "additional prison term". The "remainder" of the prison term has to be calculated by reference to §549.265(2) and (3) RSMo., and §549.275 RSMo., which indicate how any credits arising from time on parole are to be determined as well as the effect of imposition of a sentence served outside the division of corrections after the defendant's release on parole.

If the defendant's *conditional release* is revoked he has to serve the remainder of his conditional release term as an "additional prison term".

Where the defendant must serve an additional prison term following either revocation of parole or conditional release, the Code makes it clear that he may still be considered for further parole under the provisions of §549.261 RSMo. In the event of violation of this later parole, the offender will be treated as any parole violator.

Special Notes

"May be treated as a parole violator" I.e., dealt with under the terms of §549.265 RSMo., under which the board of probation and parole "may continue or revoke the parole, or enter such other order as it may see fit," after holding a hearing on the violation charged and finding that the violation is established.

CHAPTER 4

Probation
(§§559.012-559.036)

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4.1 Introduction

This chapter deals with probation including the granting, terms and revocation of probation.

4.2 Eligible for Probation, When (§559.012)

Code

> The court may place a person on probation for a specific period upon conviction of any offense or upon suspending imposition of sentence if, having regard to the nature and circumstances of the offense and to the history and character of the defendant, the court is of the opinion that
>
> (1) Institutional confinement of the defendant is not necessary for the protection of the public; and
>
> (2) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision.

Comments

This section gives discretion to the court before whom a conviction is had to place the defendant on probation if, after having considered the nature and circumstances of the offense and the history and character of the defendant the court is of the opinion that preconditions (1) and (2) are met.

No preference is stated either for or against probation. The section merely lists factors which the court must consider, in the light of which the court must form its own opinion on the particular issues contained in subsections (1) and (2). Once the court is of the opinion that preconditions (1) *and* (2) are met in the particular case, the most appropriate sentence in most cases will involve a term of probation. Probation is the best and most economical means of rehabilitation for a large percentage of offenders. National Conference of State Trial Judges, *The State Trial Judge's Book* 293 (2d ed. 1969).

This section replaces a portion of pre-Code §549.071 RSMo. [repealed]. Under pre-Code §549.071 in order to be eligible for probation the defendant must have been "of previous good character" and the court must have been "satisfied that the defendant, if permitted to go at large, would not again violate the law." Under the Code the focus is on designing conditions of probation "to insure that the defendant will not again violate the law".

Probation is imposed for a specific period [see §559.016(2) RSMo.]. Probation *may* be imposed when the court suspends imposition of sentence. Probation *must* be imposed if the court pronounces sentence and suspends its execution. [See §557.011(2) RSMo.].

4.3 Terms of Probation (§559.016)

1. Unless terminated as provided in section 559.036, the terms during which probation shall remain conditional and be subject to revocation are:
   (1) A term of years not less than one year and not to exceed five years for a felony;
   (2) A term not less than six months and not to exceed two years for a misdemeanor;
   (3) A term not less than six months and not to exceed one year for an infraction.
2. The court shall designate a specific term of probation at the time of sentencing or at the time of suspension of imposition of sentence.

Comments

This section requires the court to fix a definite term of probation at the time of sentencing or at the time of suspension of imposition of sentence. The court must select the probation period from within the permitted ranges for the type of offense involved. It should be noted that since the repeal of §549.071 RSMo., courts have no authority to extend the period of probation once the term is fixed.

The major change in the law is the standard requirement of a minimum period of probation. This is designed to ensure that there is a sufficient period of probation to ascertain whether the probation is going to be effective. The court may terminate a period of probation early, even if this is earlier than the minimum period of probation specified in this section, §559.036(2) RSMo. This will permit mitigation of any hardship that might result from the minimum term requirement, whenever early termination is "warranted by the conduct of the defendant and the ends of justice."

The section continues the prior maximum probation term of five years for felonies and two years for misdemeanors and the minimum of one year for felonies. Pre-Code section 549.071 RSMo. [repealed].

Special Note

"Shall designate a specific term at the time of sentencing or suspension"	If probation is imposed, the court *must* designate the specific period of probation for the offender within the range for the type of offense. No later extension is permitted.

4.4 Conditions of Probation (§559.021)

Code

1. The conditions of probation shall be such as the court in its discretion deems reasonably necessary to insure that the defendant will not again violate the law. When a defendant is placed on probation, he shall be given a certificate explicitly stating the conditions on which he is being released.
2. The court may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the probation term.

Comments

1. The court must fix and state in writing the conditions of probation which the court in its *discretion* deems reasonably necessary to insure that the defendant will not again violate the law. In fixing the conditions, the court should carefully consider the needs of the particular offender.

The requirement of a certificate explicitly stating all the conditions of probation is intended to avoid misunderstandings and to provide an adequate basis for probation revocation hearings. Any modifications in the conditions of probation during the probation period should be noted on the certificate, or a new certificate issued.

2. Subsection 2 enables a court to modify or enlarge the conditions of probation at any time before the probation term expires or is terminated. Among the occasions when such authority might be employed would be at a probation revocation hearing where the court decides to continue the probation [§559.036(3) RSMo.] or on the transfer of jurisdiction over the probationer from one court to another [§559.031 RSMo.].

Special Notes

"Modify or enlarge" This permits the court to reduce the nature or extent of restrictions imposed on the probationer as well as enlarging them. See §559.036(2) RSMo., permitting early termination of probation.

4.5 Detention Condition of Probation (§559.026)

Code

Except in infraction cases, when probation is granted, the court, in addition to conditions imposed under section 559.021, may require as a condition of probation that the defendant submit to a period of detention in an appropriate institution at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court shall designate. Any person placed on probation in a county of the first class or second class or in any city with a population of five hundred thousand or more and detained as herein provided shall be subject to all provisions of section 221.170, RSMo., even though he was not convicted and sentenced to a jail or workhouse.

(1) In misdemeanor cases, the period of detention under this section shall not exceed the shorter of fifteen days or the maximum term of imprisonment authorized for the misdemeanor by chapter 558, RSMo.

(2) In felony cases, the period of detention under this section shall not exceed sixty days.

(3) If probation is revoked and a term of imprisonment is served by reason thereof, the time spent in a jail, workhouse or other institution as a detention condition of probation shall be credited against the prison or jail term served for the offense in connection with which the detention condition was imposed.

Comments

In felony and misdemeanor cases, but not in cases of infractions, this section authorizes the court to impose a limited period of detention as a condition of probation. Under previous law there was no authority for a Missouri court to impose such a condition in the absence of such statutory authorization. **State ex rel. St. Louis County v. Stussie**, 556 S.W.2d 186 (Mo. 1977).

The detention may be in any "appropriate institution" but is restricted to institutions to which the court would otherwise have the authority to commit the defendant when sentencing for an equivalent period of time (i.e. not more than 60 days). Thus committing the defendant to the custody of the division of corrections is not permissible under this section.

This "split sentence" provision gives a court great flexibility in structuring a period of detention as a condition of probation. First it provides that the period of detention may occur at any point in a period of probation. Then by indicating that there may be "intervals" the provision implies that the total period of detention may be broken down into lesser periods which can be served at any intervals the court may designate. The fact that the "intervals" may be "consecutive or nonconsecutive" indicates that the court is free to select any pattern to the time periods that it considers appropriate. Of course, the overall length and the length of any component periods of detention as well as the location of detention and the arrangement of such periods of detention are not intended to be imposed in an arbitrary way, but should be imposed with the broader objectives of the section and or probation in mind.

Subsections (1) and (2) restrict the period of detention under this provision to an *aggregate* period, which in a felony case does not exceed 60 days, and in the case of a misdemeanor, 15 days. The purpose of the authorized periods of detention is to operate as a "shock term" to give the defendant exposure to imprisonment conditions while avoiding some of the undesirable consequences, e.g., loss of employment, which normally follow from longer detention. Therefore the maximum period of detention is kept relatively short.

Subsection 3 of §559.026 provides that if probation is revoked and the defendant as a consequence is subjected to a term of imprisonment, any time spent in detention as a condition of probation *must* be credited against the prison or jail term. Note that this credit is limited to the offense for which the detention condition was imposed; no credit is available against any prison or jail term for a subsequent offense.

Since a detention condition of probation is a "condition" of probation, it may be modified or enlarged as provided in §559.021(2) RSMo. If deemed necessary, the court could increase its duration - but not so that the aggregate period exceeds the maximum period specified in §559.026(1) and (2).

4.6 Transfer to Another Court (§559.031)

Code

> Jurisdiction over a probationer may be transferred from the court which imposed probation to a court having equal jurisdiction over offenders in any other part of the state, with the concurrence of both courts. Retransfers of jurisdiction may also occur in the same manner. The court to which jurisdiction has been transferred under this section[1] shall be authorized to exercise all powers permissible under this chapter over the defendant, except that the term of probation shall not be terminated without the consent of the sentencing court.
>
> [1]Enrolled bill read "subsection".

Comments

This section facilitates movement of probationers within the state, e.g., for family or work reasons, and to ensure adequate supervision and control, by enabling jurisdiction over the probationer to be transferred from the court which imposed probation to a court having equal jurisdiction in any other part of the state. The transfer is subject to the concurrence of both courts. Retransfers are also possible.

Although the court to which jurisdiction is transferred generally will exercise all probation powers granted by Chapter 559, the power to terminate the probation under §559.036(2) RSMo. can only be exercised with the consent of the original court. Thus the powers transferred include the power to revoke the probation. If the court to which jurisdiction has been transferred feels that for any reason it would be inappropriate for it to exercise any power granted to it, there is no objection in principle to retransferring jurisdiction to the sentencing court to make critical decisions, such as a final decision on whether probation should be revoked.

4.7 Duration of Probation - Revocation (§559.036)

Code

> 1. A term of probation commences on the day it is imposed. Multiple terms of Missouri probation, whether imposed at the same time or at different times, shall run concurrently. Terms of probation shall also run concurrently with any federal or other state jail, prison, probation or parole term for another offense to which the defendant is or becomes subject during the period, unless otherwise specified by the Missouri court.
>
> 2. The court may terminate a period of probation and discharge the defendant at any time before completion of the specific term fixed under section 559.016 if warranted by the conduct of the defendant and the ends of justice. Procedures for termination and discharge may be established by rule of court.
>
> 3. If the defendant violates a condition of probation at any time prior to the expiration or termination of the probation term, the court may continue him on the existing conditions, with or without modifying or enlarging the conditions, or, if such continuation, modification, or enlargement is not appropriate, may revoke probation and order that any sentence previously imposed be executed. If imposition of sentence was suspended, the court may revoke probation and impose any sentence available under section 557.011. The court may mitigate any sentence of imprisonment by reducing the prison or jail term by all or part of the time the defendant was on probation.

4. Probation shall not be revoked without giving the probationer notice and an opportunity to be heard on the issues of whether he violated a condition of probation and, if he did, whether revocation is warranted under all the circumstances.

5. At any time during the term of probation the court may issue a notice to the probationer to appear to answer a charge of a violation, and the court may issue a warrant of arrest for the violation. Such notice shall be personally served upon the probationer. The warrant shall authorize the return of the probationer to the custody of the court or to any suitable detention facility designated by the court.

6. Any probation officer, if he has probable cause to believe that the probationer has violated a condition of probation, may arrest the probationer without a warrant, or may deputize any other officer with the power of arrest to do so by giving him a written statement of the circumstances of the alleged violation, including a statement that the probationer has, in the judgment of the probation officer, violated the conditions of his probation. The written statement, delivered with the probationer to the official in charge of any jail or otber detention facility, shall be sufficient authority for detaining the probationer pending a preliminary hearing on the alleged violation.

7. If the probationer is arrested under the authority granted in subsections 5 and 6, he shall have the right to a preliminary hearing on the violation charged. He shall be notified immediately in writing of the alleged probation violation. If he is arrested in the jurisdiction of the sentencing court, and the court which placed him on probation is immediately available, the preliminary hearing shall be heard by the sentencing court. Otherwise, he shall be taken before a judge or magistrate in the county of the alleged violation or arrest having original jurisdiction to try criminal offenses, or before an impartial member of the staff of the Missouri board of probation and parole, and the preliminary hearing shall be held as soon as possible after the arrest. Such preliminary hearings shall be conducted as provided by rule of court or by rules of the Missouri board of probation and parole. If it appears that there is probable cause to believe that the probationer has violated a condition of his probation, or if the probationer waives the preliminary hearing, the judge or magistrate, or member of the staff of the Missouri board of probation and parole shall order the probationer held for further proceedings in the sentencing court. If probable cause is not found, this shall not bar the sentencing court from holding a hearing on the question of the probationer's alleged violation of a condition of probation nor from ordering the probationer to be present at such a hearing. Provisions regarding release on bail of persons charged with offenses shall be applicable to probationers arrested and ordered held under this provision.

8. Upon such arrest and detention, the probation officer shall immediately notify the sentencing court and shall submit to the court a written report showing in what manner the probationer has violated the conditions of probation. Thereupon, or upon arrest by warrant, the court shall cause the probationer to be brought before it without unnecessary delay for a hearing on the violation charged. Revocation hearings shall be conducted as provided by rule of court.

9. The power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

Comments

1. A term of probation commences on the day it is imposed and runs concurrently with other terms of probation imposed in Missouri, irrespective of whether the terms of probation were imposed at the same time or at different times. The court has no power to modify the concurrency of multiple terms of Missouri probation.

In general, a term of probation imposed by a Missouri court will run concurrently with any foreign (federal or state) jail, prison, probation or parole term. However, the Missouri court imposing probation is authorized to modify this by ordering that the term of probation shall run consecutively to the foreign disposition. It does not matter whether the foreign disposition was imposed before or after the commencement of the Missouri probation.

The provisions of subsection 1 are based on the premise that if probation will work it will work in a relatively short period; there is therefore no point in permitting extension of probation beyond the statutory maximum period [§559.016 RSMo.] by making probation periods consecutive. If the circumstances indicate that probation is unlikely to work within the probation term imposed, then the court should consider an alternative disposition.

2. Although under §559.016 RSMo. the court is required to impose a fixed term of probation, this subsection authorizes the court to terminate the probation before completion of this term, the court may terminate probation at any time, even before the minimum probation term specified in §559.016 has elapsed. However, the minimum period of probation should be a factor to be taken into account in evaluating whether termination is warranted "by the conduct of the defendant and the ends of justice." For the previous requirements for early termination of probation, see §549.111 RSMo. [repealed]. Note that termination may only occur with the consent of the court which originally imposed the probation term [§559.031 RSMo.].

Subsection 2 also permits procedures for termination and discharge to be established by rule of court. See limited procedures contained in former §549.111 RSMo. [repealed].

3. Subsection 3 authorizes revocation of probation, but also authorizes continuation of probation, with or without modifying or enlarging existing probation conditions, if it is determined that the defendant has violated a condition of probation. The same authority was previously available under §549.101 RSMo. No revocation should be ordered unless the court is going to order a sentence previously imposed to be executed, or, if imposition of sentence was suspended, is going to impose a sentence available under §557.011 RSMo. *Cf.* pre-Code §549.101(2) RSMo. [repealed]. Under the Code if probation is revoked after sentencing, the court is expected to order that any sentence previously imposed be executed. If imposition of sentence was suspended and the defendant placed on probation, following revocation the court may impose any sentence available under §557.011. This includes the imposition of a sentence the execution of which the court suspends - which requires the imposition of probation under §557.011 2(4) RSMo. [See *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710 (Mo. 1977), for approval of such a scheme.] However, there will not be many cases in which this would be a preferable alternative to a continuation of the original probation.

Special Notes

"Prior to the expiration"	The revocation determination may be made subsequently; see subsection 9.
"The court may continue. . . without modifying or enlarging the conditions"	I.e., the probation may be continued under its existing conditions, or it may be continued subject to modified or enlarged conditions.
"Reducing the prison or jail term"	Granting credit against any existing term of imprisonment, imposed but not executed; granting credit against any term of imprisonment when sentencing is done after revocation. Such reduction is entirely discretionary with the court.

4. Federal constitutional due process protection applies to the revocation of probation. **Gagnon v. Scarpelli,** 411 U.S. 778 (1973), applying **Morrisey v. Brewer,** 408 U.S. 471 (1972). Subsection 4 lays the foundation for ensuring that these due process requirements are met. The probationer must be given notice and an opportunity to be heard on the two major issues involved in probation revocation before probation may be revoked. This provision is in direct contrast with pre-Code §549.101 RSMo. [repealed] which permitted revocation without a hearing. Section 549.101 RSMo. was declared unconstitutional in **Ockel v. Riley,** 541 S.W.2d 535 (Mo. 1976), and had in fact been superseded by procedural requirements insisted upon by the courts. See **Reiter v. Camp,** 518 S.W.2d 82 (Mo. App. 1974).

The two separate issues upon which the probationer must be heard and which the court must decide, are:

(1) Did the probationer violate a condition of probation; and

(2) If he did, is revocation of probation warranted under all the circumstances?

5. Either the court or a probation officer may initiate probation revocation proceedings. Subsection 5 deals with situations where the probation revocation proceedings are formally commenced by the court (although the court may be active in response to a request by a probation officer).

The court may adopt one of two procedures or a combination of them. Once a charge of a probation violation has been placed before it, the court having jurisdiction over the probationer, at any time during the term of probation, may:

(i) issue a notice to the probationer to appear to answer a charge of a violation. This notice must be personally served upon the probationer; *or*

(ii) issue a warrant of arrest for the violation. This warrant must authorize the return of the probationer to the custody of the court, or to any suitable detention facility designated by the court; *or*

(iii) issue a notice to the probationer as in (i) above, and in the event of default issue a warrant of arrest as in (ii).

Special Notes

"During the term of the probation"	See subsection 9 dealing with the power of the court to act beyond the term of probation.
"The court"	I.e., the court having jurisdiction over the probationer, either because it is the original sentencing court, or because it is the court to which jurisdiction has been transferred under §559.031 RSMo.

6. Subsection 6 governs those cases where a probation officer initiates the revocation proceedings by arresting the probationer, or by having him arrested by another officer who has the power to arrest. In either case the arrest may be made without a warrant if the probation officer has *probable cause* to believe that the probationer has violated a condition of probation.

If the probation officer does not carry out the arrest by himself, he may do so by deputizing any other officer with the power to arrest by giving him a written statement of the circumstances of the alleged violation, together with a statement by the probation officer that in his judgment the probationer has violated the conditions of his probation.

A written statement of the type mentioned in the paragraph above will be sufficient authority for detaining the probationer pending a preliminary hearing on the alleged violation, if the statement is delivered with the probationer to the official in charge of any jail or other detention facility.

The Code provisions are similar to those in pre-Code §549.101 RSMo. [repealed]. However, there are some differences:

(1) *Any* probation officer may arrest the probationer or deputize any other officer under the Code provision; previously it had to be a probation officer assigned to or serving the court having jurisdiction.

(2) The provision now specifically states that the probation officer must have probable cause for believing that the probationer has violated a condition of probation.

(3) The notice to another officer being deputized must now contain a statement of the circumstances of the alleged violation *in addition* to the previously required statement that in the probation officer's judgment the defendant has violated his probation.

Subsection 6 permits any probation officer to arrest a probationer from a sister state, the supervision of whom had been undertaken by the Board of Probation and Parole. *Cf.* pre-Code §549.254 RSMo. [repealed].

Three standard procedures for commencing revocation proceedings are set out in subsections 5 and 6:

(a) Where there is no urgency and the circumstances do not warrant the arrest of the defendant, the court may summon (by notice) the probationer to appear before it.

(b) Where there is no urgency but the arrest of the probationer is desired, the court may issue a warrant for arrest.

(c) In cases of urgency, or in the discretion of any probation officer, the probationer may be arrested by the probation officer or by someone deputized by him, without a warrant.

7. As indicated, federal due process protection applies to revocation of probation. The protection includes a right to a preliminary hearing on the probation revocation charges. **Morrissey v. Brewer,**

408 U.S. 471 (1972), applied to probation revocation in **Gagnon v. Scarpelli,** 411 U.S. 778 (1973). The due process protection includes the right to be "notified . . . of the alleged probation violation", the right to appear and speak in his own behalf, the right to present witnesses and documentary evidence to the hearing officer, the right to confront and cross examine adverse witnesses (unless this would subject an unidentified informant to risk of harm), and the right to a summary of the evidence at the preliminary hearing and a statement of reasons for the hearing officer's determination that there is probable cause to hold the probationer for a later revocation hearing. The provisions of subsection 7 provide the framework within which these constitutional requirements can be met. Preliminary probation revocation hearings are to be conducted as provided in rules of court, or rules of the Missouri Board of Probation and Parole.

The decisions of the United States Supreme Court in **Morrissey v. Brewer** and **Gagnon v. Scarpelli** are premised on the assumption that the revocation of probation will be handled by an administrative body, such as the Board of Probation and Parole. However, in Missouri, revocations of probations (as opposed to parole) are handled by a judicial body, the sentencing court.

Subsection 7 attempts to accommodate the Missouri practice and the constitutional requirements.

The purpose of a preliminary hearing in cases of probation revocation is to provide a determination on the question of whether there is probable cause to hold the probationer for a later hearing on the question of revocation. Since there can be a substantial period of time between the arrest of the probationer for an alleged violation of probation and the final determination by the court as to whether probation should be revoked, due process requires that the initial determination of probable cause be made quickly.

Subsection 7 provides that this preliminary hearing is to be held by the sentencing court if

(a) the probationer was arrested in the jurisdiction of the sentencing court *and*

(b) the sentencing court is *immediately* available for a preliminary hearing. Otherwise, the preliminary hearing must be before a judge in the county of the alleged violation or arrest who has original jurisdiction to try criminal offenses *or* before an impartial member of the staff of the Missouri Board of Probation and Parole. Note that this excludes the probation officer who charges that the probationer violated the probation. The preliminary hearing must be held as soon as possible after the probationer's arrest.

If, after preliminary hearing, probable cause is found, or if the probationer waives the preliminary hearing, then the probationer is held to appear at the hearing before the sentencing court. Note, however, that he may be released on bail.

If the preliminary hearing is conducted by someone other than the sentencing court and the decision is that probable cause does not exist, this does not prevent the sentencing court from proceeding on its own motion. The sentencing court may still hold a hearing to determine whether or not the probation should be revoked. However, the probationer cannot be held pending this hearing, as there will have been no finding of probable cause to justify holding him. This provision enables the sentencing court to make the final determination as to the revocation of the probation, no matter what determination is made at the preliminary hearing.

Since the sentencing court may be the body holding both the preliminary hearing and the final hearing, it is arguable that in appropriate circumstances that the two hearings be combined; or more accurately, that if the final hearing can be held quickly enough, then there is no need for the preliminary hearing. Such an approach was approved in **Moore v. Stamps,** 507 S.W.2d 939 (Mo. App. S.L.D. 1974) and **Ewing v. Wyrick,** 535 S.W.2d 442 (Mo. banc 1976). The language of subsection 7 indicates that the preliminary hearing is required in all cases where the probationer has been arrested (with or without a warrant). However, if the probationer can be adequately prepared for the final hearing and the hearing can be held quickly enough to avoid the problem of holding the probationer without a determination of sufficient grounds, then there does not seem to be any reason why the single hearing would not meet the constitutional requirements. A decision to revoke probation made at a final hearing necessarily includes a resolution of the issue of whether or not there was probable cause.

The preliminary hearing under subsection 7 is concerned exclusively with the question of probable cause to believe that the probationer has violated a condition of his probation. The "revocation hearing" under subsections 3, 4 and 8 involves two issues:

(1) The factual issue of whether the probationer did violate a condition of his probation; *and*
(2) The discretionary issue of whether, under all the circumstances, the probation ought to be revoked, or the conditions ought to be modified, enlarged, or left unaltered.

The "revocation hearing" must be held within a "reasonable time" after the preliminary hearing. **Moore v. Stamps,** 507 S.W.2d 939, 950 (Mo. App. 1974).

A probationer arrested *and* ordered held under subsection 7 after a demonstration of probable cause *or* waiver of the preliminary hearing is entitled to be released on bail pending further proceedings in the sentencing court. See §544.455 RSMo. This reverses the pre-Code position [Op. Atty. Gen. No. 219, Sartorius, 8-15-67]. The probationer is not entitled to apply for bail until he is ordered held at the preliminary hearing or until he waives his right to a hearing.

Special Notes

"sentencing court"	I.e., "the court which places him on probation" when subsection 7 fixes venue for the preliminary hearing. "Sentencing court" as used later in subsection 7, for purposes of the "revocation hearing", means *either* the original court which placed him on probation *or* the court to which probation jurisdiction was transferred under §559.031 RSMo. See §559.031 RSMo., which grants authority to revoke probation to the transferee court.
"impartial member of the staff"	This precludes the probation officer who is responsible for the arrest or supervision of the probationer from making the probable cause determination.
"waives the preliminary hearing"	A waiver that is formally obtained before the court or hearing officer, which is obtained in writing or on the record.
"ordered held"	This may occur either following a preliminary hearing or following waiver of the hearing, when the probationer is entitled to release on bail. Bail is not an issue if the probationer is required to attend the revocation hearing following subsection 5 notice from the court or a court order under subsection 7 after a finding of "no probable cause".

8. Where the probation officer or his deputy arrests the probationer without a warrant under subsection 6, the probation officer is required to notify the sentencing court (or the court exercising its jurisdiction under §559.031 RSMo.) immediately about the arrest and detention of the probationer. The probation officer must also submit a "written report" to the court setting out the manner in which the probationer allegedly violated the conditions of probation. The "written statement" under subsection 6 may suffice for this purpose if the "circumstances of the alleged violation" are sufficiently detailed to provide a basis for the revocation hearing.

Upon receiving this written report, *or* where the probationer has been arrested by virtue of a warrant issued under subsection 5, the court must require the probationer to be brought before it without unnecessary delay for the probation revocation hearing.

Special Notes

"hearing on the violation charged"	The "violation charged" as found in the "written report showing in what manner the probationer has violated the conditions of [his] probation". Due process notice requirements prevent the court from considering other violations at the hearing; the probationer must be given an adequate opportunity to formulate and present a response to the "violation charged" at the hearing. If the probation officer wishes to amend the "violation charged" in his written report, adequate notice and additional time must be granted to prepare any defense to the new charge(s).

9. Subsection 9 empowers the court to revoke probation not only during the term of probation but under certain conditions, also subsequent to its expiration date. Probation may only be revoked subsequent to its expiration

(i) during a period reasonably necessary for the adjudication of matters arising before expiration,

(ii) provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the term of probation, and

(iii) provided that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the term.

Subsection 9 deals with the type of situation considered in **State ex rel. Carlton v. Haynes,** 552 S.W.2d 710 (Mo. 1977), where the alleged violation occurs near the end of the probation term, and probation is likely to expire before a revocation hearing can be held. The right to hold the hearing is protected as long as the attempt to give notice and to hold the hearing is commenced quickly and pursued diligently. Assuming that these conditions are met, the court may revoke probation during any additional period, beyond the probation term, that is reasonably necessary to properly adjudicate the charged violation.

Special Note

"Affirmative manifestation" The issuance of a warrant of arrest for the violation or a notice for the probationer to appear for a revocation hearing under subsection 5 would be an "affirmative manifestation". Also, if any probation officer deputizes another officer to make an arrest by giving him a "written statement" under subsection 6, this would manifest an intent to hold a revocation hearing following arrest.

CHAPTER 5

Fines
(§§560.011-560.036)

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5.1 Introduction

This chapter deals with the permissible range of fines that can be imposed upon conviction, and provides for the possibility of measuring the fine in relation to the amount of gain resulting from the commission of the offense. This chapter also deals with limitations on the use of fines and policy considerations to be followed in determining whether a fine is appropriate punishment.

5.2 Fines for Felonies (§560.011)

Code

1. A person who has been convicted of a class C or D felony may be sentenced
   (1) To pay a fine which does not exceed five thousand dollars; or
   (2) If the offender has gained money or property through the commission of the crime, to pay an amount, fixed by the court, not exceeding double the amount of the offender's gain from the commission of the crime. An individual offender may be fined not more than twenty thousand dollars under this provision.
2. As used in this section the term **"gain"** means the amount of money or the value of property derived from the commission of the crime. The amount of money or value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed shall be deducted from the fine. When the court imposes a fine based on gain the court shall make a finding as to the amount of the offender's gain from the crime. If the record does not contain sufficient evidence to support such a finding, the court may conduct a hearing upon the issue.
3. The provisions of this section shall not apply to corporations.

Comments

This section specifies the maximum fine that can be imposed on a person or organization, but not a corporation (see subsection 3 and §560.021 RSMo), as punishment for a class C or D felony.

1. Ordinarily such a fine may not exceed $5,000. However, a higher limit is fixed if the offender gained money or property through commission of the crime. In such "gain" cases the court may impose a fine not exceeding double the amount of the offender's "gain", subject to an upper limit of $20,000 in the case of an individual.

2. Subsection 2 defines "gain" for purposes of this section, as well as for purposes of §560.016 and §560.021 RSMo., to be the amount of money or value of property derived from commission of the crime. If the offender obtained money or property *because* of commission of the crime, all the money or property obtained is "gain".

The amount of money or value of property returned to the victim of the offense or seized by or surrendered to lawful authority prior to the time sentence is imposed must be deducted from *a fine based on gain*.

When a court imposes a fine based on the "gain", it is required to make a specific finding as to the amount of the gain. If the record is inadequate for this purpose, the court is authorized to conduct a hearing on the issue.

The appropriate procedure for imposing a "gain" based fine is as follows:

(i) Determine the amount of the "gain" - i.e., the value of property or the amount of money obtained because of commission of the offense. If necessary, a hearing should be held on the issue.

(ii) Double the "gain" to find the maximum fine that may be imposed by the court.

(iii) Decide on an appropriate fine which may not exceed the *lesser* of the amount calculated in (ii) or $20,000 for an individual offender. In fixing an appropriate fine the court must consider the provisions of §560.026 RSMo. which set out certain limitations & policies applicable to fines.

(iv) Deduct from the amount in (iii) the value of any property or the amount of money returned to the victim, or seized by or surrendered to authorities before sentence is imposed.

This section establishes the basis for imposing substantial fines for the less serious felonies. Under pre-Code law a fine could not be imposed for any felony unless authorized in the statute defining the offense, and generally such fines were limited to $1,000.

Class A and B felonies are too serious to permit punishment by fine (except as to corporations, §560.021 RSMo.). In general, if the court considers a sentence to the division of corrections appropriate for a class C or D felony, the felony is so serious that a fine will be inappropriate. See pre-Code Missouri felony provisions under which a fine is an alternative considered equivalent to a jail term and could only be imposed in place of or in addition to a jail term for a felony. Pre-Code section 546.470 RSMo. (repealed) prohibited any fine in addition to a sentence of imprisonment in the penitentiary. The Code does not prohibit a fine in addition to such a sentence.

Special Notes

"Individual offender"	A fine imposed on an organization is not limited to $20,000 in a "gain" case.
"Value"	See the definition in §570.020 RSMo., restricted to purposes of Chapter 570. Value to the offender at the time the property is obtained, or its later increased value if it goes up in value prior to the sentencing determination of value, is the appropriate measure in order to prevent any profit from commission of the offense. If "gain" is measured in terms of "value" at the time of sentencing, then the offender should be given credit for the "value" at that time of any property returned to the victim, or seized by or surrendered to lawful authority.
"Derived from"	It is "gain" obtained *because* of the offense that provides the basis for the "double the gain" fine. Thus *increased* value of property obtained by means of an offense is "derived from" the offense. Interest paid by a bank on the money stolen by an offender is "derived from" the theft. Under this interpretation the offender's "gain" is measured as of the time of commission of the crime or at the time of the sentencing, whichever is greater.
"Prior to the time of sentence"	Property recovered after sentence cannot be taken into account directly. However, the offender who returns property later may be able to obtain relief under §560.036 RSMo.

"Deducted from the fine"	Only from a fine based on gain. Unless the court makes a finding as to the amount of "gain" and specifically "imposes a fine based on gain", there is no basis for this required deduction.
"Sufficient evidence"	This involves an issue of availability of evidence in "the record" - i.e., evidence already brought to the court's attention - sufficient to make a determination of "gain". The prosecution has the burden of presenting such evidence to the court in any case in which a "double the gain" fine is to be considered.
"Hearing"	A sentencing hearing, subject to the normal standards for hearings at which findings are made that affect the sentence.

Note: non-Code felonies for which a penalty is specified that does not include a fine cannot be punished by a fine. See §557.011(1) RSMo. "Double the gain" fines are not authorized as to persons convicted of non-Code felonies.

5.3 Fines for Misdemeanors and Infractions (§560.016)

Code

1. Except as otherwise provided for an offense outside this code, a person who has been convicted of a misdemeanor or infraction may be sentenced to pay a fine which does not exceed:
   (1) For a class A misdemeanor, one thousand dollars;
   (2) For a class B misdemeanor, five hundred dollars;
   (3) For a class C misdemeanor, three hundred dollars;
   (4) For an infraction, two hundred dollars.
2. In lieu of a fine imposed under subsection 1, a person who has been convicted of a misdemeanor or infraction through which he derived "gain" as defined in section 560.011, may be sentenced to a fine which does not exceed double the amount of gain from the commission of the offense. An individual offender may be fined not more than twenty thousand dollars under this provision.

Comments

When an individual or organization (not a corporation) is convicted of a non-Code misdemeanor or infraction, the maximum fine which may be imposed will be that specified in the statute defining the offense §557.011(1) RSMo. A great many misdemeanors and infractions are not included in the Code.

1. In all other cases (including non-Code misdemeanors which do not specify the penalty) the maximum fine which may be imposed is fixed by subsection 1, subject to the "double the gain" provisions in subsection 2.

The dollar limits for class A and B misdemeanors are consistent with the limits fixed in many pre-Code and non-Code misdemeanor statutes.

2. The operation of the "double the gain" provision is discussed in §560.011 above. The cross reference to "gain" as defined in §560.011 includes all provisions in §560.011(2). Therefore, the court must make a finding as the the amount of "gain" and must deduct from the "gain fine" the amount of money or value of property returned, seized, or surrendered.

5.4 Fines for Corporations (§560.021)

Code

1. A sentence to pay a fine, when imposed on a corporation for an offense defined in this code or for any offense defined outside this code for which no special corporate fine is specified, shall be a sentence to pay an amount, fixed by the court, not exceeding:
   (1) Ten thousand dollars, when the conviction is of a felony;
   (2) Five thousand dollars, when the conviction is of a class A misdemeanor;
   (3) Two thousand dollars, when the conviction is of a class B misdemeanor;
   (4) One thousand dollars, when the conviction is of a class C misdemeanor;
   (5) Five hundred dollars, when the conviction is of an infraction;
   (6) Any higher amount not exceeding double the amount of the corporation's gain from the commission of the offense, as determined under section 560.011.
2. In the case of an offense defined outside the code, if a special fine for a corporation is expressly specified in the statute that defines the offense, the fine fixed by the court shall be
   (1) An amount within the limits specified in the statute that defines the offense; or
   (2) Any higher amount not exceeding double the amount of the corporation's gain from the commission of the offense, as determined under section 560.011.

Comments

This section controls the amount of any fine to be imposed on a corporation, as follows:

1. Subsection 1 fixes the maximum fine that may be imposed by the court in the case of an offense *defined in the Code*. The fine is the principal punishment employed against corporations. Accordingly, it is made available as punishment for all categories of felonies. In addition, in order to prevent corporations from violating the law and then "passing on" any resulting fine as a cost of doing business, the Code provides for fines based on the "gain" to the corporation from commission of the offense. Note, there is no maximum limit on corporate fines based on double the amount of gain. Note the obligation placed by §560.031(4) RSMo. on persons authorized to make disbursements from corporate assets, and their superiors, to see that a fine against a corporation is paid.

Subsection 1 also fixes the maximum fine that may be imposed in the case of any offense *defined outside the Code for which no special corporate fine is specified*. The maximum fine that may be imposed is shown in the following table.

Class of offense	Maximum fine		
Felony	$10,000	OR	Double the "gain" without any limit
Misdemeanor	The amount stated in the statute defining the offense	OR	Double the "gain" without any limit
Infraction	$500	OR	Double the "gain" without any limit

Subsection 1 sets a maximum limit of $10,000 for any felony and a maximum of $500 for any "infraction" for which no special corporate fine is specified. Since non-Code misdemeanors are not classified in terms of A, B, or C misdemeanors, the limit for non-Code misdemeanors is that provided in the non-Code statute (or double the gain).

Note that "double the gain" fines without limit are available as to all classes of offenses for which no special corporate fine is specified.

2. Subsection 2 fixes the maximum fines that may be imposed in the case of an offense *defined outside the Code if a special fine for a corporation is expressly specified* in the statute defining the offense. The fine fixed by the court must be

(1) With the range specified in the statute that defines the offense; *or*

(2) Any amount not exceeding double the "gain" to the corporation from the commission of the offense - without any maximum.

The cross reference to "gain" as determined under §560.011 includes all provisions in §560.011(2). Therefore the court making a finding as to the amount of "gain" must deduct from the "gain fine" the amount of money or value of property returned, sezied, or surrendered.

In all cases of offenses by corporations, whether defined in or outside the Code, the "double the gain" provisions apply.

5.5 Imposition of Fines (§560.026)

Code

1. In determining the amount and the method of payment of a fine, the court shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of an individual. The court shall not sentence an offender to pay a fine in any amount which will prevent him from making restitution or reparation to the victim of the offense.

2. When any other disposition is authorized by statute, the court shall not sentence an individual to pay a fine only unless, having regard to the nature and circumstances of the offense and the history and character of the offender, it is of the opinion that the fine alone will suffice for the protection of the public.

3. The court shall not sentence an individual to pay a fine in addition to any other sentence authorized by section 557.011, RSMo., unless

(1) He has derived a pecuniary gain from the offense; or

(2) The court is of the opinion that a fine is uniquely adapted to deterrence of the type of offense involved or to the correction of the defendant.

4. When an offender is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, the fine shall be payable forthwith.

5. When an offender is sentenced to pay a fine, the court shall not impose at the same time an alternative sentence to be served in the event that the fine is not paid. The response of the court to nonpayment shall be determined only after the fine has not been paid, as provided in section 560.031.

Comments

1. Subsection 1 requires the court to take into account, in fixing the amount and method of payment of a fine, the burden that payment will impose having regard to the financial resources of the individual offender. It recognizes that a fine may be burdensome in two ways:

(i) in the amount which the individual is called upon to pay; and

(ii) in the method by which he is required to pay it.

Subsection 1 also recognizes that imposition of a fine may place the state in competition with the victim for the offender's resources and might prevent the offender from making restitution or reparation to the victim. In such cases it establishes the clear priority of the victim by stipulating that the amount of the fine shall not be so large that it will prevent the offender from making reparation or restitution to the victim.

Note the options available under subsection 4 to adjust fines to avoid undue burdens.

Subsection 1 further reflects the established practice in Missouri (see **Hendrix v. Lark,** 482 S.W.2d 427 (Mo. 1972)) that it is inappropriate to fine an indigent person.

2. Subsection 2 prohibits the imposition of a fine *alone* if any other disposition is authorized, *unless,* having regard to the nature and the circumstances of the offense and to the history and character of the defendant [see §557.036(1) RSMo.] the court is of the opinion that the fine alone will suffice for the protection of the public. This provision does not require the court to always imprison as well as fine an offender, or just imprison him, in any felony or misdemeanor case in which a fine is authorized. The provision speaks of "other disposition" and among the other dispositions available under §557.011 is placing the defendant on probation without imposing any sentence, or sentencing the defendant to pay a fine "and suspend its execution, placing the person on probation" or sentencing the defendant to pay a fine and to a term of imprisonment, followed by suspension of execution of the sentence during a term of probation.

Special Notes

"disposition"	See §557.011 RSMo. for the authorized dispositions under the Code.
"protection of the public"	Because the court is required to have regard to the nature and circumstances of the offense as well as the history and character of the offender, this language requires the court to inquire whether the public will be sufficiently protected from this offender, by imposition of a fine alone. The court should also consider the possible effect on others who are likely to commit the offense if a "fine alone" is the only punishment to be expected. However, primary emphasis should be on the specific offender.

3. Subsection 3 prohibits a court from sentencing an individual to pay a fine *in addition* to any other sentence *unless*

(1) the offender derived pecuniary gain from the offense; *or*

(2) the court is of the opinion that a fine is uniquely adapted to deterrence of the type of offense involved or to the correction of the defendant.

In part this provision reflects the approach of pre-Code §546.470 RSMo. [repealed] which prohibited the imposition of a fine where the defendant was sentenced to the penitentiary. However, where the offender has profited substantially from the offense, a fine may be necessary in addition to any other sentence in order to deny the offender his "gain".

It should be noted that subsection 3 refers to "any other sentence", not "disposition", so that the prohibition of a fine in addition to "any other sentence" does not apply if the defendant is fined and then placed on probation. Probation is not *another* "sentence" if execution of the fine imposed is then suspended and the offender placed on probation. On the other hand, suspending execution of a jail or prison term and coupling this with probation is another "sentence" and imposing a fine in addition is prohibited unless one of the two conditions in subsection 3 is met.

Because the impact and rehabilitative value of a fine is uncertain, both subsections 2 and 3 are designed to discourage imposition of fines unless there is some positive reason indicating that a fine is particularly appropriate in the case before the court. The Code requires the consideration of the other sentencing alternatives available under the Code and to determine which of these alternatives should be applied to the particular offender. Because of these special limitations with regard to imposition of fines, no jury sentencing or jury recommendation is permitted as to fines. See §557.036(3) RSMo.

Special Notes

"Sentence"	Not all dispositions authorized by §557.011 RSMo. are "sentences". Probation per se cannot be imposed, but if imposed in conjunction with a sentence to pay a fine, the execution of which is suspended, it does not amount to another "sentence".
"Pecuniary"	Any financial advantage will suffice even if it is not quantifiable.
"Uniquely"	Must be analyzed in terms of a fine's ability to "deter" or "correct". It will often be "uniquely adapted" where the offender derived pecuniary gain from the offense.

4. In principle a fine is payable immediately, as stated in subsection 4, *unless* the court in sentencing the defendant

(i) gives the defendant a specified period of time in which to pay the fine; or

(ii) allows the defendant to pay the fine by installments fixed by the court.

Combinations of (i) and (ii) permit the court to fix the time for the first installment and to set up a system of deferred installments. See subsection 1, requiring the court to determine the amount "and the method of payment" and proportioning "amount" and "method" to the burden on the offender. The provisions of subsection 4 provide flexibility to meet the requirements of subsection 1.

The provision for deferred or installment payments essentially formalizes existing practices [see, e.g., **Hendrix v. Lark,** 482 S.W.2d 427 (Mo. 1971); Op. Atty. Gen. Nos. 213 & 252, Baker & Paden, 10-27-71.]

Special Notes

"When the offender is sentenced" Provision for specified installments or for payment in full to be made within a specified period *must* be made at the time of sentencing, or the fine "shall be payable forthwith". Sections 560.031(3) and 560.036 RSMo. provide means for allowing additional time to pay and for reducing the amount of the fine or of each installment.

"may provide" Granting time to pay or specifying installment payments is discretionary. However, considering the subsection 1 requirements, it may be necessary for the court to provide for payment to be made later or in specified installments, in order to impose a substantial fine that is not too burdensome.

5. Subsection 5 requires that the court's response to nonpayment of a fine must be determined only when and if the fine is not paid. In particular, the court may not, at the time of imposition of a fine, impose an alternative sentence to be served in the event that the fine is not paid. The approach to be followed in the event of nonpayment of a fine is set out in §560.031 RSMo.

The principle underlying this provision is found in **Tate v. Short,** 401 U.S. 395 (1971), followed by the Missouri Supreme Court in **Hendrix v. Lark,** 482 S.W.2d 427 (Mo. 1971). These cases pointed out that the impact of a "jail as an alternative to fine" system was to discriminate in favor of the wealthy and to deny the constitutional right of the poor to equal protection of the law. Thus an indigent person may not be held in or committed to jail for his involuntary nonpayment of a fine and costs, formerly permitted under pre-Code §§543.270 and 546.830 RSMo. (both repealed).

Special Notes

"Alternative sentence" another sentence, e.g., so many days in jail, or one day's imprisonment for every $X, if the fine and costs are not paid by a certain time. Subsection 5 also prohibits any sentence designed to circumvent the nondiscrimination law; e.g., a sentence to jail along with a sentence to pay a fine, with probation conditioned upon payment by a certain date of part of the fine and the costs in the case. This would not be an "appropriate combination" of dispositions authorized by §557.011 RSMo.

"Fine is not paid" The same principle applies when costs in the case are not paid. See repealed sections 546.830 and 546.850 RSMo., requiring imprisonment for nonpayment of costs but providing for relief by oath of insolvency "after . . .twenty days' imprisonment".

5.6 Response to Nonpayment (§560.031)

Code

1. When an offender sentenced to pay a fine defaults in the payment of the fine or in any installment, the court upon motion of the prosecuting attorney or upon its own motion may require him to show cause why he should not be imprisoned for nonpayment. The court may issue a warrant of arrest or a summons for his appearance.

2. Following an order to show cause under subsection 1, unless the offender shows that his default was not attributable to an intentional refusal to obey the sentence of the court, or not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for

payment, the court may order the defendant imprisoned for a term not to exceed one hundred eighty days if the fine was imposed for conviction of a felony or thirty days if the fine was imposed for conviction of a misdemeanor or infraction. The court may provide in its order that payment or satisfaction of the fine at any time will entitle the offender to his release from such imprisonment or, after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of the fine.

3. If it appears that the default in the payment of a fine is excusable under the standards set forth in subsection 2, the court may enter an order allowing the offender additional time for payment, reducing the amount of the fine or of each installment, or revoking the fine or the unpaid portion in whole or in part.

4. When a fine is imposed on a corporation it is the duty of the person or persons authorized to make disbursement of the assets of the corporation and their superiors to pay the fine from the assets of the corporation. The failure of such persons to do so shall render them subject to imprisonment under subsections 1 and 2.

5. Upon default in the payment of a fine or any installment thereof, the fine may be collected by any means authorized for the enforcement of money judgments.

Comments

1. In the event an offender fails to pay a fine, the court may require him to show cause why he should not be imprisoned for nonpayment, following the procedures in this section. The court may act on its own motion or on the motion of the prosecuting attorney. The court is authorized to initiate the "show cause" process by

(i) summoning the defaulter to appear; *or*

(ii) issuing a warrant of arrest.

In the absence of some indication that he is intentionally refusing to pay, it would be inappropriate for the court to order the arrest of the defendant without previously having summoned him to appear. Nonpayment should not be considered prima facie evidence of intentional refusal to obey the sentence of the court for this purpose.

If the defendant is arrested to be held pending a hearing on the order to show cause, the court should immediately consider provision for his release on personal recognizance or other condition that will reasonably assure appearance. See §544.455 RSMo. While §560.031 does not specifically provide for bail, this is a "warrant authorized by law to be issued in [a] criminal case", §544.030 RSMo., and this is a "stage of the proceedings against him" within the meaning of §544.455 RSMo.

2. Subsection 2 is deceptive; it appears to require the defendant, forced to show cause, to prove two negatives: that his failure to pay the fine or any installment

(i) was not a consequence of an intentional refusal on his part, *and*

(ii) was not a consequence of a failure on his part to make a good faith effort to obtain the necessary funds.

However, in fact, the proceeding is a criminal contempt proceeding, carrying the possibility of a jail term not exceeding 180 days if the conviction was of a felony, and 30 days if the fine was imposed for a misdemeanor conviction.

Because of the contempt-like character of the hearing, the offender is entitled to fair notice of the charge(s), a reasonable opportunity to defend against them with the assistance of counsel, the right to call witnesses and to confront and cross-examine the witnesses against him. Although the burden of coming forward with evidence on negatives (i) and (ii) is placed on the defendant, he cannot be compelled to testify. There is no right to a jury trial in this proceeding. **Cheff v. Schnackenberg,** 384 U.S. 373 (1966).

Once the defendant has presented some evidence to the court which supports his lack of culpability in not paying the fine, the burden rests on the state to prove his culpability beyond a reasonable doubt. The court must find that the defendant has "shown cause" if a reasonable doubt is raised at the hearing as to the defendant's culpability. *Cf.* **Chemical Fireproofing Corp. v. Bronska,** 553 S.W.2d 710 (Mo. App. SLD 1977); **Ramsay v. Grayland,** 567 S.W.2d 682 (Mo. App. SLD, 1978).

If the court finds the defendant's failure to pay to be cuplable in terms of either (i) or (ii) above and orders imprisonment, at the time of imposition of a jail term it may provide that payment of the fine at any time during the term will entitle the offender to release. Alternatively, the court, at a time subsequent to making the order for imprisonment, may reduce the length of the term of imprisonment imposed for good cause shown. The statute specifically provides that payment or satisfaction of the fine is good cause; however, the court has discretion whether to reduce the sentence upon a showing of good cause. The extent of the defendant's contempt is a relevant issue in deciding whether or not to reduce the sentence.

The defendant may be imprisoned under subsection 2 for a period which may exceed the maximum period for which he might be imprisoned for the offense committed. This does not deny equal protection as the defendant is being imprisoned for culpable nonpayment, not for committing the substantive offense. Note that up to 30 days imprisonment is authorized for refusal to pay even in infraction cases, in which no imprisonment could be imposed initially. [§556.021(1) RSMo.].

In deciding whether or not to impose imprisonment under this section, the court should bear in mind that in some cases the fine may be collected by means of seizure and sale as authorized in subsection 5. (See State **ex. rel. Stanhope v. Pratt**, 533 S.W.2d 567 at 575 (Mo. 1976)).

3. If a reasonable doubt is raised as to the offender's culpability in not paying the fine or fine installment, the court is authorized to

(1) give the offender additional time to pay;
(2) reduce the amount of the fine;
(3) reduce the amount of each future installment;
(4) revoke the entire fine;
(5) revoke the unpaid portion of the fine in whole or in part.

It should be noted that this provision does not permit the court to allow the defendant to pay by installments if such a method of payment was not authorized at the time of imposition of the fine [see §560.026(4) RSMo.]. Such authority is, however, provided by §560.036 RSMo., following the defendant's petition to revoke the fine. Subsection 3 provides flexibility in modifying the fine or method of payment in respect of a non-culpable offender who may not be imprisoned for his debt. See **Tate v. Short,** 401 U.S. 395.

4. Subsection 4 imposes a positive duty on the persons authorized to make disbursements from the assets of a corporation (e.g., a treasurer), and on any of their superiors, to insure that a fine imposed on the corporation is paid. Such persons would be subject to the same proceedings as an individual offender under subsections 1 and 2, and would correspondingly be in a position to have their non-culpability established under subsection 2. If the court finds that their nonpayment was not excusable under subsection 2, they would be subject to imprisonment in the same manner as individual offenders.

The effect of this provision is to deny the shield of corporate personality to the officers of the corporation who are *together* authorized to make disbursement of the assets of the corporation.

5. Subsection 5 authorizes the use of civil process for the collection of fines. In general, this will involve seizure and sale (see Chapter 513 RSMo.). Consideration should be given to this technique as an alternative to attempting to collect fines by the coercive technique of imprisonment under subsection 2. Seizure and threatened sale of property may force the defendant to pay the fine in order to avoid a sale and resulting costs. A finding that the defendant intentionally refused to obey the sentence of the court, or failed to make a good faith effort to obtain the neceesary funds for payment, is *not* required in order to proceed with collection by means authorized for enforcement of money judgments.

5.7 Revocation of a Fine (§560.036)

> A defendant who has been sentenced to pay a fine may at any time petition the sentencing court for a revocation of a fine or any unpaid portion thereof. If it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine no longer exist or that it would otherwise be unjust to require payment of the fine, the court may revoke the fine or the unpaid portion in whole or in part or may modify the method of payment.

Comments

A person sentenced to pay a fine may petition the sentencing court at any time after sentencing to
(1) revoke the entire fine;
(2) revoke any unpaid portion of the fine.
If the court is satisfied that
(a) the circumstances which warranted the imposition of the fine no longer exist, *or*
(b) that it would otherwise be unjust to require payment of the fine, it may
(i) revoke the entire fine;
(ii) revoke the unpaid portion of the fine, in whole or in part;
(iii) modify the method of payment [see §560.026(4) RSMo.].

This section provides a method of bringing relief to a defendant on whom a fine has been imposed, at his own initiative [contrast §560.031(1) RSMo., requiring the initiative of the prosecutor or the court]. It is particularly suited for use in the case of changed circumstances or mistake. Even though the defendant is required to petition for revocation of the entire fine or the unpaid portion to bring the matter before the court, the situation may simply call for modification of the method of payment by the court.

Special Note

"unjust to require payment of the fine" I.e., the entire fine or any portion of it.

CHAPTER 6

Collateral Consequences of Conviction (§§561.016-561.026)

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6.1 Introduction

The approach of the Code in this chapter is based on the premise that all persons are "civilly alive" but may be deprived of certain privileges of citizenship because of conviction of a crime. This is in sharp contrast to the pre-Code law. Missouri's pre-Code approach was based on the common law and pre-Code §222.010 which provided that a sentence of imprisonment for a felony suspended all civil rights, and in the case of a life sentence, the person so convicted was deemed to be "civilly dead." That approach obviously required knowledge of what all the "civil rights" were. Further, it required researching the common law cases and the various statutory and case law exceptions to the suspension of civil rights that were created.

Under the Code, all disqualifications and disabilities which are not necessarily incident to the execution of the sentence must be expressly listed. By defining these disqualifications and disabilities and stating when they apply, much confusion is avoided.

To determine which statutes have been repealed by the Code please see the **Major Changes** section in the following paragraphs.

6.2 Basis of Disqualification or Disability (§561.016)

Code

1. No person shall suffer any legal disqualification or disability because of a finding of guilt or conviction of a crime or the sentence on his conviction, unless the disqualification or disability involves the deprivation of a right or privilege which is
   (1) Necessarily incident to execution of the sentence of the court; or
   (2) Provided by the constitution or the code; or
   (3) Provided by a statute other than the code, when the conviction is of a crime defined by such statute; or
   (4) Provided by the judgment, order or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived.
2. Proof of a conviction as relevant evidence upon the trial or determination of any issue, or for the purpose of impeaching the convicted person as a witness, is not a disqualification or disability within the meaning of this chapter.

Major Changes

This section covers the matters contained wholly or partially in pre-Code §222.010-State prison sentence, effect on civil rights; §222.020-Convict under protection of and amenable to law; §222.030-

Pardon removes disabilities; §549.111-Absolute discharge of person on probation or parole-citizenship restored-Order of discharge to indicate restoration of rights; §556.300-Conviction not to work corruption of blood; §559.470-Citizenship lost by conviction of certain crimes.

Source

This section is based on Model Penal Code §306.1 and Proposed New Jersey Penal Code §2C:51-1 (1971).

Comments

Subsection 1(1) preserves disabilities necessarily incident to execution of the sentence. A person who is in prison would not be permitted to engage in acts inconsistent with incarceration; *e. g.*, he obviously could not continue any outside employment. Chapter 460 RSMo. on estates of convicts would continue to apply and require appointment of a trustee in most situations in which a convict is sued or wishes to sue while in prison. See §460.100 RSMo. If the convict is a litigant, he would still have to obtain a writ of habeas corpus in order to leave prison to testify.

Subsection 1(2) recognizes that either the Constitution or the Code may require a specific legal disability. *E. g.*, Mo. Const. art. VIII §2 provides that "No . . . person . . . while confined in any public prison shall be entitled to vote . . ."

Subsection 1(3) permits retention of any provisions outside of the Code, wherever they might be, which make disqualification or disability a penalty for an offense defined by such statute. Most of the pre-Code disqualification and disability statutes are repealed and replaced by the Code provisions.

Subsection 1(4) allows a deprivation when it is provided in a judgment, order or regulation of a court, agency or official exercising jurisdiction conferred by law, whenever the commission of the crime or the conviction or the sentence "is reasonably related" to the competency of the offender to exercise the right or privilege of which he is deprived. This is the most important provision in this section. The pre-Code law sometimes contained blanket restrictions against employment in certain regulated areas of persons convicted of crimes.

6.3 Forfeiture of Public Office - Disqualification (§561.021)

Code

1. A person holding any public office, elective or appointive, under the government of this state or any agency or political subdivision thereof, who is convicted of a crime shall forfeit such office if
   (1) He is convicted under the laws of this state of a felony or under the laws of another jurisdiction of a crime which, if committed within this state, would be a felony; or
   (2) He is convicted of a crime involving misconduct in office, or dishonesty; or
   (3) The constitution or a statute other than the code so provides.
2. Except as provided in subsection 3, a person convicted under the laws of this state of a felony or under the laws of another jurisdiction of a crime which, if committed within this state, would be a felony, shall be ineligible to hold any public office, elective or appointive, under the government of this state or any agency or political subdivision thereof, until the completion of his sentence or period of probation.
3. A person convicted under the laws of this state or under the laws of another jurisdiction of a felony connected with the exercise of the right of suffrage shall be forever disqualified from holding any public office, elective or appointive, under the government of this state or any agency or political subdivision thereof.

Major Changes

This section covers matters previously covered by the following pre-Code sections:
§129.420 - Persons convicted to forfeit citizenship;
§498.230 - Commissioner shall forfeit his office;
§557.490 - Conviction for perjury forfeits citizenship;
§558.130 - Conviction - effect of;
§560.610 - Forfeiture of civil rights on conviction or imprisonment in certain cases;
§561.340 - Loss of citizenship by conviction of certain felonies;
§564.710 - Convicted persons disfranchised.

Source

This section is based primarily on §306.2 of the Model Penal Code.

Comments

This section mandates forfeiture of any public office, elective or appointive, state or municipal, upon a conviction of any felony, any crime involving malfeasance in office, or of any crime involving dishonesty. In addition, where the Constitution or a statute outside the Code so provides, the office is forfeited.

Note that public employees, as distinguished from public officers, are not covered by this section.

6.4 Disqualification from Voting and Jury Service (§561.026)

Code

Notwithstanding any other provision of law, a person who is convicted:
(1) Of any crime shall be disqualified from registering and voting in any election under the laws of this state while confined under a sentence of imprisonment;
(2) Of a felony connected with the exercise of the right of suffrage shall be forever disqualified from registering and voting;
(3) Of any felony shall be forever disqualified from serving as a juror.

Major Changes

This section covers material previously contained in pre-Code §556.030-Infamous crime; §564.710-Convicted persons disfranchised; §560.610-Forfeiture of civil rights on conviction; §558.130-Conviction, effect of; and §559.470-Citizenship lost by conviction of crimes.

Source

This section is based on Model Penal Code §306.3, Kansas Criminal Code §21-4615 (1970), Ill. Unified Corrections Code Ch. 38, §1005-5-5 (1973), Oregon Revised Statutes §137.240 (1961), and Proposed New Jersey Penal Code §2C:51-3 (1971).

Comments

Under pre-Code law only persons convicted of certain felonies "or of a misdemeanor involving moral turpitude" were disqualified from serving as jurors. See pre-Code §§494.020, 557.490, 559.470, 560.610 and 561.340 RSMo. Some felons lost their right to hold public office or to vote without losing their right to serve as a juror, except while imprisoned. See pre-Code §§558.130 and 564.710 RSMo. Many felons lost no

civil rights at all, except while imprisoned, because they were not convicted of one of the designated felonies. Persons convicted of only one felony usually regain their right to serve as a juror almost automatically without any pardon by the governor. See pre-Code §§216.355 and 549.111 RSMo. There was no "waiting period" when a disqualified felon was released from judicial probation or parole. First offenders discharged from prison under the three-fourths rule regained their civil rights automatically after two years, and they regained them immediately if they were paroled and successfully completed parole. Pre-Code §494.020 RSMo. which appears to make "any person convicted of a felony" ineligible to serve as a juror, only applies until "such person has been restored to his civil rights." Many felons sentenced to prison regained their civil rights as soon as the term expired under pre-Code §222.010 RSMo, and many convicted felons never lost their rights.

Note that the Code excludes all convicted felons from jury service forever.

CHAPTER 7

General Principles of Liability (§§562.011—562.086)

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7.1 Introduction

This chapter deals with provisions which are generally applicable to all offenses. It covers some of the basic concepts for criminal liability, such as the concepts of "act" and "criminal intent" and responsibility for the conduct of another person. It also deals with several matters that are commonly thought of as defenses, such as mistake, entrapment, duress, effect of intoxication, infancy and lack of responsibility because of mental disease or defect. For the most part, the Code provisions in this chapter are restatements of pre-Code law, but much of that law, particularly dealing with the basic concepts underlying criminal liability, was not covered fully or at all by pre-Code statutes. Note there are some significant changes in pre-Code law, but the basic concepts are the same.

7.2 Voluntary act (§562.011)

Code

1. A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act.

2. A "**voluntary act**" is
   (1) A bodily movement performed while conscious as a result of effort or determination; or
   (2) An omission to perform an act of which the actor is physically capable.

3. Possession is a voluntary act if the possessor knowingly procures or receives the thing possessed, or having acquired control of it was aware of his control for a sufficient time to have enabled him to dispose of it or terminate his control.

4. A person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law.

Comments

This section is based on the Illinois Code, Ch. 38, §§4-1, 4-2; the New York Penal Law §§ 15.00, 15.05; and the Model Penal Code §2.01.

This section states the basic proposition that criminal liability must be based on conduct which includes a voluntary act. This is probably also a constitutional requirement. Cf. **Robinson v. California,** 370 U.S. 660, 82 S.Ct. 1417 (1962); **Powell v. Texas,** 392 U.S. 514, 88 S.Ct. 2145 (1968).

Note however that the requirement is not that liability must be based on an act, but rather upon conduct which includes a voluntary act. Liability can be based on a course of conduct during part of which the actor may not be conscious. For example, if a driver loses consciousness and his car hits and kills or injures a pedestrian, the driver is clearly not acting while he is unconscious. However, if criminal liability is to be imposed, his failure to stop as he felt illness approaching could, in the appropriate circumstances, be regarded as sufficient for criminal liability. The liability would be based on the entire course of conduct of which his failing to stop would be a part. See Comments, Model Penal Code, Tent. Draft No. 4, 119-120 (1955).

Subsection 1 states the minimal requirement of conduct. Note it does not require that the conduct be that of the defendant. While some conduct on his part will always be required, a defendant can be held responsible, in appropriate circumstances, for the conduct of other persons. See §§562.036, 562.041 and 562.046.

Subsection 2 defines "voluntary act". Subsection 2(1) requires consciousness and follows pre-Code law that criminal liability cannot be based on behavior while unconscious. See **State v. Buxton,** 324 Mo. 78, 22 S.W.2d 635 (1929); **State v. Barr,** 366 Mo. 300, 78 S.W.2d 104 (1935); and **State v. Small,** 344 S.W.2d 49 (Mo. 1961) all dealing with unconsciousness resulting from intoxication.

Subsection 2(2) defines "act" to include "omission". This seeming inconsistency is both logical and convenient. As stated by the drafters of the Illinois Code

> "[A]n omission necessarily is defined by describing the act of omission which is omitted; and if the distinction is made, then the phrase 'act or omission' must be used each time reference is made to a person's physical behavior, unless the reference is only to a positive movement, or only to the lack of required movement. Consequently, the use of 'act' to include 'omission' seems reasonable, and clearly is more convenient."
>
> Tent. Final Draft, Proposed Illinois Revised Code of 1961, 144.

Subsection 3 provides that possession can be sufficient as a voluntary act. This is needed since possession is not necessarily a bodily movement nor an omission. The definition is consistent with Missouri decisions. See **State v. Burns,** 457 S.W. 2d 721 (Mo. 1970) ruling that for illegal possession under §195.020 RSMo, "there must be a conscious possession of the particular substance . . ."

Subsection 4 states the accepted principle that omissions are not sufficient for criminal liability unless there is a "duty to act". The duty can, of course, be based on a statute providing that the failure to perform a certain act is a crime. For example, the failure to pay taxes. More difficult from an analytical point of view is criminal liability by omission in crimes not defined in terms of failure to act. Such situations are rare and the most common is liability for homicide (usually manslaughter) based on the failure to perform some act, such as supplying medical assistance to a close relative. See e.g. **State v. Beach,** 329 S.W.2d 712 (Mo. 1959). It would be impossible to state with precision a definition of all such situations. The general categories are stated in **Jones v. United States,** 308 F.2d 307, 310 (D.C.Cir. 1962):

"The problem of establishing the duty to take action which would preserve the life of another has not often arisen in the case law of this country. . . .

"There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care for another and so secluded the helpless person as to prevent others from rendering aid." (Footnotes omitted).

7.3 Culpable Mental State (§562.016)

Code

1. Except as provided in section 562.026, a person is not guilty of an offense unless he acts with a culpable mental state, that is, unless he acts purposely or knowingly or recklessly or with criminal negligence, as the statute defining the offense may require with respect to the conduct, the result thereof or the attendant circumstances which constitute the material elements of the crime.

2. A person "**acts purposely**", or with purpose with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result.

3. A person "**acts knowingly**", or with knowledge,
   (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
   (2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

4. A person "**acts recklessly**" or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

5. A person "**acts with criminal negligence**" or is criminally negligent when he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Comments

This and the next two sections, §§562.021 and 562.026, deal with the mental component or "mens rea" and are based on the Illinois Code Ch. 38, §§4-3 through 4-9; the New York Penal Law §§15.00, 15.05; and the Model Penal Code §2.02. This section defines the four terms used throughout the code to cover the mental states needed for criminal liability. These four terms replace a multitude of terms found in precode statutes. The terms are derived from the Model Penal Code and such terms, with slight variations, have been used in most of the criminal law revisions in other jurisdictions.

Subsection 1 states the rule that a culpable mental state is generally required for guilt. However, there are times when a culpable mental state will not be required and absolute or strict liability will be imposed. Such situations are covered in §562.026 to which reference is made in subsection 1. Under the Code the absence of a culpable mental state as an element of a crime is the exceptional situation and thus even if a statute is silent as to whether or not a mental state is required, one is still required.

"**Purposely**" and "**knowingly**" refer to what is commonly thought of as intention. It will usually make no difference in the degree of criminal liability whether a person acted purposely or knowingly. The difference between these two is significant in those crimes such as attempts and conspiracies, where achieving the object is not required for guilt but a purpose to achieve the objective is required.

Note that for example §569.055 makes it a crime to knowingly damage property of another by starting a fire or causing an explosion. If the defendant threw a lighted match, onto a pool of gas under a car and started a fire which damaged the car, he would be guilty under §569.055, if he was aware he was throwing a lighted match into a pool of gas underneath the car belonging to another person and knew that it was practically certain that a fire or explosion would result in damaging the car. Since one can

never "know" that a certain result will follow to an absolute certainty, all that is required is that the defendant know it to a practical certainty. If in the same example, however, no fire resulted so that the car was not damaged but the defendant was charged with attempting to violate §569.055, the jury would have to find that it was his purpose to damage the car of another.

The difference between **"recklessness"** and **"Criminal negligence"** is that recklessness requires an awareness of the risk and a conscious disregard of that risk while criminal negligence requires only that the person should have been aware of the risk. Note that the risk involved in both recklessness and criminal negligence must be a substantial and unjustifiable risk. This means that not only must the risk be a significant risk but that the taking of the risk is not offset by some benefit. Driving a car at a high rate of speed may create a substantial risk of causing serious physical injury, but whether such would be sufficient for recklessly causing serious physical injury, assuming such injury occured, would also depend upon why the person was speeding. That is, rushing a heart attack victim to a hospital could justify taking some risks which would not be justified simply because the driver was late for work. Thus, a jury may be called on to make the moral judgement of whether the disregard of or failure to be aware of the risks "constitutes a gross deviation from the standard of care" of a reasonable person. Note that the mental states of purposely, knowingly and recklessly are all subjective states of mind. This has significance with regard to the application of the doctrine of mistake. See §562.031 discussed in paragraph 7.6.

7.4 Culpable Mental State, Application (§562.021)

Code

1. If the definition of an offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state applies to each such material element.

2. Except as provided in section 562.026 if the definition of an offense does not expressly prescribe a culplable mental state, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly or recklessly, but criminal negligence is not sufficient.

3. If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts purposely or knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts purposely.

4. Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning or application of the statute defining an offense is not an element of an offense unless the statute clearly so provides.

Comments

This section sets out the rules to be followed in interpreting what mental states are required in a particular statute.

Under subsection 1, if the statute specifies a mental state but does not indicate the elements to which it refers then the mental state applies to all the elements. The statute of course may indicate that a different mental state applies to different elements of the crime. In such a case, the specific mental state applicable to each element then controls.

Under subsection 2 if a statute does not mention a culpable mental state, then subject to the exception of §562.026 (see paragraph 7.5) a culpable mental state is still required. When the statute does not mention a culpable mental state, but one is still required, as will usually be the case, the defendant will be guilty if he acts recklessly, knowingly or purposely. However, in order for criminal negligence to be sufficient as a mental state it must be expressly included in the statute.

Subsection 3 makes it clear that the culpable mental states are "graded". That is each mental state is included in the higher mental state. Thus, if a statute requires acting with criminal negligence, a person will be guilty if he acts with criminal negligence or any higher mental state such as recklessly, knowingly

or purposely. Similarly, if the statute requires acting recklessly, a person will be guilty if he acts recklessly or with the higher mental states of purpose or knowledge.

Subsection 4 makes it clear that knowledge of the existence of the statute or its meaning is not an element of the offense (unless expressly provided) and therefore acting purposely, knowingly, recklessly or with criminal negligence as to the existence or the meaning of the law is not required for guilt. For most crimes, knowledge of the law is not an element of the crime.

7.5 Culpable Mental State, When Not Required (§562.026)

Code

A culpable mental state is not required

(1) If the offense is an infraction and no culpable mental state is prescribed by the statute defining the offense; or

(2) If the statute defining the offense clearly indicates a purpose to dispense with the requirement of any culpable mental state as to a specific element of the offense.

Comments

This section provides for exceptions to the requirement of a culpable mental state. Subsection 1 allows for absolute liability for infractions, the regulatory offenses, in which quite often the mental element is omitted as the purpose is regulation rather than punishment. Of course, if the infraction states a mental element is required, then of course, one is. However, if the statute declares certain conduct to be an infraction and mentions no mental state, the legislative intent is that none is required. Subsection 2 permits the legislature to do away with the requirement of a culpable mental state as to any crime. However, an exception must be clearly indicated.

7.6 Ignorance and Mistake (§562.031)

Code

1. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact or law unless such mistake negatives the existence of the mental state required by the offense.

2. A person is not relieved of criminal liability for conduct because he believes his conduct does not constitute an offense unless his belief is reasonable and

(1) The offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him; or

(2) He acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in

(a) A statute;

(b) An opinion or order of an appellate court;

(c) An official interpretation of the statute, regulation or order defining the offense made by a public official or agency legally authorized to interpret such statute, regulation or order.

3. The burden of injecting the issue of reasonable belief that conduct does not constitute an offense under subdivisions (1) and (2) of subsection 2 is on the defendant.

Comments

This section is based on the Illinois Code Ch. 38, §4-8; The New York Penal Law §15.20 and The Model Penal Code §2.02.

Subsection 1 states the general doctrine of mistake. It states the obvious that if a mistake negatives a culpable mental state which is required for an offense, then the person cannot be guilty of that offense. In other words, mistake is a negation of the requirement of the culpable mental state and thus only those

mistakes which negative the culpable mental state are relevant. To negative criminal negligence, the mistake must be both honest and reasonable. However, a belief honestly held can negative purpose, knowledge or recklessness whether or not the mistake is reasonable. Note that no distinction is drawn between mistake of fact or law. The question is whether or not the mistaken belief negatives the existence of a mental state required by the offense. There are not many offenses which require the existence of a belief as to law. However, in theft offenses, a mistaken belief as to ownership can negative the intent to steal. Other examples are crimes involving physical restraint, such as felonious restraint and false imprisonment, where the crime requires that the person knowingly restrain another unlawfully. In such a situation, if the person believes he is acting lawfully, then he cannot be guilty of that offense. Of course the individual may be guilty of another crime such as assault.

Subsection 2 deals with the few exceptional situations where a good faith belief of legality should be a defense even though it does not relate to any element of the crime. This section codifies those situations that are commonly recognized such as where the offense is not contained in a published statute and the regulation or order which contains the offense has not been sufficiently published to make it available to a reasonable person. The section also covers situations where an individual acts in reasonable reliance upon a statement of the law made by a group which is empowered to officially declare the law. For example, the legislature in a statute or an appellate court making a decision, or those agencies of the state which are authorized to interpret statutes, regulations or orders.

7.7 Accountability For Conduct (§562.036)

Code

A person with the required culpable mental state is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is criminally responsible, or both.

Comments

This section and the next two sections deal with accountability for conduct and responsibility for the conduct of another. They replace pre-Code §§556.170 and 556.190 which deal with accessories. These sections do not deal with the concept of accessories after the fact which is covered by §575.030, hindering prosecution.

7.8 Responsibility For Conduct of Another (§562.041)

Code

1. A person is criminally responsible for the conduct of another when
   (1) The statute defining the offense makes him so responsible; or
   (2) Either before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agress to aid or attempts to aid such other person in planning, committing or attempting to commit the offense.
2. However, a person is not so responsible if:
   (1) He is the victim of the offense committed or attempted;
   (2) The offense is so defined that his conduct was necessarily incident to the commission or attempt to commit the offense. If his conduct constitutes a related but separate offense, he is criminally responsible for that offense but not for the conduct or offense committed or attempted by the other person;
   (3) Before the commission of the offense he abandons his purpose and gives timely warning to law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.
3. The defense provided by subdivision (3) of subsection 2 is an affirmative defense.

Comments

This section deals with accessorial liability and states the rules by the which the defendant can be held criminally liable for the conduct of another person. It is based on several other codes but differs in wording and organization from all of them.

Subsection 1 (1) is the same as Illinois Code Ch. 38 §5-2 (b) and permits a statute to create greater liability for the conduct of another than would be true under the rest of this section.

Subsection 1 (2) is similar to Illinois Code Ch. 38 §5-2 (c), but unlike that section, covers two different bases for liability for conduct of another. This subsection, when read in connection with section 562.046, covers causing an innocent or irresponsible person to commit the conduct of a crime and also covers accessorial liability by the usual method of aiding a guilty person in the commission of a crime. Section 562.046 precludes certain matters, including the other person's lack of criminal capacity, unawareness of the defendant's criminal purpose or immunity, from being a defense to liability based on the conduct of another. Thus, this section combined with the provisions of 562.046 cover making one person responsible criminally for the conduct of another when it is based upon either causing an innocent person to engage in criminal conduct or aiding another guilty person in the commission of an offense.

Note that this section is a means of imputing conduct from another person to the defendant. It is not a means of imputing culpable mental states. To be guilty of any offense the defendant must himself have the necessary culpable mental state for that offense, but his liability can be based upon the conduct of another person. But to be so liable he must also have the purpose of promoting the offense. Cf. State v. Grebe 451 S.W.2d 265 (Mo. banc 1970).

Subsection 2 excludes certain persons from being liable for the conduct of another if they fall into certain categories. The first is covered by subsection 2(1) and excludes the victim from being an accessory even though in certain crimes the victim does provide assistance. As for example the victim who pays the extortionist or the under age girl who solicits the act of intercourse. Subsection 2(2) deals with another group of persons who do not fall neatly into the category of victims. If a statute defines an offense so that a person's conduct is necessarily incident to the commission of that offense but the statute does not provide that his conduct makes him guilty of the offense, then the legislative intent is to exclude him from liability. Thus, if a statute simply makes the giving of a bribe a crime, the recipient is not guilty of violating that statute on the basis of providing aid. Of course, this would not prevent the person from being guilty under a statute punishing receiving a bribe.

Subsection 2(3) provides a new defense, that of abandonment and provides an inducement for a person to take steps to prevent the crime from occurring if he has provided assistance to another for the purpose of committing a crime. He may do this either by disclosing it to the police or by other appropriate means. Note that the defense is an affirmative defense which means the defendant has the burden of persuasion.

7.9 Defense Precluded (§562.046)

Code

> It is no defense to any prosecution for an offense in which the criminal responsibility of the defendant is based upon the conduct of another that
>
> (1) Such other person has been acquitted or has not been convicted or has been convicted of some other offense or degree of offense or lacked criminal capacity or was unaware of the defendant's criminal purpose or is immune from prosecution or is not amenable to justice; or
>
> (2) The defendant does not belong to that class of persons who was legally capable of committing the offense in an individual capacity.

Comments

This section rules out certain matters as being a defense to accessory liability. Some of these provisions are found in pre-Code §556.190 which has been repealed but this Code section is broader. See

comments in paragraph 7.8. Subsection 2 is designed to cover the situation where the individual cannot be guilty of a crime based solely on his own conduct but can be guilty as an accessory. For example, a husband cannot by his own conduct be guilty of raping his wife. However, by assisting another in doing the act, he can be guilty as an accessory. This subsection however, must be read in the light of subsection 2(1) and 2(2) of §562.041.

7.10 Conviction of Different Degrees of Offenses (§562.051)

Code

> Except as otherwise provided, when two or more persons are criminally responsible for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating or mitigating fact or circumstance.

Comments

This section is based on New York Penal Law §20.15. At common law there was a question whether an "aider and abettor" could be guilty of a higher (or lower) degree of the offense assisted. This section clearly permits the degree of punishment to be apportioned according to the culpability of each person. Thus, even when a defendant is criminally responsible for the conduct of another, in order to be guilty of a particular offense, the defendant must have the mental state required for that offense. Therefore it is possible for the defendant and the other person to be guilty of different degrees of the offense. If a defendant, in cold blood, gives a knife to another person, who while enraged, uses the knife to kill someone, the defendant might well be guilty of murder while the other person who actually did the killing might only be guilty of manslaughter.

7.11 Liability of Corporations and Unincorporated Assoc. (§562.056)

Code

1. A corporation is guilty of an offense if
   (1) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
   (2) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation, and the offense is a misdemeanor or an infraction, or the offense is one defined by a statute that clearly indicates a legislative intent to impose such criminal liability on a corporation; or
   (3) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.
2. An unincorporated association is guilty of an offense if
   (1) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the association by law; or
   (2) The conduct constituting the offense is engaged in by an agent of the association while acting within the scope of his employment and in behalf of the association and the offense is one defined by a statute that clearly indicates a legislative intent to impose such criminal liability on the association.
3. As used in this section:
   (1) "**Agent**" means any director, officer or employee of a corporation or unincorporated association or any other person who is authorized to act in behalf of the corporation or unincorporated association;
   (2) "**High managerial agent**" means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.

Comments

This section is based on New York Penal Law §20.20; Model Penal Code §2.07, Illinois' Code Ch. 38 §5-4 and several proposed codes.

This section sets the standards for determining when a corporation made be held criminally liable. Subsection 1(1) covers the obvious situation of corporate liability for the failure to perform a duty specifically imposed by statute on corporations. Subsection 1(2) provides for corporate criminal liability for misdemeanors and infractions where such are commited by an agent acting within the scope of his employment and on behalf of the corporation and the liability where a statute specifically provides for corporate liability. Subsection 1(3) covers the situation where the crime is in effect directed by the management of the corporation. Again, the persons involved must be within the scope of their employment and acting on behalf of the corporation. Thus, a corporation cannot be guilty of a felony unless the statute so provides or unless the board of directors or a high managerial agent in effect directed the commission of the felony. Note that §560.021 specifically deals with the penalty of fines for corporations.

Subsection 2 deals with criminal liability for unincorporated associations. Their liability traditionally is far more limited simply because of the difficulty of defining the entity involved in the great variety of such organizations. This subsection basically does not provide for any criminal liability for unincorporated associations but merely allows for statutes to impose specific duties on such organizations and to provide a penalty for the failure to comply. It also allows for the possibility that the legislature may wish to specifically provide for criminal liability for unincorporated associations in the definition of a particular offense.

7.12 Liability of Individual for Conduct of Corporation or Unincorporated Association (§562.061)

Code

A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation or unincorporated association to the same extent as if such conduct were performed in his own name or behalf.

Comments

This section is based on New York Penal Law §20.25; Model Penal Code §2.07(6); Illinois Code, Ch. 38, §5-5.

This section states the obvious that an individual who engages in conduct constituting an offense cannot avoid liability because he does so while acting for a corporation or other organization.

7.13 Entrapment (§562.066)

Code

1. The commission of acts which would otherwise constitute an offense is not criminal if the actor engaged in the prescribed conduct because he was entrapped by a law enforcement officer or a person acting in cooperation with such an officer.

2. An "**entrapment**" is perpetrated if a law enforcement officer or a person acting in cooperation with such an officer, for the purpose of obtaining evidence of the commission of an offense, solicits, encourages or otherwise induces another person to engage in conduct when he was not ready and willing to engage in such conduct.

3. The relief afforded by subsection 1 is not available as to any crime which involves causing physical injury to or placing in danger of physical injury a person other than the person perpetrating the entrapment.

4. The defendant shall have the burden of injecting the issue of entrapment.

Comments

This section follows pre-Code Missouri decisions. See also New York Penal Law §40.05; Kentucky Penal Code 433 C.3-010.

An entrapment occurs if a law enforcement officer or a person acting in cooperation with such an officer for the purpose of obtaining evidence of the commission of an offense solicits and or otherwise induces another person to engage in criminal conduct when the other person was not ready and willing to engage in such conduct. Note that entrapment involves two requirements; first, the solicitation or encouragement by the officer or someone working in cooperation with the officer and secondly, that the person so encouraged or solicited was not already predisposed to commit the crime. In order for there to be a defense of entrapment both requirements must be satisfied.

Note, however, that once the defendant has injected the issue of entrapment, the burden of proving that there was no entrapment is upon the state. This can mean that once it has been shown that the encouragement or solicitation was by a state officer, the state must prove that the defendant was already predisposed to commit the crime. Note also that defense of entrapment does not apply to any offense involving causing physical injury or threatening physical injury to another person.

7.14 Duress (§562.071)

Code

1. It is an affirmative defense that the defendant engaged in the conduct charged to constitute an offense because he was coerced to do so, by the use of, or threatened imminent use of, unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist.

2. The defense of "**duress**" as defined in subsection 1 is not available:

(1) As to the crime of murder;

(2) As to any offense when the defendant recklessly places himself in a situation in which it is probable that he will be subjected to the force or threatened force described in subsection 1.

Comments

This section is based on Model Penal Code §2.09; New York Revised Penal Law §35.35. This section codifies the common law defense of duress which has also been called coercion or compulsion. See **State v. St. Clair** 262 SW2d 25 (Mo. 1953). Anno. 40A.L.R. 2d 903 (1953). The defense is allowed when an individual is coerced by the use of force or the imminent use of force which "a person of reasonable firmness in his situation would have been unable to resist" This standard allows such tangible factors as the individual's size, age, health, strength, etc. to be taken into consideration, but not his temperament. It also takes account of the individual's "situation". The threat of force must be "imminent". This term is not defined but it clearly indicates that the threat should not be remote in time. However, neither is it necessarily limited to the last possible second. The question is whether the individual had a reasonable opportunity to avoid coercive force without harm to himself or the other threatened person.

Note the defense will not apply to murder nor to any offense committed after the defendant recklessly places himself in the situation where it is probable he will be subjected to force. Thus, a person who voluntarily goes along with others to commit robbery cannot defend against a charge of assault based on striking the victim by claiming a threat to kill him by a cohort. In such a situation a jury could properly find that he recklessly, or even knowingly, placed himself in a situation where it was probable such force would be threatened. Note that duress is an affirmative offense and the burden of persuasion is on the defendant.

7.15 Intoxicated or Drugged condition (§562.076)

Code

1. A person who is in an intoxicated or drugged condition whether from alcohol, drugs, or other substance, is criminally responsible for conduct unless such condition
   (1) Negatives the existence of the mental states of purpose or knowledge when such mental states are elements of the offense charged or of an included offense; or
   (2) Is involuntarily produced and deprived him of the capacity to know or appreciate the nature, quality or wrongfulness of his conduct or to conform his conduct to the requirements of law.
2. The defendant shall have the burden of injecting the issue of intoxicated or drugged condition.

Comments

This section is based on Model Penal Code §2.08; New York Penal Law §15.25; Illinois Code Ch 38, §6-3; Kansas Criminal Code §21.209.

This section makes a change in pre-Code law as to the effect of "voluntary" intoxication on criminal liability. It is consistent with pre-Code law as to the effect of "involuntary" intoxication.

The section first states the accepted doctrine that intoxication, no matter what the cause (whether from liquor, drugs or other substances) does not, in and of itself, affect criminal liability. It then sets out the two situations where intoxication can, however, affect criminal liability: where the intoxication is to such a degree that it negatives an essential mental state required for guilt and where it is involuntary and is of such a degree as to render the individual irresponsible.

Subsection 1(1) deals with "**voluntary**" intoxication. This, generally, does not affect criminal liability. However, if a person becomes so intoxicated that he does not have the mental state required for the particular crime with which he is charged, then he is not guilty of that crime, not because he was intoxicated, but because he lacks the required mental state. Note however, that this applies only as to crimes where the required mental state is purposely or knowingly. It does not apply to crimes which can be committed recklessly or with criminal negligence. In a sense, becoming so intoxicated that one is totally unaware of what he is doing, or of the surrounding circumstances is itself reckless. Pre-Code Missouri case law indicated that intoxication could not be considered at all in determining whether the defendant had the necessary mental state. This section changes Missouri law and makes it consistent with the law of the vast majority of jurisdictions.

Even if a person is so intoxicated as to be unable to have sufficient awareness to have the necessary purpose or knowledge required by the crime, the result will normally not be an acquittal but conviction of a lesser degree of the crime, a degree which requires only recklessness as the culpable mental state.

Subsection 2(2) deals with "**involuntary**" intoxication and states the generally accepted proposition that involuntary intoxication is a complete defense provided the individual is rendered irresponsible as judged by the same standards applicable to lack of responsibility because of mental disease or defect. Involuntary intoxication (whether from alcohol or drugs) occurs when the individual in effect has no choice in becoming intoxicated, either because he was forced to consume the alcohol or drugs, or when he had no way of knowing that what he was consuming would result in his becoming intoxicated.

Note that the defendant has the burden of injecting the issue of intoxicated or drugged condition which means that once the issue is in the case, the state must negative it beyond a reasonable doubt. As to intoxication relating to whether the defendant had the required purpose or knowledge to be guilty of the crime charged, this will involve the state proving beyond a reasonable doubt that the defendant did act purposely or knowingly—a burden which the state already has.

7.16 Infancy (§562.081)

Code

1. No person shall be convicted of any offense unless he had attained his fourteenth birthday at the time the offense was committed.
2. The defendant shall have the burden of injecting the issue of infancy.

Comments

This section is included primarily for completeness. The age of fourteen is consistent with the precode Missouri law on juveniles. See §211.071 RSMo. Nothing in the code is intended to affect the operation of the juvenile procedures, and this section makes no change.

7.17 Lack of Responsibility Because of Mental Disease or Defect (§562.086)

Code

1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law.
2. The procedures for the defense of lack of responsibility because of mental disease or defect are governed by the provisions of chapter 552, RSMo.

Comments

The code makes no change in the Missouri law on lack of responsibility because of mental disease or defect. This section uses the same language as §552.030(1) as the standard for criminal responsibility and then provides a cross-reference to Chapter 552.

Note however that §552.030 RSMo provides

"* * *

3. Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible.

(1) To prove that the defendant did or did not have a state of mind which is an element of the offense. . ."

This doctrine of "diminished responsibility" will apply to code offenses. Note that the approach is similar to that with regard to the effect of voluntary intoxication in that the mental disease or defect can be considered as to whether the defendant had a culpable mental state required by the crime.

CHAPTER 8

Justification
(§§563.011-563.061)

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8.1 Introduction

Conduct which would otherwise be criminal can be justified and thus non-criminal because of the circumstances in which it occurs. This chapter deals with justification and particularly with the specific situations in which the use of force is justified, as in self-defense, defense of other persons, defense of premises and property, and effecting arrest.

The specific instances of justifiable use of force are sometimes called "privileges", that is, it is sometimes said that a person is privileged to use force in self-defense, or that a law enforcement officer is privileged to use force to make an arrest. The Code uses the term "justification" but the idea is the same. There are times when the use of force against another ought not to be a crime because the use of force is for a valid purpose. However, because the use of force, particularly deadly force, can be so harmful, the law sets restrictions on its use for the purpose of insuring that such force, particularly deadly force, will be used only when necessary. This is why in most instances the danger being avoided or prevented must be "imminent". This is not simply a question of time, although the time factor will be important, but a requirement that there is no other reasonable alternative available.

It is important to remember that the justifications for the use of force in the specific situations, such as self-defense, defense of others, to make an arrest, etc. are not mutually exclusive. There will be situations where the justifications will overlap. This will be particularly important when it is claimed that deadly force was justified. The fact that deadly force may not be justified under a particular justification (such as defense of property) does not mean that a person who is lawfully defending property cannot use deadly force in self-defense. That is, a person may be entitled to act under more than one justification, provided the requirements for both justifications are met. Thus a law enforcement officer making an arrest may be entitled to use deadly force either to make the arrest, or in self-defense, or both. But the requirements for the justification must be present.

The following terms are defined in section 563.011 which provides:

> (1) "**Deadly force**" means physical force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious physical injury.

(2) "Dwelling" means any building or inhabitable structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging.
(3) "Premises" includes any building, inhabitable structure and any real property.
(4) "Private person" means any person other than a law enforcement officer.

The definition of "deadly force" is derived from the Model Penal Code §3.11(2) and Kentucky Penal Code §433C.1-010(1). It does not include the threat to cause death or serious physical injury, provided the actor does not intend to carry out the threat.

The definition of "dwelling" is the same as Model Penal Code §3.11(3) and is broad enough to include a tent, caravan or hotel room. The rationale or the rule giving special protection to the "dwelling-house" is that a man "is under no duty to take to the fields and the highways, a fugitive from his own home." Cardozo, J., in **People v. Tomlins**, 213 N.Y. 240, 107 N.E. 496 (1914). This suggests that all places should be included which can be said to be in any sense a person's home, even though temporarily.

The definition of "premises" is derived from New York Revised Penal Law §140.00 and the proposed Michigan Criminal Code §2601(a), (d).

"Private person" is defined to include all other persons than law enforcement officers.

8.2 Civil remedies unaffected (§563.016)

Code

The fact that conduct is justified under this chapter does not abolish or impair any remedy for such conduct which is available in any civil actions.

Comments

This section is based on Model Penal Code §3.01(2) and Kansas Criminal Code §21-3103 (1969).

This section makes it clear that the justifications provided by the Criminal Code apply only as to criminal liability. If a person's conduct is justified under one of the Code provisions he will have a defense to a criminal charge, but this does not necessarily mean he will be immune from civil liability.

That being excused from criminal liability does not automatically excuse one from civil liability may be important with regard to the use of deadly force by a law enforcement officer in making an arrest. See ¶8.8.

8.3 Execution of public duty (§563.021)

Code

1. Unless inconsistent with the provisions of this chapter defining the justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when such conduct is required or authorized by a statutory provision or by a judicial decree. Among the kinds of such provisions and decrees are:
   (1) Laws defining duties and functions of public servants;
   (2) Laws defining duties of private persons to assist public servants in the performance of their functions;
   (3) Laws governing the execution of legal process;
   (4) Laws governing the military services and the conduct of war;
   (5) Judgments and orders of courts.
2. The defense of justification afforded by subsection 1 of this section applies:
   (1) When a person reasonably believes his conduct to be required or authorized by the judgment or directions of a competent court or tribunal or in the legal execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process;
   (2) When a person reasonably believes his conduct to be required or authorized to assist a public servant in the performance of his duties, notwithstanding that the public servant exceeded his legal authority.
3. The defendant shall have the burden of injecting the issue of justification under this section.

Major Changes

This section is based on Model Penal Code §3.03; Michigan Proposed Criminal Code §601 (Final Draft 1969); New York Revised Penal Law §35.05(1); and Kentucky Penal Code 433C-1-040.

Comments

§563.021 provides that conduct which is required by a statute or by a court order is justified and does not result in criminal liability. A person claiming justification under this section must reasonably believe (1) his conduct is required or authorized by the judgment or directions of a competent court or in the legal execution of legal process; or (2) his conduct is required or authorized to assist a public servant in the performance of his duties.

This is a general section to cover the situations where a person is acting under the authority of a statute or court order. All such situations cannot be defined ahead of time so a general provision is needed. The statute does contain a list of types of situations, by listing certain kinds of provisions and decrees that can be sufficient authority:

(1) Laws defining duties and functions of public servants;

(2) Laws defining duties of private persons to assist public servants in the performance of their duties;

(3) Laws governing the execution of legal process;

(4) Laws governing the military services and the conduct of war;

(5) Judgments and orders of courts.

For example, a law enforcement officer executing a valid search warrant is entitled to enter property of another without consent. This section makes it clear that such action by the officer will not constitute a trespass. Note that the officer will be protected even if the warrant is not valid so long as the officer reasonably believes it is valid.

8.4 Justification generally (§563.026)

Code

1. Unless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute any crime other than a class A felony or murder is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighs the desirability of avoiding the injury sought to be prevented by the statute defining the crime charged.

2. The necessity and justifiability of conduct under subsection 1 may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this section is offered, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.

3. The defense of justification under this section is an affirmative defense.

Source

This section is based on Model Penal Code §3.02; New York Revised Penal Law §35.05(2); and Michigan Proposed Criminal Code §605.

Comments

This section adopts the view that a principle of necessity properly conceived affords a general defense of justification for conduct that otherwise would constitute a crime; and that such a qualification is essential to the rationality and justice of all penal prohibitions.

Subsection 1 restricts the defense of justification under this section to crimes other than Class A Felonies. In addition, competing values which have been foreclosed by deliberate legislative choice are excluded from the general defense of justification, as when the law has dealt explicitly with the specific situations that present a choice of evils.

The section is designed to cover unusual situations in which some compelling circumstances or "emergency" warrant deviation from the general rule that transgression of the criminal law will not be tolerated. It would "justify", for example, blasting buildings to prevent the spread of a major conflagration; breaking into an unoccupied rural house for the purpose of making a telephone call vital to a person's life; or forcibly restraining a person infected with a virulent contagious disease in order to prevent him from going out and starting an epidemic.

The phraseology of the section, tightened by the use of such terms as "emergency measure," is designed closely to limit its application and to preclude extension beyond the narrow scope intended. However, it must be remembered that what constitutes "emergency measure" and "imminent" does not depend solely on the interval of time before the injury sought to be prevented will occur. Additional circumstances of the particular fact situation must also be evaluated. Thus, if under the circumstances, the mere passage of time is such that a reasonable man would perceive no viable alternatives to his present course of conduct the fact that the injury sought to be prevented will not take place for some time hence, e.g. six hours, will not prevent the use of the defense of justification under this section, provided it is otherwise available.

Subsection 2 is intended to insure that the balancing cannot go to the desirability of the statute itself under which the prosecution is maintained. This renders the provision unavailable to the mercy killer, or the crusader who considers a penal statute unsalutory because it tends to obstruct his cause, or to anyone who bases his violation on the "immorality" of the statute he is charged with violating.

Subsection 3 provides that the defense of justification under this section is an *affirmative defense.* Thus the state need not prove the absence of this defense and the defendant has the burden of establishing that his claim is more probably true than not. Justification under the specific justifications (§563.031, .036, .041, .046, .051, .056 and .061) are not affirmative defenses. Under these sections the defendant has the burden of injecting the issue, but the state has the burden of proving that the justification did not exist.

8.5 Use of force in defense of persons (§563.031)

Code

1. A person may, subject to the provisions of subsection 2, use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful force by such other person, unless:

(1) The actor was the initial aggressor; except that in such case his use of force is nevertheless justifiable provided

(a) He has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened use of unlawful force; or

(b) He is a law enforcement officer and as such is an aggressor pursuant to section 563.046; or

(c) The aggression is justified under some other provision of this chapter or other provision of law;

(2) Under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would not be justified in using such protective force.

2. A person may not use deadly force upon another person under the circumstances specified in subsection 1 unless he reasonably believes that such deadly force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping.

3. The justification afforded by this section extends to the use of physical restraint as protective force provided that the actor takes all reasonable measures to terminate the restraint as soon as it is reasonable to do so.

4. The defendant shall have the burden of injecting the issue of justification under this section.

Major Changes

This section is based on Model Penal Code §§3.04, 3.05; and New York Revised Penal Law §35.15. This section combines the right of self-defense with the right to defend others as is done in the New York Code. The Model Penal Code has these in separate sections.

Comments

The section distinguishes the occasions in which a person is justified in using physical force from the occasions in which deadly force is justified. In the former, the actor must reasonably believe that another is about to employ unlawful force against him or against one whom he seeks to protect and that the use of physical force is necessary to prevent the use of such unlawful force. This is basically consistent with pre-Code Missouri law. See **State v. Enyard,** 108 S.W.2d 337 (Mo. 1937), where the Missouri Supreme Court held that one has the right to use in self-defense such force as appears to him to be reasonably necessary under the attending circumstances.

However, if the defendant was the initial aggressor, he must, under this section and pre-Code Missouri law, in good faith withdraw from the encounter and effectively communicate such withdrawal before he is justified in using physical force to defend himself. See **State v. Spencer,** 307 S.W.2d 440 (Mo. 1958). This does change the law somewhat. Under the pre-Code law, where the defendant was the aggressor and entered the encounter without "felonious intent" but was obliged during the encounter to kill to save his own life, he could, according to **State v. Mayberry,** 360 Mo. 35, 226 S.W. 2d 725 (1950), defend on the basis of "imperfect self-defense" which does not justify the homicide but reduces the grade of the offense. Under the Code the problem is handled in the sections which define the degrees of the offense.

If the defendant is a law enforcement officer and is an aggressor of necessity he is under no obligation to withdraw (or retreat). Code §563.046 provides that a "law enforcement officer need not retreat or desist to effect the arrest, or from efforts to prevent escape from custody of a person he reasonably believes to have committed an offense . . ." If a law enforcement officer, in the performance of his duty, is required to take the role of the aggressor in defense of himself or other persons, the defense of justification under this section is available to him. §563.031. 1(1)(c) provides for a similar result whenever the initial aggression is itself justifiable.

If the defendant goes to the defense of another, he is justified in using physical force to defend such person provided that under the circumstances as the actor reasonably believed them to be, the person whom he seeks to protect would be justified in using such force.

Subsection 2 limits the justifiable use of *deadly force* to situations where the actor reasonably believes such force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping. This limitation rests on the common law principle that the amount of force used must bear a reasonable relation to the magnitude of the harm sought to be avoided.

Under pre-Code Missouri law, one could justifiably use deadly force to protect oneself from death or serious physical injury. **State v. Farrell,** 320 Mo. 319, 6 S.W.2d 857 (1928). However, the use of deadly force in defense of others had been restricted to the defense of persons standing in certain relationships to the actor. In **State v. Kennedy,** 207 Mo. 528, 102 S.W. 57 (1907), the Missouri Supreme Court held that the fact that a man and a woman live together in a relation of concubinage does not, of itself, justify the man in taking life in defense of the woman. This restriction was codified in §559.040 RSMo. Under the Code, the defense of others is not so limited. Now, the relationship of a person in need of assistance will not conclusively determine one's right to go to his aid.

Missouri, unlike the majority of jurisdictions, imposed no duty to retreat on the actor before he can resort to deadly force in self-defense. A person who is assailed in a place in which he is entitled to be is not bound to retreat before exercising his right to self-defense, **State v. Barlett**, 170 Mo. 658, 71 S.W. 148 (1902). Thus, the law of self defense had been held to imply a right of attack when it appeared reasonably necessary for protection against an impending assault, **State v. McGee**, 361 Mo. 309, 234 S.W.2d 587 (1950); followed in **State v. Hicks**, 438 S.W.2d 215 (Mo. 1969). The Code retains the "no retreat" rule.

Subsection 3 makes clear that the use of confinement may be justified. Its use, of course, is subject to the other limitations of the section. Since confinement may be a continuing condition unless something is done to terminate it, the section requires that the actor take reasonable measures to terminate it as soon as it is reasonable to do so. Where the person confined has been arrested, the "reasonable" measures to terminate the confinement will be the use of normal legal processes.

8.6 Use of physical force in defense of premises (§563.036)

Code

1. A person in possession or control of premises or a person who is licensed or privileged to be thereon, may, subject to the provisions of subsection 2, use physical force upon another person when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of the crime of trespass by the other person.
2. A person may use deadly force under circumstances described in subsection 1 above only
   (1) When such use of deadly force is authorized under other sections of this chapter; or
   (2) When he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit arson or burglary upon his dwelling.
3. The defendant shall have the burden of injecting the issue of justification under this section.

Major Changes

Under pre-Code Missouri law a person could lawfully use that amount of force which was necessary under the circumstances for the protection of his property, but he would be guilty of an assault if he used excessive force, or any force, after the necessity therefor has passed. See e.g., **State v. Shilling**, 212 S.W.2d 96 (Mo. App. 1948). With respect to the forcible ejectment of trespassers, the Kansas City Court of Appeals in **State v. Webb**, 163 Mo. App. 275, 146 S.W. 805 (1912), held that one in possession of land may eject intruders without being guilty of a breach of the peace provided he does not use unnecessary force.

Source

This section is based on New York Revised Penal Law §35.20.

Comments

This section provides that the use of force against a person to protect premises is justified in certain circumstances. It does not deal with the use of force against property, *i. e.* the privilege to damage another's property to protect one's own property, which is covered by Code §563.026. It should also be noted that this section is not primarily concerned with the use of physical force by an occupant of real property to repel physical force or crime against the person by a trespasser or intruder. Such use of physical force is covered by Code §563.031 on use of force in defense of persons, which applies whether or not there is a trespass to property. This section on use of force in defense of premises controls only the narrow category of cases where a person in possession or control of premises, or some other person lawfully present thereon, does not fear personal injury from an intruder but may fear some other type of criminal conduct, or may simply wish to prevent or terminate the trespass.

Subsection 1 dealing with prevention and termination of criminal trespass, is primarily applicable to cases of trespass not amounting to burglary and not involving arson. Absent those felonies, an owner or occupant of premises or a person privileged to be thereon—but no one else—is authorized to use any physical force other than deadly force, which he reasonably believes to be necessary to prevent or terminate the intrusion.

Subsection 2 sets forth that deadly force can be used only if such is authorized elsewhere in this chapter, or if such is reasonably necessary to prevent what the person reasonably believes to be an attempt by the intruder to commit arson or burglary upon his dwelling. The rationale of the rule giving special protection to the dwelling is that a man should be under no obligation to submit his home or place of lodging to arson or burglary. These two crimes are specifically covered because they are the only serious felonies affecting or jeopardizing life which may not be afforded adequate protection against by Code §563.031.

8.7 Use of physical force in defense of property (§563.041)

Code

1. A person may, subject to the limitations of subsection 2, use physical force upon another person when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be the commission or attempted commission by such person of stealing, property damage or tampering in any degree.

2. A person may use deadly force under circumstances described in subsection 1 only when such use of deadly force is authorized under other sections of this chapter.

3. The justification afforded by this section extends to the use of physical restraint as protective force provided that the actor takes all reasonable measures to terminate the restraint as soon as it is reasonable to do so.

4. The defendant shall have the burden of injecting the issue of justification under this section.

Source

This section is based on New York Revised Penal Law §35.25, and Michigan Proposed Criminal Code §625 (Final Draft 1967).

Comments

Much of the comment on Code §563.036 applies to this section also. The scope of this section is limited to the use of physical force by a person to prevent stealing, property damage or tampering. Under subsection 1 he may use such force (but *not deadly force*) as he reasonably believes necessary to prevent a person from stealing his bicycle, or from damaging his automobile with an axe. Subsection 2 reiterates the common law principle that the amount of force used must bear a reasonable relation to the magnitude of the harm sought to be avoided.

Subsection 3 authorizes the use of physical restraint provided the restraint is terminated as soon as it is reasonably possible to do so.

Deadly force is not justified simply to protect property. However, a person protecting property may be able to use deadly force under some other justification, such as self-defense.

Suppose for example, Donald sees Harry stealing Donald's bicycle. To prevent the loss of the bicycle, Donald might be justified in pulling Harry off the bicycle or knocking him down. Donald would not be justified in stabbing Harry or shooting him just to prevent a theft. However, if while Donald were trying to prevent the theft, Harry pulled a knife and tried to stab Donald, Donald could be justified in using deadly force in self-defense to protect himself from serious physical injury or death. (Note that while Donald was the aggressor in the encounter, his aggression was justified because he was acting in defense of property.)

8.8 Law enforcement officer's use of force in making an arrest (§563.046)

Code

1. A law enforcement officer need not retreat or desist from efforts to effect the arrest, or from efforts to prevent the escape from custody, of a person he reasonable believes to have committed an offense because of resistance or threatened resistance of the arrestee. In addition to the use of physical force authorized under other sections of this chapter, he is, subject to the provisions of subsections 2 and 3, justified in the use of such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.

2. The use of any physical force in making an arrest is not justified under this section unless the arrest is lawful or the law enforcement officer reasonably believes the arrest is lawful.

3. A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only

(1) When such is authorized under other sections of this chapter; or

(2) When he reasonably believes that such use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested

(a) Has committed or attempted to commit a felony; or

(b) Is attempting to escape by use of a deadly weapon; or

(c) May otherwise endanger life or inflict serious physical injury unless arrested without delay.

4. The defendant shall have the burden of injecting the issue of justification under this section.

Major Changes

None except in language. See **State v. Nolan,** 192 S.W.2d 1016 (Mo. 1946); **State v. Ford,** 130 S.W.2d 635 (Mo. 1939); **State v. Havens,** 177 S.W.2d 625 (Mo. 1944); and **Manson v. Wabash Ry.,** 338 S.W.2d 54 (Mo. 1960).

Comments

A law enforcement officer, as any other citizen, is justified in using force in self-defense. But a law enforcement officer is justified in being an aggressor when he undertakes to make a lawful arrest or prevent an escape from custody. If the arrestee resists, the officer is not only permitted to defend himself, he is under no obligation to retreat or withdraw. He is justified in using such non-deadly physical force as he reasonably believes is immediately necessary to make the arrest or prevent the escape. However, the officer is not justified in using physical force to make an arrest unless the arrest is in fact lawful or the officer reasonably believes the arrest is lawful.

A law enforcement officer cannot use deadly force to make an arrest or prevent an escape unless he reasonably believes that the use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested

(a) has committed or attempted to commit a felony; or

(b) is attempting to escape by use of a deadly weapon; or

(c) may otherwise endanger life or inflict serious physical injury unless arrested without delay.

Under the Code section an officer who reasonably believes a person who is fleeing has committed a felony and reasonably believes deadly force is necessary to apprehend him may use deadly force to arrest the fleeing felon even if the felon is not armed and does not pose any danger to other persons. The officer would have a defense to a charge of criminal homicide or assault. However, he would not necessarily have a defense to a civil suit for damages.

Note that the officer can act on reasonable appearances. Note also that even if the officer is not justified in using deadly force to make the arrest he may be justified in using deadly force under some other justification such as self-defense.

One of the most difficult problems today is to define precisely when a law enforcement officer is entitled to use deadly force simply to make an arrest or prevent an escape. If the person being arrested resists with force, the officer is entitled to use such force as is necessary to overcome that resistance and make the arrest. In such a situation the officer will also be justified in using force in self-defense as the officer is being subjected to force from the person being arrested. In this situation, the officer need not and ought not retreat. He is entitled to be the aggressor and his being the aggressor does not affect his use of

force to defend himself or make the arrest. In such a situation, if the officer is threatened with deadly force from the person being arrested, the officer is, of course, justified in using deadly force to protect himself provided he reasonably believed the use of deadly force was necessary. In such a situation the justification of using force to make an arrest and in self-defense overlap and there is no question but that if the officer reasonably believes he is in imminent danger of death or serious physical injury from the person being arrested and reasonably believes the use of deadly force is necessary to protect himself, the use of deadly force is justified.

However, it is not as clear when the use of deadly force is justified solely to make an arrest. The problem is the most difficult as to the use of deadly force against a fleeing felon. When the person being arrested runs away, there is no threat of harm to the officer and so there is no basis for self-defense. If the officer uses deadly force, the only justification is that the officer was making an arrest or preventing escape. Although the Code allows the use of deadly force in this situation when the officer reasonably believes it is immediately necessary to use deadly force to make the arrest and reasonably believes the person being arrested has committed a felony, there is the possibility that if the officer uses deadly force in this situation against an unarmed person who does not pose any danger to others that the officer may not be completely immune. Since the statute allows the use of deadly force in this situation he has a defense from criminal prosecution (but keep in mind the use of deadly force must have appeared to be immediately necessary) but he may be subject to civil liability.

8.9 Private person's use of force in making an arrest (§563.051)

Code

1. A private person who has been directed by a person he reasonably believes to be a law enforcement officer to assist such officer to effect an arrest or to prevent escape from custody may, subject to the limitations of subsection 3, use physical force when and to the extent that he reasonably believes such to be necessary to carry out such officer's direction unless he knows or believes that the arrest or prospective arrest is not or was not authorized.

2. A private person acting on his own account may, subject to the limitations of subsection 3, use physical force to effect arrest or prevent escape only when and to the extent such is immediately necessary to effect the arrest, or to prevent escape from custody, of a person whom he reasonably believes to have committed a crime and who in fact has committed such crime.

3. A private person in effecting an arrest or in preventing escape from custody is justified in using deadly force only

(1) When such is authorized under other sections of this chapter; or

(2) When he reasonably believes such to be authorized under the circumstances and he is directed or authorized by a law enforcement officer to use deadly force; or

(3) When he reasonably believes such use of deadly force is immediately necessary to effect the arrest of a person who at that time and in his presence

(a) Committed or attempted to commit a class A felony or murder; or

(b) Is attempting to escape by use of a deadly weapon.

4. The defendant shall have the burden of injecting the issue of justification under this section.

Major Changes

This section clarifies and makes some slight modifications in Missouri Law. In summary it provides a private person can be justified in using force to make an arrest in two situations:

(1) A private person may justifiably use force in making an arrest or preventing escape if a law enforcement officer requests his assistance;

(2) A private person *acting on his own* may justifiably use *non-deadly* force to make an arrest or prevent an escape if he reasonably believes the suspect has committed a crime and if the suspect, in fact, has committed a crime. Note that a law enforcement officer need only reasonably believe the suspect has committed a crime in order to be able to use force in making an arrest. A private citizen must be correct in his belief. In addition, a private person may only use such force as is immediately necessary to effect the arrest.

A private person may *not use deadly force to effect an arrest* or prevent an escape *except in two situations:*

(1) A private person may use deadly force if he is directed to do so by a law enforcement officer and if he reasonably believes the use of deadly force is authorized under the circumstances;

(2) A private person acting on his own can use deadly force to effect an arrest or prevent an escape only if he reasonably believes the use of deadly force is immediately necessary to effect the arrest of someone who **at that time** and **in his presence** (a) committed or attempted to commit murder or a Class A Felony, or (b) is attempting to escape by using a deadly weapon.

Source

This section is based on Model Penal Code §3.07; Illinois Criminal Code Ch. 38, §7-5 and New York Revised Penal Law §35.30.

Comments

In **State v. Parker,** 378 S.W.2d 274, 282 (Mo. 1964), the Missouri Supreme Court stated:

> "The private citizen is limited in the power of arrest; but he does have the right, without warrant or other process, to arrest for certain crimes, such as the commission of a felony or the commission of petit larceny in the presence. But he should be sure of the crime and the person . . . All authorities seem to agree that a private person has the right (where not abrogated by statute) to arrest in order to prevent a breach of peace or an affray. We know of no statute which abrogates this right of the citizen in this state."

Authorities cited included **Pandjiris v. Hartman,** 196 Mo. 539, 94 S.W. 270 (1906) and **Wehmeyer v. Melvihill,** 150 Mo. App. 197, 130 S.W. 681 (1910).

This section deals with the private person acting on his own, or with other private persons, in making arrests (subsection 2); and when he is summoned or directed to assist a law enforcement officer (subsection 1). The section distinguishes the occasions when deadly force can be used.

Subsection 1 prescribes the amount of non-deadly physical force that a private person can use if summoned by a law enforcement officer. As with other sections of this Chapter, the section allows a person to act on appearances provided he does so reasonably. To be justified under subsection 1, the private person must, first, be summoned by one he reasonably believes to be a law enforcement officer; second, use only that amount of force which he reasonably believes necessary to carry out the orders of the officer; and lastly, believe the arrest lawful.

Subsection 2 prescribes the amount of non-deadly physical force a private person may use when acting on his own account, which impliedly includes acting in conjunction with other private persons. The applicability of Subsection 2 is contingent on the private person having a reasonable belief that the person to be arrested has committed an offense *and that such person in fact has committed such offense.* Again the defense is dependent on using physical force only as a final means of effecting an arrest.

Subsection 2 makes a slight modification in Missouri law. It authorizes the use of physical force even when the offense was committed out of the presence of the private person. However, the in presence requirement announced in **State v. Parker,** *supra* had not been strictly adhered to by Missouri courts. For example, in **State v. Keeney,** 431 S.W.2d 95 (Mo. 1968), the Missouri Supreme Court held that where a private person had been advised by the victim of a crime as to the description of the robber's automobile and 16 minutes later such person observed the automobile fitting the description in another state, he had the authority to arrest the occupants of the automobile and search the same. The safeguards that a private person must reasonably believe the person sought to be arrested committed the offense and that such person did in fact commit the offense removes the need for the "in presence" requirement as to the use of non-deadly physical force.

Under subsection 3 the use of *deadly force by a private person* effecting an arrest is authorized only if it is allowed under another section of this Chapter, as for example in self-defense under Code §563.031; or when he is directed by a law enforcement officer to use deadly force and he reasonably believes such to be

authorized; or when it is necessary in the arrest of a person who has committed a Class A Felony or murder or who is attempting to escape by using a deadly weapon.

Subsection 3 (2) authorizes the use of deadly force when the private person is directed to use deadly force by the officer he has been summoned to assist. The private person must, however, reasonably believe the use of deadly force to be authorized under the circumstances. Mistakes will not vitiate the applicability of the justification unless such mistakes were unreasonable.

Subsection 3 (3) authorizes the use of deadly force in very limited circumstances. However, there are two significant differences between use of deadly force by law enforcement officers and private persons. First, as to the private person, the situations giving rise to the use of deadly force must occur "at that time and in his presence." Thus, the private person must personally detect the crime and immediately thereafter attempt to effect the arrest. Secondly, the situations in which the private person is justified in using deadly force are more limited than those in which a law enforcement officer may use deadly force. For the private person, it must involve a Class A Felony, murder, or attempted escape by use of a deadly weapon.

8.10 Use of force to prevent escape from confinement (§563.056)

Code

1. Except as provided in section 216.445, RSMo., a guard or other law enforcement officer may, subject to the provisions of subsection 2, use physical force when he reasonably believes such to be immediately necessary to prevent escape from confinement or in transit thereto or therefrom.
2. A guard or other law enforcement officer may use deadly force under circumstances described in subsection 1 only
   (1) When such use of deadly force is authorized under other sections of this chapter; or
   (2) When he reasonably believes there is a substantial risk that the escapee will endanger human life or cause serious physical injury unless the escape is prevented.
3. The defendant shall have the burden of injecting the issue of justification under this section.

Major Changes

This section is based on Model Penal Code §3.07(3). The use of force to prevent escape from custody is covered by Code §563.046. This section deals exclusively with the use of force to prevent escape from confinement. Specifically exempted from limitation by this section is §216.445 RSMo. which deals with prohibitions on striking prisoners and also allows for the use of force in maintaining discipline, etc. The authorization under §216.445 for the use of physical force, including deadly force, are in no way qualified or restricted by this section.

Comments

Subsection 1 permits the use of physical force, short of deadly force, when immediately necessary to prevent escape from confinement. Subsection 2 states the circumstances under which deadly force can be used. While there is a public interest in the prevention of escape this alone is not sufficient to justify the use of deadly force. Thus, a guard is justified in using deadly force only when such is authorized elsewhere in this chapter (as, for example, in self-defense) or when the guard reasonably believes there is a substantial risk that the escapee will endanger human life or cause serious physical injury unless his escape is prevented by the use of deadly force. Of course, if deadly force is authorized under §216.445 RSMo., applicable to state penal institutions, that section governs.

8.11 Use of force by persons with responsibility for care, discipline or safety of others (§563.061)

Code

1. The use of physical force by an actor upon another person is justifiable when the actor is a parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person or when the actor is a teacher or other person entrusted with the care and supervision of a minor for a special purpose; and

(1) The actor reasonably believes that the force used is necessary to promote the welfare of a minor or incompetent person, or, if the actor's responsibility for the minor is for special purposes, to further that special purpose or to maintain reasonable discipline in a school, class or other group; and

(2) The force used is not designed to cause or believed to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain or extreme emotional distress.

2. A warden or other authorized official of a jail, prison or correctional institution may, in order to maintain order and discipline, use whatever physical force, including deadly force, that is authorized by law.

3. The use of physical force by an actor upon another person is justifiable when the actor is a person responsible for the operation of or the maintenance of order in a vehicle or other carrier of passengers and the actor reasonably believes that such force is necessary to prevent interference with its operation or to maintain order in the vehicle or other carrier, except that deadly force may be used only when the actor reasonably believes it necessary to prevent death or serious physical injury.

4. The use of physical force by an actor upon another person is justified when the actor is a physician or a person assisting at his direction; and

(1) The force is used for the purpose of administering a medically acceptable form of treatment which the actor reasonably believes to be adapted to promoting the physical or mental health of the patient; and

(2) The treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of the parent, guardian, or other person legally competent to consent on his behalf, or the treatment is administered in an emergency when the actor reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

5. The use of physical force by an actor upon another person is justifiable when the actor acts under the reasonable belief that

(1) Such other person is about to commit suicide or to inflict serious physical injury upon himself; and

(2) The force used is necessary to thwart such result.

6. The defendant shall have the burden of injecting the issue of justification under this section.

Major Changes

This section only makes minor changes in Missouri law.

Source

This section is based on Model Penal Code §3.08; Kentucky Penal Code 433C-1-110 and Proposed Michigan Criminal Code §610 (Final Draft 1967).

Comments

Subsection 1 deals with the parent or guardian of a minor or a person similarly responsible for his general care or supervision. So long as the person exercising parental authority acts for the purpose of safeguarding or promoting the child's welfare, including care or supervision for a special purpose, he is justified provided he acts reasonably and does not create a substantial risk of the excessive injuries specified in sub-paragraph (2).

Existing law, §559.050 RSMo., allowed a privilege for the exercise of domestic authority without defining its scope. In **State v. Black**, 360 Mo. 261, 227 S.W.2d 1006 (1950), the court held that a parent

has the right to administer proper and reasonable chastisement of a child without being guilty of assault and battery or mistreatment of children as codified in pre-Code §559.340 RSMo. The new section is consistent with this holding; it requires a true parental purpose, while not justifying extreme force however well intentioned.

In addition the section varies the standard in the case of teachers or other persons entrusted with the care or supervision of a minor for a special purpose. Here the additional criterion is the defendant's reasonable belief that physical force is necessary to further the special purpose of his trust; including but not limited to the maintenance of reasonable discipline in a school, class or group. The variation is designed to make clear the distinction between the position of a person charged with the general care of a minor and that of one performing a more limited protective function.

Subsection 2 makes no specific exclusion for §216.445 RSMo., as is done in Code §563.056, because the language "is authorized by law" includes any statutory authorization of the use of physical force or deadly force.

There is undoubtedly a need to recognize a special authority in those responsible for a vessel or aircraft to employ that force which reasonably appears necessary to prevent the interference with its operation. Subsection 3 is intended to cover this. The justification expressed in this subsection must extend in extreme cases even to the use of deadly force, as where the actor reasonably believes such force necessary to prevent death or serious physical injury.

Subsection 4 articulates existing law that doctors administering a recognized form of treatment are justified in using physical force provided such is used for the promotion of the physical or mental health of the patient *and* the patient or other appropriate individual consents. Sub-paragraph (2) grants authority for surgical operations and other treatment in emergencies. Even in an emergency the privilege under this section is conditioned on the reasonableness of the doctor's belief that a person wishing to safeguard the welfare of the patient would consent.

Subsection 5, has no counterpart in pre-Code Missouri law. It is designed to support the general policy of the law to discourage or prevent suicides.

CHAPTER 9

Attempt and Conspiracy (§§564.011-564.016)

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9.1 Introduction

This chapter deals with the offenses of attempt and conspiracy. These are part of the general chapters of the Code because they apply to all offenses. An attempt or conspiracy to commit any offense is itself an offense. Attempts and conspiracies are called inchoate offenses because, in a sense, they are incomplete or preliminary offenses. These crimes have been substantially changed. Attempt convictions should be easier to obtain under the Code and should be more widely used than the pre-Code attempt crimes. Conspiracy will still be of limited value, given the restrictions contained in section 564.016.

9.2 Attempt (§564.011) See Penalty Discussion Below

Code

1. A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense. A "**substantial step**" is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

2. It is no defense to a prosecution under this section that the offense attempted was, under the actual attendant circumstances, factually or legally impossible of commission, if such offense could have been committed had the attendant circumstances been as the actor believed them to be.

3. Unless otherwise provided, an attempt to commit an offense is a:
   (1) Class B felony if the offense attempted is a class A felony.
   (2) Class C felony if the offense attempted is a class B felony.
   (3) Class D felony if the offense attempted is a class C felony.
   (4) Class A misdemeanor if the offense is a class D felony.
   (5) Class C misdemeanor if the offense attempted is a misdemeanor of any degree.

Elements

A person is guilty of attempt to commit an offense when:
(1) he has a purpose to commit and offense *and*
(2) he does an act which is a substantial step toward the commission of the offense.

Penalty

This section generally provides that an attempt crime is one grade lower than the crime attempted. Thus, an attempt to commit a class A felony is a class B felony. However, attempt to commit any misdemeanor is a class C misdemeanor. If an individual attempts a crime that is not defined by the Code the attempt statute is still applicable. Section 557.021 provides the information necessary for determining how to grade the crime being attempted. Once the object crime is graded, the attempt to commit can be graded. The attempt is one grade less, unless the object crime was a misdemeanor, in which case the

attempt will be a class C misdemeanor. Some attempts are treated as assaults. See chapter 10. For example, attempts to kill are assault in the first degree and punished in accordance with the punishment for assaults.

Major Changes

The pre-Code attempt statutes, §§556.150 and 556.160 RSMo. have been repealed. The Code language is similar to the Model Penal Code. The Code makes three major changes in attempt law. First, failure is not an element of the offense. Therefore, a conviction of attempt can be proper even if the evidence shows that the defendant successfully completed the substantive crime. Secondly, an act of perpetration is no longer required. The defendant need only do an act which is a substantial step towards commission of the offense. See the comments. Third, impossibility is no longer a defense.

Comments

Section 1 does away with failure as an element of attempt offenses. Pre-Code law permitted a defendant charged with attempt to argue that he was innocent because he actually went through with the crime. By eliminating failure as an element of attempt, the section avoids the problem of losing a conviction on a charge of attempt when the evidence shows that the offense was completed. Since failure is not an element, attempt clearly is a lesser included offense. There will be situations where, as now, attempt convictions will not be possible because the attempt can require a higher culpable mental state than does the completed offense.

Section 1 limits attempt offenses to purposive conduct. However, while so doing, it expands the area of conduct that can constitute an attempt. The pre-Code attempt statute is couched in terms of preparation and perpetration. The dividing line is between mere preparation and conduct which is sufficient to constitute an attempt. Though these terms are not precise and cannot be defined with any greater degree of clarity, they have usually been interpreted to require the defendant to come very close to the actual commission of the offense before he can be guilty of an attempt. **State v. Davis,** 319 Mo. 1222, 6 S.W.2d 609 (1927); **State v. Thomas,** 438 S.W. 2d 441 (Mo. 1969). Section 1 expands the area of conduct sufficient for attempt by requiring an act "which is a substantial step towards the commission of the offense."

The principal difficulty here lies in explaining what is meant by a "substantial step." The Final Report of the National Commission on Reform of Federal Criminal Laws states:

> "A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step towards the commission of the crime. *A substantial step is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime . . .*" (emphasis added).

This language, "strongly corroborative of the firmness of the actor's intent . . ." is the gist of the "substantial step." The conduct must be indicative of the actor's purpose to complete the offense.

What act will constitute a substantial step will depend on the facts of the particular case. If the other requirements of attempt liability are met, the following, if strongly indicative of the actor's criminal purpose, should not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the offense.

(b) enticing or seeking to entice the contemplated victim of the offense to go to the place contemplated for its commission.

(c) reconnoitering the place contemplated for the commission of the offense.

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the offense will be committed.

(e) possession of materials to be employed in the commission of the offense, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances.

(f) possession, collection or fabrication of materials to be employed in the commission of the offense, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances.

(g) soliciting an agent, whether innocent or not, to engage in conduct constituting an element of the offense or an attempt to commit such offense or which would establish the agent's complicity in its commission or attempted commission.

Similar provisions are in the Model Penal Code and the Proposed New Jersey Penal Code. These criteria are a matter of degree, but the basis for the indicative nature of the "substantial step" shifts the emphasis from what has yet to be done to what has already been done. The fact that further major steps must be taken by the actor to complete the offense attempted does not render an act insubstantial. However, the "substantial step" is merely part of the evidence required to go to the jury on the question of purposive conduct. The substantial step is not required in itself to be enough evidence to go to the jury on the issue of purposive conduct. If, for example, there is a confession, so that there is clear evidence of purpose, the substantial step would be merely an additional indication of the actor's purpose. The examples listed as (a) through (g) above should not be held insufficient as a matter of law on the issue of a substantial step *if the other requirements of attempt liability are met.*

The emphasis of section 1 is that an act need not be the "last proximate act" for a finding of attempt. Under the "last proximate act" doctrine, when an actor has done all he believes necessary to cause a particular result, it is sufficient to constitute an attempt. This is, of course, true under section 1 but under the section it is not necessary for a finding of attempt for the actor to have performed the last proximate act, if the act performed is strongly indicative of a criminal purpose to accomplish the criminal result. The policy reason underlying the shift in emphasis from what has yet to be done to what has been done, as stated in the Model Penal Code, is that the law is not interested merely in punishing dangerous acts, but also in neutralizing dangerous individuals. Thus section 1 represents a shift in the emphasis of Missouri law to the extent that conduct may suffice for an attempt though not coming as close to the actual commission of the offense as pre-Code Missouri law often required.

Note that item (g) in the list of situations which are not to be held insufficient as a matter of law to constitute a substantial step is designed to cover all cases of criminal solicitation. A similar provision is in the proposed New Jersey Code. Solicitation is not included in the Code as a separate offense. It was only a misdemeanor at common law and was possibly the only common law crime still in effect in Missouri prior to the Code, though not covered by statute. It was, however, a very minor offense at present. Under this section, instead of being a separate offense, if the other requirements of attempt liability are met, acts of solicitation can constitute a "substantial step".

Section 2 is based on the New York Penal Law §110.10. It rejects the so-called "legal impossibility" defense to attempt liability. The nature of that defense and arguments for its rejection are well stated in the commentary to the Model Penal Code, Tent. Draft No. 10 (1960) at 30-31:

> "[In several jurisdictions] attempt convictions have been set aside on the ground that it was legally impossible for the actor to have committed the crime contemplated. These decisions held: (1) that a person accepting goods which he believed to have been stolen, but which were not then 'stolen' goods, was not guilty of an attempt to receive stolen goods; (2) that an actor who offered a bribe to a person believed to be a juror, but who was not a juror, could not be said to have attempted to bribe a juror [**State v. Taylor,** 345 Mo. 325, 133 S.W.2d 336 (1939)]; (3) that an official who contracted a debt which was unauthorized and a nullity, but which he believed to be valid, could not be convicted of an attempt to illegally contract a valid debt; (4) that a hunter who shot a stuffed deer believing it to be alive had not attempted to take a deer out of season [**State v. Guffey,** 262 S.W.2d 152 (Mo. App. 1958)]. The basic rationale of these decisions is that, judging the actor's conduct in light of the actual facts, what he intended to do did not amount to a crime. This approach, however, is unsound in that it seeks to evaluate a mental frame of reference, but to a situation wholly at variance with the actor's beliefs. In so doing, the courts exonerate defendants in situations where attempt liability most certainly should be imposed. In all of these cases (1) criminal purpose has been clearly demonstrated, (2) the actor has gone as far as he could in implementing that purpose, and (3) as a result, the actor's dangerousness is plainly manifested."

It should be noted that Missouri is one of the jurisdictions in which attempt convictions have been set aside on the ground of impossibility. Aside from the compelling policy arguments advanced by the Model Penal Code, Missouri courts have also held the other way as to the impossibility defense. One can be guilty of an attempt to steal even if there is nothing to be stolen, **State v. Scarlett,** 291 S.W.2d 138 (Mo. 1956); one can attempt murder even though the intended victim is not where the defendant thought him to be, **State** v. **Mitchell,** 170 Mo. 633, 71 S.W. 175 (1902). It has been said that a crime need be only apparently possible and that impossibility is no bar so long as it is not obvious, **State v. Block,** 333 Mo. 127, 131, 63 S.W.2d 428, 430 (1933). The elimination of the impossibility defense is approved here because greater dangerousness is demonstrated by the actor's conduct than there is likelihood of his abandonment of his criminal purpose.

In eliminating impossibility as a defense, the Code follows the lead of all of the new code revisions and proposed code revisions. It is still necessary that the result desired or intended be an offense. The actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal, unless it actually is criminal.

Included and Related Offenses

Attempt is clearly included in all substantive offenses. See section 556.046(3).

Practice Pointers

Note that under the Code there are no such crimes as assault with intent to rape or assault with intent to rob. This type of conduct under the Code should be prosecuted as attempted rape or attempted robbery.

9.3 Conspiracy (§564.016) See Penalty Discussion below

Code

1. A person is guilty of conspiracy with another person or persons to commit an offense if, with the purpose of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such offense.

2. If a person guilty of conspiracy knows that a person with whom he conspires to commit an offense has conspired with another person or persons to commit the same offense, he is guilty of conspiring with such other person or persons to commit such offense, whether or not he knows their identity.

3. If a person conspires to commit a number of offenses, he is guilty of only one conspiracy so long as such multiple offenses are the object of the same agreement.

4. No person may be convicted of conspiracy to commit an offense unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

5. (1) No one shall be convicted of conspiracy if, after conspiring to commit the offense, he prevented the accomplishment of the objectives of the conspiracy under circumstances manifesting a renunciation of his criminal purpose.
(2) The defendant shall have the burden of injecting the issue of renunciation of criminal purpose under subdivision (1) of this subsection.

6. For the purpose of time limitations on prosecutions:
(1) Conspiracy is a continuing course of conduct which terminates when the offense or offenses which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired.
(2) If an individual abandons the agreement, the conspiracy is terminated as to him only if he advises those with whom he has conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation in it.

7. A person may not be charged, convicted or sentenced on the basis of the same course of conduct of both the actual commission of an offense and a conspiracy to commit that offense.

8. Unless otherwise provided, a conspiracy to commit an offense is a:
(1) Class B felony if the object of the conspiracy is a class A felony.
(2) Class C felony if the object of the conspiracy is a class B felony.
(3) Class D felony if the object of the conspiracy is a class C felony.
(4) Class A misdemeanor if the object of the conspiracy is a class D felony.
(5) Class C misdemeanor if the object of the conspiracy is a misdemeanor of any degree or an infraction.

Elements

A person is guilty of conspiracy to commit an offense if:

(1) he has a purpose to promote or facilitate the commission of the offense, *and*

(2) he agrees with one or more persons that they or one of them will engage in conduct which constitutes the offense, *and*

(3) at least one member of the conspiracy commits an overt act in pursuance of the agreement.

Penalty

Conspiracies to commit offenses are punished according to the seriousness of the offense which was the object of the conspiracy. If the object crime is a class A felony, the conspiracy will be a class B felony. If the object crime is a class B felony, the conspiracy will be a class C felony. If the object crime is a class C felony, the conspiracy will be a class D felony. If the object crime is a class D felony, the conspiracy will be a class A misdemeanor. A conspiracy to commit any misdemeanor or infraction is a class C misdemeanor. If the object crime is not a Code offense, section 557.021 must be consulted to determine how to grade the object crime. Once the object crime is graded, a conspiracy to commit that crime will be one grade less, unless the object crime is a misdemeanor in which case the conspiracy is a class C misdemeanor.

Major Changes

This section constitutes a major reformation of the offense of conspiracy in Missouri previously covered by §§556.120, 556.130 and 546.320 RSMo. The Code relies heavily on §5.03 of the Model Penal Code and is similar to the proposed Alaska, New Jersey and South Carolina Codes. See the comments section for a discussion of the changes made. The most important changes are:

1) only an agreement to commit a specific offense is sufficient under the Code.

2) The *scope* of the conspiracy is limited to conspiracy to commit only the specific offenses contemplated.

3) An overt act is required for *all* conspiracies. Pre-Code law did not require an overt act if the object of the conspiracy was to commit a felony upon the person, arson, or burglary. (See pre-Code §556.130 RSMo.).

4) A person cannot be convicted of both the conspiracy and the crime which was the object of the conspiracy. Also, he cannot be charged with both and

5) Renunciation can be a defense. The burden of injecting the issue is on the defendant.

Comments

Conspiracy is basically an agreement between two or more persons to commit a crime. In addition to the agreement, there must be an overt act performed by one of the conspirators. An overt act is an act done in furtherance of and designed to carry out the purposes of the conspiracy. It need not be a substantial step as required for a conviction of an attempt to commit a crime.

The following comments are taken from the comments of the Committee to Draft a Modern Criminal Code for Missouri. (They have been modified as needed to follow the *Code* as adopted and to change references.)

The most apparent change is that under the Code only an agreement to commit a specific offense is sufficient for conspiracy. Such a change has been adopted in Illinois and New York and is contained in a number of proposed codes. The old approach is usually defended on the ground of the increased danger of

group over individual activity requires an open-ended conspiracy crime. However, it is clear that such open ended provisions are either unnecessary because civil remedies would be adequate or so vague as to fail to provide a sufficiently definite standard needed in a penal code. In Missouri, for example, it was a misdemeanor to conspire "to commit any act injurious to the public health or public morals, or for the perversion or obstruction of justice, or the due administration of the laws . . ." §556.120 RSMo.

The section also follows the approach of the Model Penal Code and other revisions and proposals by departing from the traditional view that conspiracy is an entirely bilateral or multilateral problem, and instead focuses on each individual's culpability. The conduct of the individual becomes determinative rather than the conduct of a group. Under this formulation, one conspirator cannot escape liability because the only other one was irresponsible or has immunity from prosecution or secretly does not intend to go through with the plan, or has been found innocent of conspiracy.

Another problem in the past has been defining the crime of conspiracy. Mr. Justice Jackson said that "the modern crime of conspiracy is so vague that it almost defies definition." **Krulewich v. United States,** 336 U.S. 440, 445-446, 69 S.Ct. 716, 92 L.Ed. 790 (1939). Thus, traditional formulations of conspiracy say nothing of the required state of mind except what may be inferred from the concept of agreement. Courts have been forced to struggle with the problem, and with no standards to guide them, some decisions have blurred the culpability requirement. The problem is aggravated because some courts confuse the type of evidence from which the elements of conspiracy may be inferred and the elements themselves.

For example, a person may supply ingredients to producers of illicit whiskey. If there is evidence that the supplier knew of the illegal use to which his supplies were being put, such evidence may be used to infer an agreement. Such knowledge, however, should not be equated with a purpose or desire to have the offense committed.

Under the Code, the state will have to prove in every case that the actor acted "with the purpose of promoting or facilitating" the commission of the offense. There must be a firm purpose to commit a specific offense. This purpose must be something more than a passive role in knowing about the offense and the conspiracy. There must be an interest in promoting or facilitating its commission. Not only is this essentially what conspiracy is aimed at, it also corresponds to decisions of the United States Supreme Court. In the Communist cases, the court held that mere membership is not sufficient to constitute conspiracy. **Dennis v. United States,** 341 U.S. 494, 499-500, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). Of course, membership may be *some evidence* or purpose to accomplish the commission of an offense—it can be interpreted as an agreement to the objectives of the organization—but it is not independently sufficient to establish liability. It should be clear that conspiracy may not be predicated merely on joining or adhering to a criminal organization.

Perhaps the most litigated aspect of conspiracy involves the scope of the offense both as to participants and objectives. The scope of conspiracy is vital for several reasons. It may determine what evidence is admissible, which persons are guilty of what substantive offenses, which persons may be tried jointly, how many separate sentences may be handed out for separate conspiracies, etc. Sections 1, 2 and 3 deal with the scope problem. By requiring a firm purpose to promote or facilitate the commission of a specific offense, the scope of the conspiratorial agreement and the scope of the individual conspirator's liability are limited to those offenses which it (the conspiracy) and he (the conspirator) actually intended to commit or facilitate.

Central to this approach is the focus on the individual's culpability and his purpose to promote or facilitate a specific offense or offenses. Perhaps this is best explained in the context in which it can arise. **United States v. Bruno,** 105 F.2d 921 (2nd Cir. 1939) is an example and the Model Penal Code comments analyze the case very well: (Tent. Draft No. 10, 120 et seq. (1960).

> "In that case, 88 defendants were indicted for a conspiracy to import, sell and possess narcotics. The proof showed a vast operation extending over a long period of time, which included smugglers who brought narcotics into New York City, middlemen who paid the smugglers and distributed to retailers, and two groups of retailers selling to addicts—one in New York and the other in Texas and Louisiana. There was no evidence of cooperation or communication between the smugglers and either group of retailers or between the two widely separated groups of retailers. The relationship

between the smugglers, the middlemen and each group of retailers consequently was a typical chain, with communication as well as narcotics passing from smuggler to middleman to retailer. The two groups of retailers, on the other hand, may be considered separate spokes of a wheel whose hub was the middlemen, since they communicated and cooperated only with the middlemen and not with each other.

"The appellants argued that the evidence may have established several separate conspiracies but not the single one alleged. The court held that the jury could have found a single large conspiracy 'whose object was to smuggle narcotics into the Port of New York and distribute them to addicts both in [New York] and in Texas and Louisiana.' This required, the court reasoned, the cooperation of all the various groups—smugglers, middlemen and the two groups of retailers.

> " '[T]he smugglers knew that the middlemen must sell to retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. Thus the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole.'

"The only possible basis mentioned in the opinion for a finding of separate conspiracies was the fact that there was apparently 'no privity' between the two separate groups of retailers. To the argument that there were consequently two conspiracies—one including the smugglers, the middlemen and the New York retailers, and the other the smugglers, the middlemen and the Texas and Louisiana retailers—the court replied:

> " 'Clearly, quoad the smugglers, there was but one conspiracy, for it was of no moment to them whether the middlemen sold to one or more groups of retailers, provided they had a market somewhere. So too of any retailer; he knew that he was a necessary link in a scheme of distribution, and the others, whom he knew to be convenient to its execution, were as much parts of a single undertaking or enterprise as two salesmen in the same shop.' "

The Draft would require a different approach to a case such as *Bruno* and might produce different results.

"Since the overall operation involved separate crimes of importing by the smugglers and possession and sale by each group—smugglers, distributors and retailers—the question as to each defendant would be whether and with whom he conspired to commit *each* of these crimes, under the criteria set forth in Subsections (1) and (2). The conspiratorial objective for the purpose of this inquiry could not be characterized in the manner of the *Bruno* court, as 'to smuggle narcotics into the Port of New York and distribute them to addicts both in [New York] and in Texas and Louisiana.' This is indeed the overall objective of the entire operation. It may also be true of *some* of the participants that they conspired to commit all of the crimes involved in the operation; under Subsection (3) of the Draft as under prevailing law they would be guilty of only one conspiracy if all these crimes were the object of the same agreement or continuing conspiratorial relationship, and the objective of *that* conspiracy or relationship could fairly be phrased in terms of the overall operation. But this multiplicity of criminal objectives affords a poor referent for testing the culpability of each individual who is in any manner involved in the operation.

"With the conspiratorial objectives characterized as the particular offenses and the culpability of each participant tested separately, it would be possible to find in a case such as *Bruno*—considering for the moment only each separate chain of distribution—that the smugglers conspired to commit the illegal sales of the retailers but that the retailers did not conspire to commit the importing of the smugglers. Factual situations warranting such a finding may easily be conceived; the smugglers might depend upon and seek to foster their retail markets while the retailers might have many suppliers and be indifferent to the success of any single source. The court's approach in *Bruno* does not admit of such a finding, for in treating the conspiratorial objective and the entire series of offenses involved in smuggling, distributing and retailing it requires either a finding of no conspiracy or a single conspiracy in which all three links in the chain conspired to commit all of each other's offenses.

"It would also be possible to find, with the inquiry focused upon each individual's culpability as to each criminal objective, that some of the parties in a chain conspired to commit the entire series of offenses while others conspired only to commit some of these offenses. Thus the smugglers and the middlemen in *Bruno* may have conspired to commit, promote or facilitate the importing and possession and sales of all the parties down to the final retail sale; the retailers might have conspired with them as to their own possession and sales but might be indifferent to all the steps prior to their receipt of the narcotics. In this situation, a smuggler or a middleman might have conspired with all three groups to commit the entire series of offenses, while a retailer might have conspired with the same parties but to commit few criminal objectives. Such results are conceptually difficult to reach under existing doctrine not only because of the frequent failure to focus separately upon the different criminal objectives, but because of the traditional view of the agreement as a bilateral relationship between each of the parties, congruent in scope both as to its party and its objective dimensions." (footnotes omitted).

Conspiracy being a preparatory offense, the particular result of an agreement must be intended.

Section 3 states the normal rules where there is more than one criminal objective. If there is only one agreement there is only one conspiracy. If various offenses are the product of a continuous relationship they should be considered part of one conspiracy. Otherwise multiplication of sentences might become almost fortuitous and, considering the extremely inchoate nature of conspiracy, oppressive and unjust.

Section 4 requires an overt act in pursuance of the conspiracy, committed by one of the co-conspirators, before liability attaches. It is well settled that such an act need not be a substantial step in the commission of the target offense. The overt act serves as some indication, beyond the bare agreement, that the actors are serious in their plans. [Proof of the overt act is required for all conspiracies under the Code].

Section 5 varies from pre-Code law by providing a bar to conviction for conspiracy based on the actor's renunciation of criminal purpose and prevention of the aims of the conspiracy. This should be distinguished from abandonment or withdrawal from the conspiracy which may serve (a) as a means of commencing the running of the statute of limitations with respect to the actor, or (b) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators, or (c) as a defense to substantive offenses subsequently committed by the other conspirators. Such abandonment or withdrawal does not affect the liability for the conspiracy crime already committed by the agreement. Decisions in other jurisdictions frequently fail to distinguish renunciation from all of these and have created uncertainty by applying the same terminology and the same tests interchangeably. The time limitation problem is dealt with in section 6 (See also §556.036). The admissibility of evidence problem is not dealt with under conspiracy, but under the laws and rules governing the admissibility of evidence. Liability for subsequently committed offenses is dealt with under Code §562.041.

Section 562.041 provides:

1. A person is criminally responsible for the conduct of another when
   (1) The statute defining the offense makes him so responsible; or
   (2) Either before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense.
2. However, a person is not responsible if:
   (1) He is the victim of the offense committed or attempted;
   (2) The offense is so defined that his conduct was necessarily incident to the commission or attempt to commit the offense. If his conduct constitutes a related but separate offense, he is criminally responsible for that offense but not for the conduct or offense committed or attempted by the other person,

(3) Before the commission of the offense he abandons his purpose and gives timely warning to law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

3. The defense provided by subdivision (3) of subsection 2 is an affirmative defense.

Thus, liability for a substantive offense as an accomplice cannot be predicated solely on the fact of having been a party to a conspiracy to commit that offense, but must be measured by the tests for liability under §562.041. [Note that the defense of abandonment is an affirmative defense.]

The traditional rule concerning renunciation and conspiracy is strict and inflexible; since the offense is complete with the agreement, no subsequent action can exonerate the conspirator of that offense. This position can be defended only if the act of agreement itself is considered sufficiently undesirable and indicative of the actor's dangerousness to warrant penal sanctions in spite of subsequent renunciation and action to defeat the purposes of the conspiracy. This is not generally supportable, especially in light of allowing an analagous exception in Code §562.041. This judgment is based on two considerations: that the renunciation tends to negative the firmness of purpose that evidences individual dangerousness; and that the law should provide a means of encouraging persons to desist from carrying out criminal designs.

The restrictions in section 5 are consistent with the purposes of conspiracy. First, the circumstances must manifest renunciation of the actor's criminal purpose. Second, he must take action sufficient to prevent consummation of the criminal objective. Since conspiracy involves preparation for crime by more than one person, the objective will generally be pursued despite renunciation by one conspirator, and the section accordingly requires for renunciation that the actor thwart the success of the conspiracy. This is an added reason for allowing renunciation, for the evil thwarted is potentially greater because of the plurality of actors. The means required to thwart the success of the conspiracy will vary from case to case and a specific rule would be unworkable. Timely notification of law enforcement authorities will normally suffice, and this is in accord with Code §562.041. Notification of the authorities which fails to thwart the success of the conspiracy because not timely or because of failure on their part will not be sufficient under section 5 but will commence the running of the period of limitations under section 6(2). In the case of the criminal mastermind who formulated all the plans of the conspiracy and then proclaimed his renunciation, the naked renunciation would be insufficient under section 5 to avoid liability. To successfully renounce, he must thwart the success of the conspiracy.

The burden of injecting the issue of renunciation is on the defendant. Thus, the issue of renunciation is not in the case unless some evidence that the defendant did renounce his criminal purpose and took preventive action is admitted. The state then would have the burden of proving that the defendant did not effectively renounce his criminal purpose.

Section 6 defines the duration of a conspiracy for the purpose of determining the application of the period of limitations. 6(1) covers termination as to all parties. The leading case recognizing conspiracy as a continuing offense is **United States v. Kissel,** 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168 (1910) which held that "conspiracy continues up to abandonment or success." Pre-Code Missouri cases are in agreement. **State v. Chernick,** 280 S.W.2d 56 (Mo. 1955) (abandonment and frustration); **State v. Mangiaracina,** 350 S.W.2d 796 (Mo. 1961). Abandonment by all the parties is usually presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitations, measured from the date of the agreement. For the purpose of the period of limitations, the conspiracy may also terminate by success—the commission of the offense or offenses which were its objectives.

Section 6(2) governs abandonment of the agreement by an individual conspirator, which commences the running of the period of limitations as to him. This is recognized in Missouri, see **State v. Bailey,** 383 S.W.2d 781 (Mo. 1964), and in virtually all American jurisdictions, see **Hyde v. United States,** 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912).

Section 7 basically provides for the merger of the conspiracy into the conviction for the substantive offense that was the target of the conspiracy. [But it also goes much further. The legislature added a provision to the proposed draft and the Code, as enacted, also prohibits *charging, convicting* or *sentencing* on the basis of the same course of conduct of both the actual commission of the offense and conspiracy to commit it. Thus, a person can be *charged* with either one, but not both.]

CHAPTER 10

Homicide, Assaults and Kidnapping (§§565.001-565.150)

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10.1 Introduction

This chapter covers the homicide offenses, assault crimes, kidnapping and related offenses.

10.2 Homicide, Introduction

Many of the homicide offenses were recently enacted by the Legislature, but they are not part of the Code and the language of these offenses is frequently very different from Code language. The most

important homicide offenses are: capital murder, first degree murder, second degree murder, and manslaughter.

When the elements of an offense indicate that the defendant must intend to take the life of his victim, it is not essential that he, in fact, kill the person he intended to kill. If he kills another person, he is still guilty of the same offense. It is especially important to note here that even though the Homicide statutes are pre-Code statutes, many of the provisions of the Code will be applicable to homicide offenses committed after the Code takes effect. For example, self defense as defined in the Code may be available to homicide offenses. Also it is arguable that evidence of the defendant's intoxicated condition is admissible to help establish that be did not act "knowingly" if he is charged with capital murder. In addition, the conditional release term contained in §558.011 will apply to sentences for homicide offenses except where it is clearly inconsistent with the punishment authorized for the offense, as in tbe case of capital murder.

10.3 Capital Murder (§565.001) Death or life imprisonment

Statute - Not Code

Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

Elements

A person commits the crime of capital murder if he:
1) caused the death of another human being and
2) intended to take the life of his victim; and
3) knew that he was practically certain to cause the victim's death; and
4) considered taking the victim's life; and
5) reflected on the matter coolly and fully before doing so.

Aggravating and Mitigating Elements

The following circumstances shall be considered by the judge or jury in assessing the penalty for capital murder.

Aggravating Circumstances (§565.012)

1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

2) The offense was committed while the offender was engaged in the commission of another capital murder;

3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Mitigating Circumstances (§565.012)

1) The defendant has no significant history of prior criminal activity;

2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

3) The victim was a participant in the defendant's conduct or consented to the act;

4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

5) The defendant acted under extreme duress or under the substantial domination of another person;

6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

7) The age of the defendant at the time of the crime.

10.3 Capital Murder-Death Penalty-Supreme Court Review (§565.001-.016)

Major Changes

None.

Comments

The sections relating to capital murder and the death penalty are not part of the Criminal Code, but went into effect May 26, 1977. The primary purpose of the recent revisions of the murder statutes was to provide for the imposition of the death penalty in a constitutionally permissible manner.

The United States Supreme Court in **Furman v. Georgia,** 408 U.S. 238, (1972), struck down the death penalty as applied by three states, in part because it was imposed in an arbitrary and freakish manner. The General Assembly of Missouri responded by making the death penalty mandatory in certain situations. (See former sections 559.005 and 559.009.) The Missouri Supreme Court in **State v. Duren,** 547 S.W.2d 476 (Mo. Banc 1977) held sections 559.005 and 559.009 unconstitutional in light of several United States Supreme Court decisions passed down in 1976. The United States Supreme Court had declared invalid a similar statute requiring a mandatory death penalty in **Woodson v. North Carolina,** 428 U.S. 280 (1976), because it failed to provide "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death," 428 U.S. at 303-304. The current statutes were passed to establish a valid death penalty statute for certain homicides.

While none of the Supreme Court's decisions on the death penalty since **Furman** have reflected more than the opinion of a plurality of the Court, it is clear that a death penalty provision must take account of several factors in order to withstand appellate scrutiny.

The sentencing authority must not have "unbridled discretion" to inflict the death penalty in an arbitrary manner. At the same time, the judge or jury must have *some* discretion to consider aggravating and mitigating factors in assessing the penalty for capital offenses. Finally, an automatic appellate review is advisable, although perhaps not constitutionally required, to assure that the death penalty will not be imposed arbitrarily or freakishly. See **Gregg v. Georgia,** 428 U.S. 153, 194-195 (1976).

The present Missouri death penalty provision attempts to meet constitutional mandates by requiring two separate trials, one on the issue of guilt and another on the penalty, and an automatic review by the Missouri Supreme Court of every case in which the death penalty is imposed.

Under *Missouri Approved Jury Instructions—Criminal,* No. 6.02, a verdict of guilt in a capital murder case requires a finding that the defendant: intended to take the victim's life; knew that he was practically certain to cause the victim's death; considered taking the victim's life; and reflected on the matter coolly and fully before causing the death. If the judge or jury finds the defendant guilty of capital murder, a second hearing on the issue of punishment will follow.

The same judge or jury which decided the issue of guilt will hear evidence of the defendant's prior criminal record and other aggravating or mitigating factors. *If the prosecutor plans to introduce evidence of aggravating circumstances, he must disclose these circumstances to the defendant before trial.* (§565.006.2).

Section 565.012 lists the statutory aggravating and mitigating circumstances which may be weighed by the judge or jury in fixing the penalty for capital murder. Section 565.012.1(3) allows the sentencing authority to consider any other mitigating or aggravating circumstances authorized by law, in addition to those statutory circumstances which the evidence supports. In light of the most recent United States Supreme Court ruling on the death penalty, this subsection should be liberally construed to include as a mitigating factor, "any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* —U.S.—, 57 L.Ed.2d 973, —S.Ct.—, (1978.)

The judge will consider the factors, or if the case is tried by a jury, will instruct the jury to consider the factors which are supported by the evidence (§565.012.1). The judge or jury will weigh the aggravating factors against the mitigating factors in assessing punishment. If the judge or jury finds beyond a reasonable doubt that at least one of the statutory aggravating factors is present in the case, and is not outweighed by the mitigating factors involved, the death sentence may be imposed. The jury must specify in writing which aggravating factors support the penalty of death. If no statutory aggravating factor is found, or if the mitigating circumstances outweigh the aggravating circumstances, the judge or jury will sentence the defendant to life imprisonment without possibility of probation or parole until he has served at least fifty years of his sentence.

If the jury is unable to agree on the punishment the judge must sentence the individual to life imprisonment. He may not impose the death penalty (§565.008.1).

If the defendant is sentenced to death, the circuit clerk will forward the record of the case and a report prepared by the trial judge to the Missouri Supreme Court. The court will have records of all capital cases for purposes of comparison and establishing standards. If the defendant takes a direct appeal, it will be consolidated with the automatic review of the death sentence (§565.014.7). Both the defendant and the state may submit briefs and make oral arguments to the court on the propriety of the sentence.

The Supreme Court will decide whether the death sentence was imposed arbitrarily, or because of prejudice and passion; whether the evidence supports the finding of a statutory aggravating factor; and whether the sentence was disproportionate in light of the crime, the defendant and other capital cases. The Court will either affirm the death sentence or remand the case for re-sentencing, along with records of similar cases relied on by the court in its decision.

If the Supreme Court or any other appellate court finds error only in the hearing on sentencing, the new trial will apply only to the issue of punishment. If the Missouri Supreme Court or United States Supreme Court finds the death penalty provisions unconstitutional, any killing which would be capital murder will be tried and sentenced as if it were first degree murder. Any defendants already sentenced to death will be resentenced to life imprisonment with no possibility or probation or parole for fifty years. (Section 565.016). The Missouri Supreme Court upheld a similar alternate punishment statute in **State v. Duren,** 547 S.W.2d 476 (Mo. Banc 1977), although the court did not discuss the question of whether a life sentence with a required minimum of incarceration for fifty years without the possibility of parole might be "cruel and unusual punishment." See opinion of Seiler, J. at 481.

10.4 First Degree Murder (§565.003) Life Imprisonment

Statute—Non-Code

> Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping.

Elements

A person commits the crime of first degree murder if he:

1) causes the death of another human being, and
2) does so
   a) in committing or attempting to commit, or
   b) to prevent detection after committing or attempting to commit, or
   c) to promote escape after committing or attempting to commit
3) arson, burglary, kidnapping, rape, or robbery.

Major Changes

None.

Comments

This section is a pre-Code offense which has not been repealed. It was passed at the same time as the capital murder section discussed in paragraph 10.3. It covers killings done during the commission or attempted commission of five specified felonies which involve a risk of serious physical harm or death to the victims and others. The major difference between this crime and capital murder is that the State must show that the killing occurred in the perpetration of one of the listed felonies, but need not show that the defendant acted with the mental states required for capital murder. A killing which occurs during the perpetration of one of the above felonies may be first degree murder even if it occurs accidentally. The state need not show that the defendant intended to kill anyone. In other words, first degree murder consists of only felony murder, and must be committed in conjunction with one of the five specified felonies.

A killing which occurs during the perpetration one one of the listed felonies might still be capital murder if the defendant had the mental state required for capital murder. For instance, a robber might decide to kill his victims beforehand to prevent later identification. This may be capital murder.

Generally, if a killing occurs during commission of a felony not listed in this section, the crime will be second degree felony murder. If it occurs during the perpetration of a misdemeanor, it may be manslaughter. (see paragraph 5.6)

Since first degree murder carries a mandatory life sentence the question arises whether the conditional release term specified in §558.011 of the Code is applicable. The answer is: probably not, because there is no practical way to compute a conditional release term on a life sentence, unless it is commuted to a term of years by the governor.

In addition, since section 565.008 does not specifically say that an individual sentenced to life imprisonment for first degree murder is not eligible for probation or parole during the first fifty years, he may be subject to release for probation or parole at anytime the department of probation and parole decides to release him. Note that a person given a life sentence for capital murder is not eligible for probation or parole for 50 years.

10.5 Murder in the Second Degree (§559.020) Not Less Than Ten Years Imprisonment

Statute—Non-Code

All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.

Elements

A person commits the crime of murder in the second degree if he:

A. 1) caused the death of another human being
   2) with intent to
      a) take the victim's life or
      b) cause serious bodily harm to the victim
   3) and did not do so in anger, fear, or agitation suddenly provoked by the unexpected acts or conduct of the victim,
   OR

B. 1) causes the death of another human being
   2) a) in committing or attempting to commit, or
      b) to prevent detection after committing, or attempting to commit, or
      c) to promote escape after committing or attempting to commit
   3) any felony other than arson, burglary, kidnapping, rape, or robbery.

Major Changes

None. This is not a Code offense. See paragraph 10.2 introductory comments.

Comments

This statute covers intentional killings which are not capital murder and felony murder which is not first degree murder.

When a killing occurs intentionally, it may be second degree murder if the evidence does not show beyond a reasonable doubt that the defendant deliberated—"reflected coolly and fully" before the act. In other words, second degree murder covers a situation where the defendant forms the intent to kill and commits the act of killing almost instantaneously without reflection, or, because of other circumstances, did not reflect coolly and fully. Also, second degree murder covers killings where the perpetrator only intends to do serious bodily harm to the victim. Thus, where the defendant intends to only seriously wound his victim, but causes death instead, he is guilty of second degree murder. See **State v. Washington,** 368 S.W.2d 439 (Mo. 1963).

In the above situations, the defendant must act without adequate provocation for the killing. Adequate provocation means a state of extreme emotional agitation brought on suddenly by the victim's conduct. A killing done under adequate provocation is manslaughter. See **State v. Williams,** 442 S.W.2d 61 (Mo. 1968); **State v. Avers,** 470 S.W.2d 534 (Mo. 1971); **State v. Stapleton,** 518 S.W.2d 292 (Mo. Banc 1975).

This section also covers felony murder which is not covered by first degree murder. Thus, if the defendant kills while perpetrating, attempting to perpetrate any felony other than arson, burglary, kidnapping, rape, or robbery, he is guilty of second degree murder. See **State v. Williams,** 529 S.W.2d 883 (Mo. Banc 1975). The felony need not be a dangerous felony. See **State v. Chambers,** 524 S.W.2d 826 (Mo. Banc 1975); and case comment, 41 Mo. L. Rev. 595 (1976) and cases cited therein.

10.6 Manslaughter (§559.070)

Two to ten years in prison; or not less than six months in the county jail; or fine of not less than five hundred dollars; or both a fine of not less than $100 and not less than three months in the county jail.

Statute - Non-Code

Every killing of a human being by the act, procurement, or culpable negligence of another, not herein declared to be murder or excusable or justifiable homicide, shall be deemed manslaughter.

Elements of the most common types of manslaughter:

A person commits the crime of manslaughter if he:

A. 1) while in a state of anger, fear, or agitation suddenly provoked by the unexpected acts of the victim,
   2) causes the death of another human being, and
   3) the death was not a justifiable or excusable homicide,
   OR

B. 1) acts in such a manner as to show a reckless disregard for human life and safety
   2) and as a direct result of his act he
   3) causes the death of another human being, and
   4) the death was not a justifiable or excusable homicide.

Major Changes

None.

Comments

Manslaughter is a "catch-all", including any killing which is not justified or excusable, or covered by other murder statutes. The statute does not define manslaughter, but the case law has limited its application to three situations: (A) killings done without "malice" (provoked by victim); (B) reckless killings (culpable negligence); and (C) killings which occur during the perpetration of a misdemeanor (elements not listed).

The manslaughter statute is a non-Code statute. "Culpable negligence", as used in the manslaughter statute, means recklessness or extreme indifference to human life.

The third type of manslaughter includes homicides occurring during the perpetration of a misdemeanor. This is almost never used as a basis for manslaughter convictions today.

10.7 Manslaughter—Assisting in Self Murder (§559.080)

See penalties for manslaughter in paragraph 10.6.

Statute - Non-Code

Every person deliberately assisting another in the commission of self-murder shall be deemed guilty of manslaughter.

Elements

A person is guilty of manslaughter if he:

1) deliberately assists another
2) in committing suicide.

Comments

This is an old statute which was not repealed by the new Code but is almost never used. It provides a manslaughter penalty for persons who deliberately aid another person in killing himself.

10.8 Assault-Introduction

The Code has substantially changed the language and grading of the assault crimes. The Code divides assault into three degrees, and is very specific in defining what constitutes an assault.

The Code repealed the following statutes: poisoning (559.150); placing harmful objects in food, (559.155); assault with intent to kill (§559.180 RSMo.), punishment for assaults (§559.190 RSMo.); mayhem (559.200); penalty for mayhem in certain circumstances (559.210); guardian defiling ward (559.320); striking officer in performance of his duties (557.215); assaulting a police officer executing a writ (557.220); and common assault (559.220).

The Code also does not specifically contain any crimes such as assault with intent to rob; or assault with intent to rape, etc. Such activity is adequately covered by and should be charged as attempted robbery, attempted rape, etc.

Pre-Code law (§557.215 RSMo.) provided a specific category of felonious assault where the victim was a police officer. Essentially that provision made a felony of what would otherwise be a misdemeanor. The Code eliminates this classification of assault based on the identity of the victim. Criminal liability for interfering with arrests is covered elsewhere (§575.160), and under certain circumstances interfering with an arrest can be a felony.

These sections cover both infliction and attempted infliction of injury and grade both at the same level. This equal treatment of an attempted and an accomplished result is an exception to the general approach for attempts. (Attempts are usually graded one grade less serious than the completed crime.) This is consistent with pre-Code laws which tended to punish attempts to inflict death or serious injury at roughly the same level as the completed offense.

In the past, the penalty for assaults frequently varied according to the particular act done: for example, the penalty for mayhem was imprisonment up to 25 years, for placing harmful objects in food, imprisonment up to 10 years. The assault crimes in the Code are graded according to the culpable mental state of the defendant, the harm caused or attempted, and whether a deadly weapon was used.

The most serious assaults (first degree) usually involve causing serious physical injury intentionally or by extreme recklessness. Attempts to kill and attempts to cause serious physical injury are also first degree assault. *Serious physical injury* means an injury involving a substantial risk of death, serious permanent disfigurement or protracted impairment of a bodily function. (§556.061(24) (Note this definition removes any reason for having a separate crime of mayhem).

Assault in the first degree is a class B felony unless committed with a deadly weapon (defined in §556.061(9)) or a dangerous instrument (defined in §56.061(7)) in which case it is a class A felony.

Second degree assault covers a variety of circumstances. Some second degree assaults would be first degree except for the existence of special mitigating circumstances. Second degree assault also includes recklessly causing serious physical injury and intentionally inflicting physical injury with a deadly weapon or dangerous instrument. Physical injury means any pain, illness or impairment of physical condition. Note that serious physical injury is aggravated physical injury.

Third degree assault covers intentionally causing physical injury, offensive contact, or fear of physical injury. This class of assaults also covers recklessly endangering others, where no injury or offensive contact occurs.

Paragraph 10.12E contains a chart which will make it easier to determine which degree of assault has been committed. The chart covers only the most frequently encountered assaults; all assault crimes are not included.

10.9 Assault in the First Degree (§565.050) Class B felony unless committed with a deadly weapon or dangerous instrument in which case it is a class A felony

Code

1. A person commits the crime of assault in the first degree if:
   (1) He knowingly causes serious physical injury to another person; or
   (2) He attempts to kill or to cause serious physical injury to another person; or
   (3) Under circumstances manifesting extreme indifference to the value of human life he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes serious physical injury to another person.
2. Assault in the first degree is a class B felony unless committed by means of a deadly weapon or dangerous instrument in which case it is a class A felony.

Elements

A person commits the crime of first degree assault if he:

1) attempts
   a) to kill another person or
   b) to cause **serious physical injury** to another person;
      or
2) causes **serious physical injury** to another person
   a) and does so knowingly, or
   b) does so recklessly by engaging in conduct which creates a serious risk of death and causes serious physical injury to another, and indicates that he was acting with extreme indifference to the value of human life.

Major Changes

See introduction paragraph 10.8.

Comments

See paragraph 10.12.

10.10 Second Degree Assault (§565.060) Class D felony

Code

1. A person commits the crime of assault in the second degree if:
   (1) He knowingly causes or attempts to cause physical injury to another person by means of a deadly weapon or dangerous instrument; or
   (2) He recklessly causes serious physical injury to another person; or
   (3) He attempts to kill or to cause serious physical injury or causes serious physical injury under circumstances that would constitute assault in the first degree under section 565.050, but
      (a) Acts under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of an ordinary person in the actor's situation under the circumstances as the actor believes them to be; or
      (b) At the time of the act, he believes the circumstances to be such that, if they existed, would justify killing or inflicting serious physical injury under the provisions of chapter 563 of this code, but his belief is unreasonable.
2. The defendant shall have the burden of injecting the issues of extreme emotional disturbance under paragraph (a) of subdivision (3) of subsection 1 or belief in circumstances amounting to justification under paragraph (b) of subdivision (3) of subsection 1.
3. Assault in the second degree is a class D felony.

Elements

A person commits the crime of second degree assault if he:

1) knowingly causes or attempts to cause **physical injury** by means of a deadly weapon or dangerous instrument; or
2) recklessly causes **serious physical injury** to another person; or
3) commits what would otherwise be a first degree assault but the suspect was
   a) acting under the influence of extreme emotional distress for which there is reasonable explanation or excuse, or
   b) believed his actions were justified, but his belief was unreasonable.

Major Changes

See introduction, paragraph 10.8. Subsection (3) introduces two new concepts into the assault crimes. It allows what would otherwise be assault in the first degree to be reduced to assault in the second degree if one of two mitigating circumstances are present. Subpart (a) of subsection 3 provides that it is only second degree assault if the defendant was acting under the influence of extreme emotional distress for which there is reasonable explanation or excuse. This concept is very similar to "provocation" which can justify a manslaughter conviction instead of murder if the defendant was "adequately provoked" and therefore was acting without malice. Although the concepts are similar, the Code language may be broader than the provocation concept established by court decisions. See **State v. Williams,** 442 S.W.2d 61 (Mo. 1968). The section allows for reduction in the grade of the crime (but not exculpation) if the jury finds that the situation was such that a reasonable man in the defendant's situation would have been extremely upset and consequently that the assault which the defendant committed was attributable in part to the situation and not entirely to the defendant's evil disposition. In general, the man who commits an assault or kills while reasonably upset is not as blameworthy as the man who commits an assault or kills calmly, or one who is unreasonably upset and commits an assault or kills. This is the same sort of value judgment involved under the common law category of "heat of passion". The Code does not retain the common law language and does not limit the situations that can amount to "adequate provocation" as was done prior to the **Williams** case.

Subpart 2 of subsection 3 provides that first degree assault can be reduced to second degree assault if the actor **honestly but unreasonably** believed he was justified, as, for example, where he honestly thought he was acting in self-defense, but was unreasonable in his belief of being in imminent danger of death or serious bodily harm. Of course, if his belief were reasonable, although mistaken, he would be justified and would be guilty of no crime. Prior to **State v. Williams,** supra, Missouri treated the claim of justification as an all or nothing proposition. That is, if the justification claim were valid the assault or killing was not criminal and the defendant was acquitted. If, however, the justification claim was not valid, then a killing was murder, unless the defendant fell within one of the categories for manslaughter from "heat of passion". **Williams** changed this in homicide cases by allowing the jury to consider the circumstances of the claimed justification as removing "malice". Such a view is logical. A man who intends to kill believing honestly, but mistakenly, that he is acting in self-defense is not as blameworthy as a man who intends to kill knowing he has no justification. This is true even if the mistake is unreasonable. This subsection recognizes this concept and extends it to the assault crimes.

Section (2) places the burden of producing evidence as to the presence of the mitigating factors on the defendant. It leaves the burden of persuasion on the state. This means that if the only evidence in the case indicates intentional infliction of serious physical injury and there is nothing in the case to indicate the presence of factors of mitigation or extenuation, the state is entitled to an instruction on first degree assault and the court is not obligated to instruct on the possibility of these factors mitigating the offense to second degree assault. Once the issue is raised, however, the state, to get a first degree assault conviction, has the burden of proving that the mitigating factors were not present.

Comments

See paragraph 10.12.

10.11 Third Degree Assault (§565.070) Class A or C misdemeanor

Code

1. A person commits the crime of assanlt in the third degree if:
   (1) He attempts to cause or recklessly causes physical injury to another person; or
   (2) With criminal negligence he causes physical injury to another person by means of a deadly weapon; or
   (3) He purposely places another person in apprehension of immediate physical injury; or
   (4) He recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; or
   (5) He knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative.
2. Assault in the third degree is a class A misdemeanor unless committed under subdivision (3) or (5) of subsection 1 in which case it is a class C misdemeanor.

Elements

Class A misdemeanor

1) A person commits the crime of third degree assault if:
   a) he attempts to cause **physical injury**; or
   b) he causes **physical injury**
      1) recklessly or
      2) with criminal negligence using a deadly weapon, or
   c) he recklessly engages in conduct which creates a grave risk of death or **serious physical injury to another person.**

Class C misdemeanor

2) A person also commits third degree assault if:
   a) he purposely places another person in apprehension of immediate **physical injury;** or
   b) knowingly causes **physical contact** knowing the other person will regard it as offensive or provocative.

Major Changes

See introduction paragraph 10.8.

Subsection 1(1) makes infliction and attempts to inflict physical injury a third degree assault. Recklessness is the required mental state, meaning that the required mental state is satisfied if the defendant acts recklessly, knowingly or purposely. Thus, the defendant must at least be aware of a substantial risk that he will cause injury to someone. See §562.021. Attempts and accomplished acts are penalized the same. This approach is consistent with first and second degree assault, and with pre-Code law. **State v. Higgins**, 252 S.W.2d 641 (Mo. App. 1952).

Subsection 1(2) provides for an assault based on criminal negligence. All other assaults require at least recklessness as the culpable mental state. However, assault based on criminal negligence can occur only when physical injury is caused by a deadly weapon. It cannot be based on criminal negligence with a dangerous instrument.

Subsection 1(3) makes purposefully frightening someone a crime. The defendant must intend to cause an apprehension of immediate physical injury, and the victim must in fact be apprehensive of such injury. The defendant need not intend to cause injury but must intend to frighten. See **People v. Wood**, 10 A.D. 2d 231, 199 N.Y.S.2d 342 (1960).

Subsection 1(4) creates a new offense, sometimes known as reckless endangerment. One who knowingly or purposely inflicts injury commits an assault. Similarly, one who recklessly inflicts injury also commits an assault. An unsuccessful attempt to cause intended injury is an attempted assault. But

reckless acts that are likely to cause injury but do not, under the pre-Code statutes, did not constitute an assault. This section is designed to cover this gap. See New York Penal Code §120.20, 120.25.

Subsection 1(5) criminalizes simple offensive touchings. This section is the only assault where physical injury, serious physical injury or death are not involved. Contact which the defendant knows will be offensive to the victim is sufficient. This section can cover those offensive touchings not covered by the sexual offenses chapter (566). Also, it allows for intervention into situations where physical contact has occurred (pushing and shoving) before the situations become more serious.

Comments

See paragraph 10.12.

10.12 Comments on Assault

The following analysis of assaults is based on the type of injury inflicted on the victim. Injury (or lack thereof) is usually the most visible element of an assault case. Thus, this approach should facilitate understanding the various assault statutes. Additional information is in the introduction, paragraph 10.8.

(A.) Assaults Causing Death are almost always a homicide offense.

See ¶10.2 through 10.7.

(B.) Assaults Involving Serious Physical Injury

Some assaults involve the infliction of serious physical injury. Acts which cause such injuries will usually either be first or second degree assault.

An individual who knowingly or purposely (intentionally) inflicts serious physical injury commits first degree assault. First degree assault is normally a class B felony, however, if the defendant inflicts the injury with a deadly weapon or dangerous instrument it is a class A felony.

A person who causes serious physical injury may be guilty of an assault even though he did not knowingly or purposely inflict the injury. If the suspect recklessly causes serious physical injury, he commits second degree assault. Suppose Donald and David are racing their cars down a city street. John, a pedestrian, is in a crosswalk crossing the street. Donald sees John, but thinks he can miss him, and he does not want to lose the race. Donald runs a stop sign at 80 m.p.h., strikes John and seriously injures him. Donald could be convicted of second degree assault if the jury concludes that he consciously disregarded a substantial and unjustifiable *risk* of causing the injury. If under the circumstances the recklessness of the defendant is so great that it amounts to a manifestation of extreme indifference to the value of human life, and creates a grave risk of death to another person, it could be first degree assault. For example, if the defendant put one bullet in a revolver, spun the cylinder, placed the revolver at another's head, and pulled the trigger, and serious injury resulted, a jury could find the defendant guilty of first degree assault.

The defendant may also cause serious physical injury because of his criminal negligence. If a person, acting with criminal negligence, causes serious physical injury, he is guilty of an assault (third degree) *only* if he was using a deadly weapon. The pertinent statute (565.070.1(2)) requires physical injury so that causing serious physical injury will also suffice. Note that if the defendant, acting with criminal-negligence inflicts serious physical injury, but is not using a deadly weapon, he does not commit an assault crime. For example, if the actor was driving an automobile negligently, and should have been aware of a risk of injury, but was not, he has not committed an assault if he does cause injury.

(C.) Assaults Involving Physical Injury

A person may commit an assault if he inflicts or attempts to inflict physical injury on another. If the defendant is attempting to kill or cause serious physical injury to the victim and physically injures him,

the defendant commits first degree assault. Otherwise, assaults involving physical injury will be second or third degree assaults.

If the defendant knowingly or purposely (intentionally) causes physical injury to another, he has committed third degree assault. If he knowingly or purposely (intentionally) causes physical injury with a deadly weapon or dangerous instrument the offense is second degree assault. Thus, if Donald attacks John, leaving John with a black eye and a bloody nose, Donald commits third degree assault. However, Donald would have committed second degree assault if he had used a blackjack to inflict those same injuries.

An individual who recklessly or negligently causes physical injury to another may also be guilty of an assault. If the victim suffers physical injury because of the defendant's recklessness, the defendant commits third degree assault. Suppose David and Donald are drag racing in a busy part of town. Donald sees John, a pedestrian in the crosswalk, but thinks he can avoid hitting him. Donald is going 80 m.p.h. in a zone where the speed limit is 40 m.p.h. Donald's car strikes John causing him minor injury. A jury could find that Donald was *aware* of the substantial *risk* of causing the injury. If they so conclude, Donald is guilty of third degree assault by recklessly causing physical injury to John.

One who with criminal negligence causes physical injury to another with a deadly weapon commits a third degree assault even though the injury was unintentional. Suppose Donald is preparing to go hunting, and is very careless while loading his rifle. If his rifle discharges because of his carelessness, and someone else is injured, Donald could be convicted of third degree assault if the jury concludes that he *should* have been *aware* of a suhstantial and unjustifiable risk of causing the injury.

(D.) Assaults Where No Physical Injury Results

1. Crimes where no physical injury is intended and none occurs.

An individual may commit an assault even though he intends to cause no physical injury and none results. Purposely frightening another by placing him in fear of immediate physical injury is a third degree assault. No physical injury need actually occur and the defendant need not have intent to cause physical injury. Suppose Donald swings a stick at John, not with a purpose to hit John but to make him believe he will be hit. Although Donald stops before striking John, if John in fact was in fear of being hit, Donald has committed third degree assault since he purposely placed John in fear of physical injury.

A person also commits an assault if he recklessly creates a risk of death or serious physical injury to another. This is a new crime that did not exist in pre-Code statutes. This crime is sometimes called "reckless endangerment" and is a third degree assault. If the defendant's recklessness actually causes serious physical injury, the act will usually be second degree assault. Suppose however that in the previous drag racing example, the pedestrian had not been hit or injured at all, that Donald missed him but only because the pedestrian jumped out of the way at the last second. Donald would have committed reckless endangerment, a third degree assault, even though he inflicted no injury because he recklessly created a grave risk of death or serious physical injury.

Purposely or knowingly touching another, knowing that the touching will be regarded as offensive or provocative, even though no injury will result, may be an assault. For example, suppose Donald intentionally pushes John away from the bar so that Donald can get faster service. Donald does not intend to physically injure John. John is in fact offended by Donald's actions. Donald has committed an assault (third degree) since he knowingly caused physical contact with John that he knew John would find offensive.

The intentional offensive touching section may be useful in allowing official intervention in situations that have the potential to become serious problems.

The offensive touching section may also cover those offensive touchings not covered by the chapter on sex offenses. For example, if Donald kisses Sally without her consent, no sexual offense is committed. The act may be an offensive touching though, and Donald may have committed third degree assault.

2. Assaults where physical injury is intended but none occurs.

An assault may be committed if a person intends to cause physical injury but none results. A person who attempts to cause physical injury, but inflicts no injury, is guilty of third degree assault. If he

attempts to cause physical injury with a deadly weapon or dangerous instrument, he is guilty of second degree assault. He commits first degree assault if he attempts to inflict serious physical injury regardless of whether or not a deadly weapon or dangerous instrument was used. However, if he uses a deadly weapon or dangerous instrument in this instance, the attempt will be a class A rather than class B felony.

Suppose Donald tries to hit John with his fist but misses him. Donald has committed third degree assault even though no injury resulted. The attempt to inflict injury is enough for assault. If Donald had tried to hit John with an axe rather than his fist, the crime would have been first degree assault. Donald's act indicates he intended to cause serious physical injury rather than physical injury, making the offense a first degree assault. The crime would be a class A felony since Donald used a dangerous instrument to commit the assault.

If a defendant attempts to kill or cause serious physical injury to another, he commits a first degree assault. The injury need not be actually accomplished to complete the crime.

(E.) Chart

The chart which follows is intended as a quick reference aid in deciding what assault crime has been committed. It does not include all assault crimes. It does not include attempts or assaults where an injury was threatened but none results.

ASSAULTS WHERE INJURY RESULTS

		Injury Caused			
Defendant's Mental State	**Death**	**Serious Physical Injury**	**Physical Injury**	**Offensive Contact**	**Apprehension Of Physical Injury**
Purposely Causes	See Homicide Statutes	First Degree	Second Degree if the defendant uses a deadly weapon or dangerous instrument, otherwise third degree	Third Degree	Third Degree
Knowingly Causes	See Homicide Statutes	First Degree		Third Degree	No Assault
Recklessly Causes	See Homicide Statutes	Usually second degree, sometimes first degree	Third Degree	No Assault	No Assault
With Criminal Negligence Causes	See Homicide Statutes	Third degree only if the defendant uses a deadly weapon, otherwise no assault		No Assault	No Assault

Included and Related Offenses

Third degree assault is included in second degree assault. Both third and second degree assault are included in first degree assault. This will clearly be the case where the difference in the various degrees is based on different culpable mental states or different degrees of harm being caused.

10.13 Consent as a Defense (§565.080)

Code

1. When conduct is charged to constitute an offense because it causes or threatens physical injury, consent to that conduct or to the infliction of the injury is a defense only if:
   (1) The physical injury consented to or threatened by the conduct is not serious physical injury; or
   (2) The conduct and the harm are reasonably foreseeable hazards of
      (a) The victim's occupation or profession; or
      (b) Joint participation in a lawful athletic contest or competitive sport; or
   (3) The consent establishes a justification for the conduct under chapter 563 of this code.
2. The defendant shall have the burden of injecting the issue of consent.

Comments

Some conduct which would be an assault is not criminal if the victim consents to the touching or injury. The threatened or inflicted injury must only be physical injury, not serious physical injury. As a rule of thumb; a victim may not consent to serious physical injury. **People v. Alfaro,** 132 Cal. Rptr. 356, 61 C.A. 3d 414 (1976). However, an individual may even consent to serious physical injury in three instances.

First, if the injury is a reasonably foreseeable hazard of the victim's employment he may be deemed to consent to the risk of injury by accepting the employment. An example would be military or police training exercises. Second, a victim can consent to a threat of infliction of serious physical injury by participating in certain lawful athletic events or competitive sports. The serious physical injury must be a reasonably foreseeable hazard of the activity. Last, if the consent amounts to a justification, the victim may consent to serious physical injury. The major topic within this last area will probably be medical treatment, so that a victim/patient can lawfully consent to surgery, etc.

A victim must be legally competent to consent to the threatened or inflicted injury. His consent is not effective if he is legally incompetent. See **State v. Jeffords,** 94 S.W.2d 915 (Mo. App. 1936). However, the defendant must know the victim is incapacitated or it must be manifest that the person is incompetent to invalidate the consent. If the defendant is unaware of the victim's incompetency, and should not have been aware of it due to the circumstances, the consent is still effective. Note that if the victim is forced to consent by force, duress or deception; the consent is not a defense to an assault charge. See the definition of consent in section 556.061(4). The defendant has the burden of raising consent as an issue in the case.

10.14 Harassment (§565.090) Class A misdemeanor

Code

1. A person commits the crime of harassment if for the purpose of frightening or disturbing another person, he
   (1) Communicates in writing or by telephone a threat to commit any felony; or
   (2) Makes a telephone call or communicates in writing and uses coarse language offensive to one of average sensibility; or
   (3) Makes a telephone call anonymously; or
   (4) Makes repeated telephone calls.
2. Harassment is a class A misdemeanor.

Elements

A person commits the crime of harassment if

1. for *the purpose* of frightening or disturbing another person

2. he does any of the following:
   a) calls the victim on the phone or sends him a writing and threatens to commit a felony; or
   b) calls the victim on the phone or sends him a writing and uses coarse language that would be offensive to the average person; or
   c) makes an anonymous phone call to the victim; or
   d) makes repeated phone calls.

Comments

The crime of harassment replaces the pre-Code statute concerning harassment by telephone (563.910 RSMo). The new section has a broader scope than the old statute since the new law also covers harassment by writings.

The crime is committed only if the defendant's purpose is to frighten or disturb the victim. If the defendant recklessly or negligently scares the victim, no crime is committed. Also, the Code does not require a "sole purpose" to harrass, as may have been required and the pre-Code statute. See **State v. Patterson,** 534 S.W.2d 847 (Mo. App. 1976).

10.15 Introduction to Crimes Involving Unlawful Restraint

Sections 565.110-565.150 prohibit unlawful interference with another person's liberty.

Kidnapping, felonious restraint, and false imprisonment require that restraint be without consent of the victim. Section 565.100 specifically indicates when the restraint is to be deemed committed without consent. If the defendant uses forcible compulsion (defined in 556.061(11)), the element of lack of consent is established. Persons under the age of fourteen or who are incapacitated are incapable of giving consent. A person is incapacitated if, before giving consent, he is in a temporary or permanent physical or mental condition in which he is unconscious, unable to appreciate the nature of his conduct, or unable to communicate unwillingness to an act. (556.061(12))

Section 565.100 provides:

1. It is an element of the offenses described in sections 565.110 through 565.130 of this chapter that the confinement, movement or restraint be committed without the consent of the victim.
1. Lack of consent results from:
   (1) Forcible compulsion; or
   (2) Incapacity to consent.
3. A person is deemed incapable of consent if he is
   (1) Less than fourteen years old; or
   (2) Incapacitated.

Consent of the victim is not involved in the final crime in this section, interference with custody (565.150). The purpose of this section is to prohibit removal of persons from custody imposed by court order. The interest protected is the lawful custody itself, rather than the freedom of the person taken from custody.

10.16 Kidnapping (§565.110) Class A felony unless committed under subdivision (4) or (5) of subsection 1 in which case it is a class B felony.

Code

1. A person commits the crime of kidnapping if he unlawfully removes another without his consent from the place where he is found or unlawfully confines another without his consent for a substantial period, for the purpose of

(1) Holding that person for ransom or reward, or for any other act to be performed or not performed for the return or release of that person; or
(2) Using the person as a shield or as a hostage; or
(3) Interfering with the performance of any governmental or political function; or
(4) Facilitating the commission of any felony or flight thereafter; or
(5) Inflicting physical injury on or terrorizing the victim or another.

2. Kidnapping is a class A felony unless committed under subdivision (4) or (5) of subsection 1 in which case it is a class B felony.

Elements

A person commits the crime of kidnapping if he:
1) a) unlawfully removes another from where he is found or
   b) unlawfully confines another for a substantial period of time
2) without the victim's consent
3) with the purpose of
   a) holding that person for ransom or reward, or any other act to be performed or not performed for the return or release of that person (Class A felony); or
   b) using the person as a shield or hostage (Class A felony); or
   c) interfering with a governmental or political function (Class A felony); or
   d) facilitating the commission of a felony or any flight thereafter (Class B felony); or
   e) inflicting physical injury on or terrorizing the victim or another (Class B felony).

Major Changes

This section replaces the pre-Code sections on Kidnapping for ransom (§559.230 RSMo. 1969) and Kidnapping (§559.240 RSMo. 1969). The pre-Code law defined kidnapping as the involuntary restraint of liberty with the specific intent to confine the victim. See State v. **Johnson,** 549 S.W.2d 627 (Mo. App. 1977). The Code covers the same matters as the pre-Code law but sets out the purposes of the confinement with more precision.

Comments

Kidnapping is designed to cover those situations where the unlawful confinement or movement of a person without his consent involves a high risk of injury or death; or where it creates a harm not adequately covered by another offense.

Kidnapping is not intended to cover the confinement or movement which is merely incidental to the commission of another offense. For example, many robberies will involve temporary confinement or movement for a short distance (as when the victim is made to move to another part of a room). To take such incidental confinement or movement and punish it as kidnapping would be making two crimes out of what is basically one offense. In these situations the movement or confinement does not add any additional danger to what is already present from the crime of robbery, and there is no purpose served by punishing this or confinement as the very serious crime of kidnapping.

If, however, the robber forces the victim to accompany him as an aid in his escape, this movement creates a harm substantially different from that involved in the robbery. This is the type of harm normally associated with kidnapping and therefore is a proper basis for the separate offense of kidnapping. See **State v. Johnson,** *Supra.*

How much movement or confinement is necessary for the act of kidnapping cannot be defined precisely as it will vary according to the circumstances. If the defendant's purpose is to use the victim as a hostage or shield, or to hold him for ransom, then almost any movement or confinement should suffice. See **State v. Burnside,** 527 S.W.2d 22 (Mo. App. 1975). Removing the victim from his place of residence or business should suffice for any of the listed purposes. The confinement or movement should be considerably more than that which is merely incidental to the commission of another offense. However, if such confinement or movement, of itself, exposes the victim to a risk of serious physical injury, it may come within the offense of felonious restraint in Code section 565.120.

The defendant must have a culpable mental state (recklessness, knowledge or purpose) as to acting without authority of law.

Since it is also necessary to prove a purpose to do one of the five specified things, the issue of whether the person thought he had legal authority is not likely to come up under this section. Defenses on the basis that the defendant did not have a *purpose* (intent) to hold the person for ransom, etc. are more likely.

Kidnapping for the purposes listed above in the Elements, Section 3(a), (b) and (c) creates a serious risk of injury and will not necessarily involve commission of another crime. These are punished as class A felonies. Kidnapping for the purposes listed in 3(d) and (e) will nearly always involve the commission of an additional offense, and are punished as class B felonies.

Included and Related Offenses

Felonious restraint, false imprisonment and interference with custody are probably *not* included offenses in kidnapping because they require that the person *know* he is acting without authority whereas kidnapping only requires that he have a culpable mental state and thus recklessness can be sufficient as to whether he has authority. Since kidnapping can, in theory, be committed with a less culpable mental state as to that element, the other offenses cannot be included. If the issue of whether the defendant knew the confinement or restraint was unlawful is likely to come up, it may be advisable to charge both kidnapping and felonious restraint.

10.17 Felonious Restraint (§565.120) Class C felony

Code

1. A person commits the crime of felonious restraint if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty and exposes him to a substantial risk of serious physical injury.
2. Felonious restraint is a class C felony.

Elements

A person commits the crime of felonious restraint if he:
1) knowingly restrains another
2) unlawfully and
3) without the victim's consent and
4) substantially interferes with his liberty and
5) exposes him to a substantial risk of serious physical injury.

Major Changes

This section and section 565.110 replace the current Missouri section on kidnapping (559.040 RSMo. 1969).

Comments

This section differs from kidnapping in that the victim need not be removed from where he is found, or be isolated in order for a felonious restraint to occur. See **U.S. v. Gaskin,** 320 U.S. 527 (1944). Any abduction or restraint involving a great risk of harm to the victim, may still be felonious restraint.

The elements of felonious restraint are the same as those of false imprisonment (see §565.130 and paragraph 10.18) with the addition of a substantial risk of serious physical harm to the victim. For example, locking a person in a closet may be false imprisonment. However, if the circumstances entail a risk of suffocation, the act is felonious restraint.

The defendant will not be guilty under this section if the victim consents or if the actor believed he was authorized by law to restrain the victim. The actor who believes he has legal authority to restrain or confine another, even if that belief is incorrect, commits no crime under this section, or false imprisonment (565.130). Since the defendant does not *know* his acts are unlawful, his mistake negates an element of the crime. Otherwise, every arrest by a police officer without legal authority would be false imprisonment or a related offense. See **People v. Camp,** 66 Hun 531, 21 NYS 741, affm'd 139 NY 87; 34 N.E. 755 (1893).

Included and Related Offenses

False imprisonment is included in felonious restraint. Note that even if the victim consents or if the defendant believes he has legal authority, the defendant who restrains his victim and causes physical injury may still be guilty of some other crime, such as assault.

10.18 False Imprisonment (§565.130) Class D felony if the victim is removed from the state, otherwise it is a class A misdemeanor

Code

1. A person commits the crime of false imprisonment if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty.
2. False imprisonment is a class A misdemeanor unless the person unlawfully restrained is removed from this state, in which case it is a class D felony.

Elements

A person commits the crime of false imprisonment if he:
1) knowingly restrains another
2) without authority of law, and
3) without his consent and
4) interferes substantially with his liberty.

Major Changes

This is a new crime involving confinements without the aggravating element of risk of serious physical injury. For example, an actor commits false imprisonment if he locks a person in a closet for a few minutes in order to frighten him. It is based on New York Penal Code §135.05.

Comments

The defendant must know that he is restraining the victim without consent or authority of law. The requirement of "substantial interference" makes it clear that causing minor delays, such as stopping another person to ask the time or to request his signature on a petition, are not criminal. The restraint must be a significant restraint on liberty.

See also paragraph 10.19 which provides for specific defense to false imprisonment. They are designed to limit the application of this section in child custody situations.

10.19 Defenses to False Imprisonment (§565.140)

Code

1. A person does not commit false imprisonment under section 565.130 if the person restrained is a child under the age of seventeen and
   (1) A parent, guardian or other person responsible for the general supervision of the child's welfare has consented to the restraint; or
   (2) The actor is a relative of the child; and
      (a) The actor's sole purpose is to assume control of the child; and
      (b) The child is not taken out of the state of Missouri.
2. For the purpose of this section, "relative" means a parent or stepparent, ancestor, sibling, uncle or aunt, including an adoptive relative of the same degree through marriage or adoption.
3. The defendant shall have the burden of injecting the issue of a defense under this section.

Comments

This section creates a defense to false imprisonment in two situations. The defendant has the burden of injecting the defense. Of course, since false imprisonment (§565.130) requires that the restraint be unlawful, the crime is not committed if the restraint is authorized by law. This section (1(a)) states that no crime is committed where someone who has authority to consent to the restraint gives consent to restrain a child under the age of seventeen. Usually, the child's parent or guardian will be the only person with such authority. Even if the child objects to the confinement, no crime is committed if the defendant has lawful consent of the parent or guardian.

Second, the defendant also has a defense to a charge of false imprisonment if he is a relative of the child (who is under seventeen) and acts only to assume control of the child, and does not remove the child from the state. The term "relative" is expressly defined by this section. The purpose of this defense is to keep child custody disputes out of criminal courts. As long as the child is not removed to another state, the proper civil court will be able to resolve the custody dispute.

10.20 Interference with Custody (§565.150) Class D felony if the victim is removed from the state, otherwise it is a Class A misdemeanor.

Code

1. A person commits the crime of interference with custody if, knowing that he has no legal right to do so, he takes or entices from lawful custody any person entrusted by order of a court to the custody of another person or institution.
2. Interference with custody is a class A misdemeanor unless the person taken or enticed away from legal custody is removed from this state, in which case it is a class D felony.

Elements

A person commits the crime of interference with custody if he:
1) takes or entices from lawful custody
2) any person entrusted to the custody of another person or institution by court order
3) knowing that he has no legal right to do so.

Major Changes

This new section replaces the current Missouri statute on enticement of insane persons and children under 12 away from their lawful custodians (559.250 RSMo. 1969). The new section has no similar age limit. This section makes it a crime for one person to interfere with the court-ordered custody of another. The interest protected is *not* the victim's freedom from confinement or abduction. These interests are covered by the statutes on Kidnapping (565.110), Felonious restraint (565.120) and False imprisonment

(565.130). The purpose of this statute is to protect court ordered custody against unlawful interferences. **State v. Hoffman,** 334 Mo. 94, 125 S.W.2d 55 (Mo. 1939). The victim's consent is therefore irrelevant to the commission of interference with custody.

Comments:

Although the statute covers all persons in the court ordered custody of another such as persons committed to mental institutions, children will comprise the bulk of the victims. It is designed in part to discourage the practice of divorced parents settling their child custody disputes by grabbing the children away from the parent who was awarded custody. See **State v. Huhn,** 346 Mo. 695, 142 S.W.2d 1064 (Mo. 1940). As long as the child or other individual is kept within the state, where a civil court can exercise jurisdiction over the custody dispute and issue orders for the return of the child, interference with custody is a class A misdemeanor. If the child is taken out of the state the crime becomes a class D felony.

This statute does not apply to situations where no court order for custody exists. If parents are merely living apart, and one party removes the children from the custody of another, this statute is not applicable. Of course, if the circumstances of the restraint amount to false imprisonment or felonious restraint, those crimes can be charged.

New York Penal Code §135.15 is similar to this Code section and should be a useful reference.

CHAPTER 11

Sexual Offenses (§§566.010-566.130)

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11.1 Introduction to Crimes Involving Sexual Intercourse

All rapes and sexual assaults were covered by the same pre-Code statute (557.269 RSMo.). That law provided imprisonment from two years to life for all forcible rapes; and all sexual intercourse with a child under 16. A major problem with the past law was its expansiveness. A 17 year old boy who had consensual sexual intercourse with his 15 year old girl friend commited the same crime as the defendant who forced his victim to submit at knifepoint. Thus, the courts and jury currently had no legislative guidance to indicate what penalty a particular type of conduct deserved.

Hunvald, *Criminal Law in Missouri—The Need for Revision, 29 Mo. L.Rev. 521,* 536-537 (1963).

The new chapter breaks down sexual offenses involving sexual intercourse into different crimes, based on the severity of the circumstances. Forcible sexual intercourse (rape) is usually separated from consensual acts (sexual assault or sexual misconduct). Nonforcible sexual intercourse with a person who is incapacitated is also separated from forced acts. Punishments are set according to the severity of the offense. This same grading approach is used with crimes involving deviate sexual intercourse.

The new sex offenses chapters also divide what was previously statutory rape into different crimes depending on the age of the victim. Punishments are graded depending on the youth of the victim. All sexual intercourse with children under 14 is rape. Sexual intercourse with 14, 15, or 16 year olds may be either sexual assault or sexual misconduct. The age of the defendant may be relevant when the intercourse is consensual.

A reference chart of the sexual offenses is contained in ¶11.14.

Suspects are likely to argue in some cases that they were not aware of the age of the victim or that the victim was incapacitated. Section 566.020 anticipated those arguments and provides as follows:

Mistakes as to incapacity or age

1. Whenever in this chapter the criminality of conduct depends upon a victim's being incapacitated, no crime is committed if the actor reasonably believed that the victim was not incapacitated and reasonably believed that the victim consented to the act. The defendant shall have the burden of injecting the issue of belief as to capacity and consent.

2. Whenever in this chapter the criminality of conduct depends upon a child's being under the age of fourteen, it is no defense that the defendant believed the child to be fourteen years old or older.

3. Whenever in this chapter the criminality of conduct depends upon a child's being fourteen or fifteen years of age, it is an affirmative defense that the defendant reasonably believed that the child was sixteen years old or older.

The new chapter is sex neutral for all crimes. A male or female may be a victim of a crime, or conversely, charged with a crime.

In this chapter the following words have the meaning indicated:

Sexual Intercourse (§566.010.1(1)) - means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.

Deviate Sexual Intercourse (§566.010.1(2)) - means any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person.

"Forcible compulsion" (§556.061(11)) - means either

(a) Physical force that overcomes reasonable resistance, or

(b) A threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of himself or another person.

Consent (§556.061(4)) - means consent or lack of consent may be expressed or implied. Assent does not constitute consent if

(a) It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifest or known to the actor; or

(b) It is given by a person who by reason of youth, mental disease or defect, or intoxication, is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) It is induced by force, duress or deception.

11.2 Rape (§566.030)

Class B felony—unless a deadly weapon is displayed or serious physical injury is inflicted, then it is a Class A felony.

Code

1. A person commits the crime of rape if:
   (1) He has sexual intercourse with another person to whom he is not married, without that person's consent by the use of forcible compulsion; or
   (2) He has sexual intercourse with another person to whom he is not married who is less than fourteen years old.
2. Rape is a class B felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which case rape is a class A felony.

Elements

A person commits the crime of rape if:

A.

1. he has **sexual intercourse**
2. with another person he is not married to
3. without that person's consent
4. by using forcible compulsion

or

B.

1. he has **sexual intercourse**
2. with another person he is not married to
3. who is under the age of 14.

Major Changes

The Code has modified the rape statute primarily by lowering the age of consent. Under the pre-Code statutes, it was rape if the defendant had sexual intercourse with a female under age 16. Under the Code the victim must be *less than* 14, and can he either male or female. Also, the Code treats sodomy exactly the same as it treats rape. The only difference between the crimes is that rape requires sexual intercourse (defined in ¶11.1) and sodomy requires deviate sexual intercourse (defined in ¶11.1).

Comments

Rape and sodomy are class B felonies. If during the commission of the rape or sodomy a deadly weapon is displayed or serious physical injury is inflicted, then the offenses are punishable as class A felonies.

To be guilty under part A, the suspect must forcibly compel the victim to submit. If the suspect does not use forcible compulsion, he is not guilty of rape or sodomy unless the victim is under the age of 14. He may be guilty of a sexual assault crime, however.

Sexual intercourse accomplished by the use of forcible compulsion is rape. The pre-Code Missouri rape statute required "forcible ravaging" of the victim, but does not define "forcible." The new law defines forcible compulsion. First, forcible compulsion exists if the defendant uses *physical force* that overcomes *reasonable resistance*. What amount of resistance is reasonable depends on the circumstances of each case. The victim is not required to resist to the utmost in situations where resisting would be foolish (e.g., where resisting means death or serious physical injury). This rule appears to follow current case law. See e.g. **State v. Adams,** 380 S.W.2d 362 (Mo. 1964). One who is incapable of resisting due to some physical inability is also protected by this definition since he reasonably could only put up nominal resistance under the circumstances.

Forcible compulsion also exists if an express or implied threat is made that places a person in reasonable fear of death, serious physical injury or kidnapping of himself or another. Threats of force, according to the current case law, satisfy the "forcible" element of the pre-Code Missouri statute. See e.g. **State v. Catron,** 296 S.W. 141 (1927); **State v. Schuster,** 282 S.W. 2d 553 (1955). Threats of death to another, serious physical injury to another, or kidnapping, *to another person* also suffice for forcible compulsion. Thus, a defendant who threatens to kill a woman's child unless she has sexual intercourse with him, has used forcible compulsion even though he makes no direct threat to the victim of the rape.

Sexual intercourse with someone under 14, or that is forcibly compelled, is not rape if the victim and defendant are married to each other. A man and woman who were legally married are defined as not married for purposes of this chapter if they live apart pursuant to a decree of legal separation.

A person also commits rape if he has sexual intercourse with a child under the age of 14. Under the pre-Code statutes, carnal knowledge (with or without the child's consent) with a child under 16 was rape. Sexual intercourse with a 14 or 15 year old who consents is no longer rape, rather it is a lesser offense. The 13 year old child's consent is still irrelevant under the new rape law as under the old statute. The defendant's belief that the victim was older than 14 is no defense. The defendant need have no mental state as to that element of age in this instance. See §566.020.2.

11.3 Sexual Assault in the First Degree (§566.040)
Class C felony—unless a deadly weapon is displayed or serious physical injury is inflicted, then it is a Class B felony.

Code

1. A person commits the crime of sexual assault in the first degree if he has sexual intercourse with another person to whom he is not married and who is incapacitated or who is fourteen or fifteen years old.
2. Sexual assault in the first degree is a class C felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a class B felony.

Elements

A person commits the crime of first degree sexual assault if:
1. he has **sexual intercourse**
2. with another person he is not married to
3. who is incapacitated, or
4. who is 14 or 15 years old.

Major Changes & Comments

See paragraph 11.4.

11.4 Sexual Assault in the Second Degree (§566.050)
Class D felony—unless a deadly weapon is displayed or serious physical injury is inflicted, then it is a Class C felony.

Code

1. A person commits the crime of sexual assault in the second degree if, being seventeen years old or more, he has sexual intercourse with another person to whom he is not married who is sixteen years old.
2. Sexual assault in the second degree is a class D felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a class C felony.

Elements

A person commits the crime of second degree sexual assault if:
1. he is 17 years old or older
2. and he has **sexual intercourse**
3. with someone he is not married to
4. who is 16 years old.

Major Changes

First and second degree sexual assault cover offenses that were scattered through a number of pre-Code statutes. These offenses replace part of the pre-Code rape statute; repeal and replace section 563.160 (molesting a minor with immoral intent); and replace section 559.300 (carnal knowledge of a female between the ages of sixteen and eighteen); and section 559.270 (rape of a drugged victim). The Code offenses are sex-neutral, the victim need not be a female, nor must the perpetrator be a male.

These sections make substantial changes from pre-Code statutes in defining the crimes in terms of the age of the victim and the age of the defendant.

Comments

Both first and second degree sexual assault entail crimes that are not forcible. If forcible compulsion exists the crime is rape. They are also distinguished from rape with very young children under 14.

First degree sexual assault covers two aspects of the old Missouri rape statute (559.260 RSMo.). First, an individual commits first degree sexual assault if he has sexual intercourse with an incapacitated person he is not married to. Incapacitation deals with the ability to consent. See §556.061(12). One who is mentally incapacitated is unable to appraise the nature of his conduct and thus legally unable to consent or refuse consent. The unconscious or '*physically helpless*' person is also unable to consent or to refuse consent. Thus, since an incapacitated person is unable to consent or refuse consent to sexual intercourse, the act is a crime. If forcible compulsion had been used to perpetrate the sexual intercourse, the offense would be rape.

The defendant may assert that he believed the victim was not incapacitated and therefore fully capable of consenting. See §566.020 and ¶11.1. The defendant has the burden of injecting this issue at trial. Once the issue is raised, the state must prove the victim's incapacitation, that the defendant should have known of the victim's incapacitation and did not reasonably believe the victim consented. This is consistent with pre-Code Missouri law. See e.g., **State v. Robinson,** 136 S.W.2d 1008 (1940); **State v. Warren** 134 S.W. 522 (1911).

This section also continues the categorization of sex offenses by the age of the victim (see 566.030). Rape covers sexual intercourse with a child under 14. First degree sexual assault covers sexual intercourse with a child who is 14 or 15 years old. Second degree sexual assault covers sexual intercourse with children aged 16.

The defendant's mistaken belief that the victim was 16 or older is a defense to first degree sexual assault if his belief is reasonable. See §566.020(3). If the defendant reasonably believed the victim was 17 he would have a defense to sexual assault in the second degree. This is different than sexual intercourse with someone under 14 where the defendant's belief is irrelevant. See §566.020(2). The defendant has the burden of proving the affirmative defense of mistake of age. He must convince the jury that he reasonably believed the victim was 16 or older to have a defense to sexual assault in the first degree.

There is no requirement that the defendant be under or over a particular age for sexual assault in the first degree. However, another section, sexual misconduct (§566.090) has the precise elements as first degree sexual assault with the additional requirement that the defendant be under 17. A 16 year old who has sexual intercourse with a 15 year old completes the elements of *both* crimes. Whether he may be charged and convicted of both crimes is not clear. The legislature's intent was probably to cover situations where the defendant was 17 or older as first degree sexual assault, while the defendant commits only sexual misconduct if he is under 17.

First degree sexual assault is a class C felony. If the defendant inflicts serious physical injury on the victim or displays a deadly weapon in a threatening manner, the penalty is escalated to a class B felony. If the defendant's display of a deadly weapon amounts to forcible compulsion the act is rape rather than first degree sexual assault. This rape would be punishable as a class A felony because of the display of a deadly weapon. (§566.030)

Second degree sexual assault replaces the current section on carnal knowledge with a female between the ages of 16 and 18, pre-Code §559.300 RSMo. The section, as all sex offenses, is sex neutral so that a male can be the victim and a female the defendant as well as vice-ver-sa. This section continues the grading of sexual offenses according to the age of the victim. The victim must be under 14 before a consented to act of sexual intercourse is rape. The victim must be 14 or 15 for it to be first degree sexual assault. For *second* degree sexual assault the victim must be 16.

There is one important added element, however. The defendant must be 17 years old or older. No one under 17 can commit second degree sexual assault. A 16 year old who has sexual intercourse with a 14 or 15 year old commits sexual misconduct. A 16 year old who engages in sexual intercourse with another 16 year old who consented commits no crime.

Second degree sexual assault is a class D felony unless the defendant inflicts serious physical injury or displays a deadly weapon in a threatening manner.

Related and Included Offenses

Sexual assault in the second degree is included in sexual assault in the first degree. It is not clear whether the sexual assault crimes are included in rape.

Sexual misconduct (§566.090) is probably included in sexual assault in the first degree.

11.5 Sodomy (§566.060)
Class B felony—unless a deadly weapon is displayed or serious physical injury is inflicted, then it is a class A felony.

Code

1. A person commits the crime of sodomy if:
   (1) He has deviate sexual intercourse with another person to whom he is not married, without that person's consent by the use of forcible compulsion; or
   (2) He has deviate sexual intercourse with another person who is less than fourteen years old.
2. Sodomy is a class B felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon, in which cases sodomy is a class A felony.

Elements

A person commits the crime of sodomy if:

A.
1. he has **deviate sexual intercourse**
2. with another person he is not married to
3. without that person's consent
4. by using forcible compulsion

or

B.
1. he has **deviate sexual intercourse**
2. with another person he is not married to
3. who is under the age of 14.

Major Changes

This section replaces §563.230 of the pre-Code statutes - The "Abominable and detestable crime against nature." This section is the same as §566.030 except that sodomy requires deviate sexual intercourse and rape involves sexual intercourse. Sodomy criminalizes certain types of deviate sexual intercourse. See the comments in paragraphs 11.1 and 11.2. Deviate sexual intercourse means any *sexual act* between the genitals of one person and the mouth, tongue, hand or anus of another (§556.010). The definition of deviate sexual intercourse is based on §21.01 of the Texas Penal Code (1970). It replaces the current language of "detestible and abominable" acts. "Genitals" refers to the external genitalia and procreative organs. "Anus" is construed in the strict anatomical sense, refering to the posterior opening of the alimentary canal. Buttocks are not included. See Stedman's Medical Dictionary, 124 (Unabr. Lawyer's ed. 1961). The term "sexual act" is not defined, but probably penetration *need not* be proven. The pre-Code Missouri law required proof of actual penetration. See **State v. Boyington,** 544 S.W. 2d. 300 (1976).

Comments

The new sodomy statute covers two different offenses involving deviate sexual intercourse. First, deviate sexual intercourse with a child under 14 is sodomy. Second, forcibly compelled deviate sexual intercourse is sodomy. Sodomy is a class B felony. If the actor displays a deadly weapon or inflicts serious physical injury on anyone in the course of the crime, the penalty is escalated to a class A felony.

A person commits sodomy if he has deviate sexual intercourse with a child under the age of 14. The pre-Code statutes made such contact with a child under 16 sodomy, even if the child consents. **State v. Katz,** 266 Mo. 495, 181 S.W. 425 (1916). Deviate sexual intercourse with 14 or 15 year olds is no longer sodomy as under the old law; rather a lesser offense. The consent of a child under 14 is still irrelevant. Also, the defendant's belief that the child was older than 14 is no defense. A mental state with regard to the victim's age is not required for this crime. (§566.020.2). "Forcible Compulsion" is (a) physical force that overcomes reasonable resistance or (b) a threat, express or implied, that places a person in reasonable fear of death , serious physical injury or kidnapping of himself or another. This is based on New York Penal Code §130.00.8. The pre-Code Missouri statute did not define "forcible." Actual force is not necessary. Threats of violence have been recognized in lieu of force and resistance. See **State v. Cunningham,** 100 Mo. 382, 12 S.W. 376 (1889), **State v. Adams,** 380 S.W. 2d (Mo. 1964). The victim need only resist so far as resistance is reasonable under the circumstances. Under pre-Code law, the victim was sometimes said to be required to resist to the utmost. **State v. McChesney,** 185 S.W. 197 (Mo. 1916). For example, a person physically incapable of resisting is protected by this definition since under the circumstances he could not be expected to resist. Further, it is reasonable not to resist in the fact of death or serious physical injury. See **State v. Walker,** 484 S.W. 2d 284 (Mo. 1972).

11.6 Deviate Sexual Assault in the First Degree (§566.070) Class C felony—unless a deadly weapon is displayed or serious physical injury is inflicted, then it is a class B felony.

Code

1. A person commits the crime of deviate sexual assault in the first degree if he has deviate sexual intercourse with another person to whom he is not married and who is incapacitated or who is fourteen or fifteen years old.
2. Deviate sexual assault in the first degree is a class C felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a class B felony.

Elements

A person commits the crime of first degree deviate sexual assault if:
1. he has **deviate sexual intercourse**
2. with another person he is not married to
3. who is incapacitated, or
4. who is 14 or 15 years old.

Comments

See paragraph 11.7, 11.1 and 11.4.

11.7 Deviate Sexual Assault in the Second Degree (§566.080) Class D felony—unless a deadly weapon is displayed or serious physical injury is inflicted, then it is a class C felony.

Code

1. A person commits the crime of deviate sexual assault in the second degree if, being seventeen years old or more, he has deviate sexual intercourse with another person to whom he is not married who is sixteen years old.
2. Deviate sexual assault in the second degree is a class D felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a class C felony.

Elements

A person commits the crime of second degree deviate sexual assault if:
1. he is 17 years old or older
2. and he has **deviate sexual intercourse**
3. with someone he is not married to
4. who is 16 years old

Comments

First degree deviate sexual assault concerns deviate sexual intercourse which is not forcibly compelled or committed with a child under 14. An individual may commit first degree deviate sexual assault either of two ways. Deviate sexual intercourse with an incapacitated person the defendant is not married to is first degree deviate sexual assault. Incapacitation deals with the ability to consent. One who is mentally incapacitated is unable to appraise the nature of his conduct and thus unable to consent or refuse consent. The unconscious or physically helpless person is also unable to consent or to refuse consent. Acts with an incapacitated person are less serious than those forcibly compelled since refusal is obviously lacking in forcibly compelled acts.

The defendant may assert that he believed the victim was not incapacitated and that the person consented. The defendant has the burden of raising this issue at trial. The State, to get a conviction, must prove the victim was incapacitated, that the defendant should have known of the victim's incapacitation and should have known there was no consent. Pre-Code Missouri law is consistent with this. See, e.g., **State v. Robinson,** 345 Mo. 897, 136 S.W. 2d. 1008 (1940), **State v. Warren,** 232 Mo. 185, 134 S.W. 522 (1911).

This section also continues the categorization of sexual offenses by the age of the victim (see 566.030). Sodomy covers deviate sexual intercourse with a child who is under 14. First degree deviate sexual assault concerns deviate sexual intercourse with a 14 or 15 year old. Second degree deviate sexual assault covers deviate sexual intercourse with a 16 year old.

The defendant's mistaken belief that the victim was 16 or older is a defense to a charge of first degree deviate sexual assault if the *belief is reasonable*. This is different from sodomy, (deviate sexual intercourse with someone under 14) where the defendant's belief is irrelevant. The defendant has the burden of proof on this issue at trial because it is an affirmative defense.

First degree deviate sexual assault is sex neutral. A male can be the victim and a female the defendant, or vice-versa. It is a class C felony. If the defendant inflicts serious physical injury on the victim or displays a deadly weapon in a threatening manner, the penalty is escalated to a class B felony. If the defendant's display of a deadly weapon amounts to forcible compulsion, the act is sodomy rather than first degree deviate sexual assault. This sodomy would be punishable as a class A felony because of the display of a deadly weapon.

Second degree deviate sexual assault replaces the pre-Code section on carnal knowledge with a female between the ages of 16 and 18 (§559.300 RSMO.). This section, as all Code sex offenses, is sex neutral so that a male can be the victim and a female the defendant as well as vice-versa.

Two critical elements of second degree deviate sexual assault are the victim's age and the defendant's age. First, this section continues the grading of deviate sexual offenses according to the age of the victim. The victim must be under 14 before an act of deviate sexual intercourse is sodomy. The victim must be 14 or 15 for an act to be first degree deviate sexual assault. For second degree deviate sexual assault, the victim must be 16.

Second, the defendant must be 17 years old or older. No one under 17 can commit second degree deviate sexual assault. A 16 year old who has deviate sexual intercourse with a 14, 15 or 16 year old commits sexual misconduct. Note that the elements of second degree deviate sexual assault may be identical to the elements of sexual misconduct (566.090). This gives the prosecutor some discretion about which to charge.

For further discussion see paragraph 11.4.

Included and Related Offenses

Second degree deviate sexual assault is included in first degree deviate sexual assault.

11.8 Sexual misconduct (§566.090) Class A misdemeanor

Code

1. A person commits the crime of sexual misconduct if:
   (1) Being less than seventeen years old, he has sexual intercourse with another person to whom he is not married who is fourteen or fifteen years old; or
   (2) He engages in deviate sexual intercourse with another person to whom he is not married and who is under the age of seventeen years; or
   (3) He has deviate sexual intercourse with another person of the same sex.
2. Sexual misconduct is a class A misdemeanor.

Elements

A person commits the crime of sexual misconduct if:

A. 1. he is less than 17 and
   2. has **sexual intercourse**
   3. with someone he is not married to
   4. who is 14 or 15 years old.

   or

B. 1. he has **deviate sexual intercourse**
   2. with someone he is not married to
   3. who is under 17 years old,

   or

C. 1. he has **deviate sexual intercourse**
   2. with another person of the same sex.

Major Changes

This is a new crime and is a catchall provision covering fact situations not covered by the provisions on sexual and deviate sexual intercourse. First, a person commits sexual misconduct if he is 16 or younger and has sexual intercourse with a 14 or 15 year old. The purpose of this section is to penalize intercourse between minors where the defendant is too young to be punished for second degree sexual assault. (§566.050). Note that consensual sexual intercourse between unmarried persons where both parties are sixteen or older is not an offense under the Code.

Second, deviate sexual intercourse with a person under 17 is sexual misconduct. Third, deviate sexual intercourse between persons of the same sex is a crime. Deviate sexual intercourse between consenting adults of the opposite sex is not criminal. Homosexual deviate sexual intercourse is sexual misconduct.

The Code contains no provisions on "bestiality."

11.9 Introduction to Crimes Involving Sexual Contact

The Code criminalizes certain types of sexual contact, as well as sexual intercourse and deviate sexual intercourse. **Sexual contact** is any touching, directly or through clothing of the genitals or anus of anyone, as well as the breast of any female for sexual purposes. Sexual purposes means for the purpose of arousing or gratifying anyone's sexual desires. (§566.010(3)) This definition covers the actor touching another and the actor causing another to touch him. It also covers fondling through clothes.

Crimes involving sexual contact, called sexual abuse, are divided into three degrees. Punishments are matched to the severity of the offense. Forcible sexual contact (first degree sexual abuse) is separated from contact not involving force (second or third degree sexual abuse). Sexual contact made while the victim is incapacitated is second degree sexual abuse. Sexual contact made without force but also without the victim's consent is third degree sexual abuse. The sexual contact crimes are also divided according to the age of the victim. Punishments are matched to the youth of the victim. All sexual contact with children under 12 is first degree sexual abuse even if the child consents. Sexual contact with a 12 or 13 year old is second degree sexual abuse, again, even if the child consents. Consensual sexual contact with someone 14 or older is **not** a sexual abuse crime.

In all crimes involving sexual contact, the authorized punishment is increased if the defendant inflicts serious physical injury or displays a deadly weapon in a threatening manner.

A reference chart of sexual offenses is contained in paragraph 11.14.

11.10 Sexual Abuse in the First Degree (§566.100) Class D felony, unless a deadly weapon is displayed in a threatening manner, or serious physical injury inflicted, then it is a class C felony.

Code

1. A person commits the crime of sexual abuse in the first degree if:
   (1) He subjects another person to whom he is not married to sexual contact without that person's consent by the use of forcible compulsion; or
   (2) He subjects another person who is less than twelve years old to sexual contact.
2. Sexual abuse in the first degree is a class D felony unless in the course thereof the actor inflicts serious physical harm on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a class C felony.

Elements

A person commits the crime of first degree sexual abuse if:

A. 1. He subjects another person to whom he is not married
   2. to sexual contact
   3. without that person's consent
   4. by using forcible compulsion

   or

B. He subjects someone **under 12** to sexual contact.

Major Changes

This is a new crime. It is a form of aggravated assault, the sexual contact being the aggravating factor.

Comments

First degree sexual abuse may be committed in two ways. The defendant commits first degree sexual abuse if he forcibly compels sexual contact with someone without their consent. Forcible compulsion is force that overcomes reasonable resistance or a threat that places a person in fear of death, serious physical injury, or kidnapping of himself or another. The crime is a class C felony if the defendant displays a deadly weapon in a threatening manner or inflicts serious physical injury.

Sexual contact with a child 11 years old or younger is also first degree sexual abuse. The consent of the child is irrelevant. Also, it does not matter whether the suspect thought the child was 12 or older. His mistake on that issue is no defense.

11.11 Sexual Abuse in the Second Degree (§566.110)
Class A misdemeanor, unless a deadly weapon is displayed in a threatening manner or serious physical injury is inflicted, then it is a class D felony.

Code

1. A person commits the crime of sexual abuse in the third degree if he subjects another person to whom he is not married to sexual contact without that person's consent.
2. Sexual abuse in the third degree is a class B misdemeanor unless in the course thereof the actor displays a deadly weapon in a threatening manner, in which case the crime is a class A misdemeanor.

Elements

A person commits the crime of second degree sexual abuse if:
1. He subjects another person to whom he is not married
2. to sexual contact
3. when the victim is 12 or 13 years old
4. or is incapacitated.

Major Changes

This is a new crime. It is a form of aggravated assault.

Comments

This section criminalizes sexual contact with very young or incapacitated persons. A defendant commits sexual abuse in the second degree if he has sexual contact with a 12 or 13 year old child. The child's consent to the touching is irrelevant as is the defendant's belief that the child was older.

A defendant also commits sexual abuse in the second degree if he has sexual contact with someone who is incapacitated. Incapacitation covers both mental and physical inability to consent to an act. An incapacitated person is not capable of appraising or appreciating his circumstances, thus, he is unable to consent or refuse consent. The age of the victim is not important if the victim is incapacitated.

The punishment is escalated to a class D felony if the defendant causes serious physical injury or displays a deadly weapon in a threatening manner.

11.12 Sexual Abuse in the Third Degree (§566.120)
Class B misdemeanor unless a deadly weapon is displayed in a threatening manner, then it is a class A misdemeanor.

Code

1. A person commits the crime of sexual abuse in the second degree if he subjects another person to whom he is not married to sexual contact, when the other person is incapacitated or twelve or thirteen years old.
2. Sexual abuse in the second degree is a class A misdemeanor unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a class D felony.

Elements

A person commits the crime of third degree sexual abuse if:
1. He subjects another person to whom he is not married
2. to sexual contact
3. without that person's consent.

Major Changes

This is a new crime. It is a form of aggravated assault.

Comments

If the victim is 14 years old or older and has not consented to the touching, then the sexual contact is a third degree sexual abuse. If the victim is less than 14, the crime will be either first or second degree sexual abuse.

Some contact, such as stealing a kiss, will not constitute sexual contact and should be dealt with under the assault statutes. See paragraphs 5.11 and 5.12 of this handbook.

If a 14 year old consents to sexual contact, no crime is committed under this chapter. If the 14 year old consents to sexual intercourse, the consent does not necessarily preclude conviction of the defendant for sexual assault in the first degree.

11.13 Indecent Exposure (§566.130) Class A misdemeanor

Code

1. A person commits the crime of indecent exposure if he knowingly exposes his genitals under circumstances in which he knows that his conduct is likely to cause affront or alarm.
2. Indecent exposure is a class A misdemeanor.

Elements

A person commits indecent exposure if:

1. He knowingly exposes his genitals,
2. in a situation where he *knows* his act will cause affront or alarm.

Comments

The defendant must know his conduct will cause affront or alarm. He must be aware that under the circumstances at hand, if he exposes himself, he is practically certain to cause alarm. Thus, if he exposes himself in a men's locker room to a football team, he is not likely to cause alarm. The terms "affront" and "alarm" are not defined.

This section replaces pre-Code statute (§563.150) covering lewd and lascivious behavior.

11.14 Reference Chart of Sexual Offenses.

Sexual Offenses

A. Where the victim is:	**The crime is:**
1. under 12, and	
1) deviate sexual intercourse occurs	sodomy
2) sexual intercourse occurs	rape
3) sexual contact occurs	first degree sexual abuse
2. **12 or 13,** and	
1) deviate sexual intercourse occurs	sodomy
2) sexual intercourse occurs	rape
3) sexual contact occurs	second degree sexual abuse
3. **14 or 15,** and	
1) a. deviate sexual intercourse occurs	first degree deviate sexual assault
b. sexual intercourse occurs	first degree sexual assault
c. sexual contact occurs without consent	third degree sexual abuse
2) a. deviate sexual intercourse occurs and defendant is under 17	sexual misconduct
b. sexual intercourse occurs and defendant is under 17	sexual misconduct
4. **16,** and	
1) deviate sexual intercourse occurs and defendant is 17 or over	second degree deviate sexual assault
2) sexual intercourse occurs and defendant is 17 or over	second degree sexual assault
B. Sexual Offenses Where Age Is Not a Factor	**Crime:**
1. Deviate Sexual Intercourse	
1) by forcible compulsion	sodomy
2) where the victim is incapacitated	first degree deviate sexual assault
3) where the victim is under 17	sexual misconduct
4) with someone of the same sex	sexual misconduct
2. Sexual Intercourse	
1) by forcible compulsion	rape
2) where the victim is incapacitated	first degree sexual assault
3. Sexual Contact	
1) by forcible compulsion	first degree sexual abuse
2) without the victim's consent	third degree sexual abuse

CHAPTER 12

Prostitution
(§§567.010-567.100)

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12.1 Introduction

This chapter provides for three types of prostitution crimes; prostitution, patronizing prostitution, and promoting prostitution. The prostitution offense is, of course, aimed at persons who engage in sexual conduct with someone in return for something of value. The crime of patronizing prostitution makes it a crime to pay for a prostitute's services. Finally, a person commits the crime of promoting prostitution if he aids or causes a person to engage in prostitution.

This chapter changes Missouri law somewhat. For example, either a male or female can be guilty of prostitution and related offenses under this chapter (§567.040). Also, the crime of patronizing prostitution is entirely new.

Section 567.090 provides that the "promoting prostitution" offenses, paragraphs 12.5, 12.6, and 12.7 (567.050 through 567.070), will preempt any other regulation of the area. Its purpose is to standardize these felony offenses throughout the state. Therefore, cities and towns may not enact ordinances that make conduct in the "promoting prostitution" area subject to a sanction of any kind. Cities and towns may enact and enforce laws prohibiting and penalizing any other conduct subject to criminal or civil sanctions under other provisions of this chapter.

Section 567.080 declares that prostitution houses are public nuisances and authorizes the courts to order the houses closed and that the house not be occupied or used for up to one year. Section 567.100 makes the prosecuting attorney responsible for enforcement of the civil remedies contained in section 567.080.

See paragraph 12.11 for chapter definitions.

12.2 Prostitution (§567.020) Class B misdemeanor

Code

1. A person commits the crime of prostitution if he performs an act of prostitution.
2. Prostitution is a class B misdemeanor.

Elements

A person commits the crime of prostitution if he:
1. Engages or offers or agrees to engage
2. In **sexual conduct**
3. With another person
4. In return for something of value
5. To be received by
   a. The person who agrees to or actually engages in sexual conduct, or
   b. a third person

"Sexual conduct" occurs when there is
(a) Sexual intercourse
(b) Deviate sexual intercourse or
(c) Sexual contact

Major Changes

Pre-Code Missouri law on prostitution, found mainly in §§563.010-563.140 RSMo., sets extremely high penalties for many types of conduct connected with prostitution but did not deal directly with prostitution itself as a crime. The Code specifically now makes prostitution a state crime. It is clear that either a male or female may be guilty under the Code.

Source

See New York Revised Penal Law §230.00 (1967), Michigan Revised Criminal Code §6201 (Final Draft 1967) and Kentucky Penal Code §3105 (Final Draft 1971).

Comments

The definition of prostitution found in §567.010(2) covers commercial sexual conduct. Notice that the Code covers this type of activity without regard to the sex of the participants.

The definition of prostitution covers solicitation and under it an act of "sexual conduct" need not be completed in order to find prostitution. However, the offer or agreement to engage in sexual conduct must be a return for "something of value." See the definitions in paragraph 12.8 of this chapter.

Although cities and towns may be preempted from enacting ordinances penalizing certain conduct in this area (§567.050-567.070), they may enact an ordinance prohibiting prostitution and solicitation subject to the constraints listed in §567.090.

12.3 Patronizing Prostitution (§567.030) Class B misdemeanor

Code

1. A person commits the crime of patronizing prostitution if he patronizes prostitution.
2. Patronizing prostitution is a class B misdemeanor.

Elements

A person commits the crime of patronizing prostitution if;

1. Pursuant to a prior understanding he gives something of value to another person as compensation for that person or a third person having engaged in sexual conduct with him or with another; or

2. He gives or agrees to give something of value to another person on an understanding that in return therefore that person or a third person will engage in sexual conduct with him or with another; or

3. He solicits or requests another person to engage in sexual conduct with him or with another, or to secure a third person to engage in sexual conduct with him or with another in return for something of value.

Major Changes

This section is new to Missouri law.

Source

This section is based on New York Revised Penal Law §230.05 (1967) and Michigan Revised Criminal Code §6205 (Final Draft. 1967)

Comments

The provisions of this section make the patron of prostitutes subject to criminal liability. A person can violate this section even if he has not yet had any dealings with a prostitute. If he arranges to give something of value to a "pimp" in exchange for a prostitute's services, he may still be guilty of the crime of patronizing prostitution.

Section 567.040 makes it clear that the sex of the parties is irrelevant. The crime of patronizing prostitution covers situations in which a woman is hired by a man, a man is hired by a woman, a man by a man, and a woman by a woman.

Section 567.040 provides:

In any prosecution for prostitution or patronizing a prostitute, the sex of the two parties or prospective parties to the sexual conduct engaged in, contemplated or solicited is immaterial, and it is no defense that

(1) Both persons were of the same sex; or

(2) The person who received, agreed to receive or solicited something of value was a male and the person who gave or agreed or offered to give something of value was a female.

12.4 Introduction to the Offenses of Promoting Prostitution

There are many Missouri statutes replaced by the next three sections. Currently Missouri has a conglomerate of overlapping and repetitive statutes covering various types of "promoting prostitution" activity which authorize severe felony punishments in most instances. Most of these provisions are found in §§563.010 to 563.140 RSMo. However, there are some inconsistent and overlapping misdemeanor provisions found in pre-Code §§563.630 and 563.640 which should be compared with §§ 563.010, 563.040, 563.080, 563.100, 563.110 and 563.120, all of which provide felony penalties for the proscribed conduct.

12.5 Promoting Prostitution in the First Degree (§567.050) Class B felony

Code

1. A person commits the crime of promoting prostitution in the first degree if he knowingly
(1) Promotes prostitution by compelling a person to enter into, engage in, or remain in prostitution; or

(2) Promotes prostitution of a person less than sixteen years old.
2. The term "**compelling**" includes
(1) The use of forcible compulsion;
(2) The use of a drug or intoxicating substance to render a person incapable of controlling his conduct or appreciating its nature;
(3) Withholding or threatening to withhold dangerous drugs or a narcotic from a drug dependent person.
3. Promoting prostitution in the first degree is a class B felony.

Elements

A person commits the crime of promoting prostitution in the first degree if he knowingly
1. promotes prostitution of a person less than sixteen years old, or
2. promotes prostitution by **compelling** a person to enter into, engage in, or remain in prostitution.
The term "compelling" includes:
a) the use of forcible compulsion
b) the use of a drug or intoxicating substance to render a person incapable of controlling his conduct or appreciating its nature
c) withholding or threatening to withhold dangerous drugs or a narcotic from a drug dependent person.

Major Changes

See paragraph 12.4.

Source

This section is based on the New York Revised Penal Law §230.30 (1967) and Michigan Revised Criminal Code §6221 (Final Draft 1967).

Comments

Promoting prostitution in the first degree requires proof that the individual promoted prostitution (see Promoting prostitution in the third degree, paragraph 13.4) and that he either promoted the prostitution of a person less than 16 years old or compelled a person to become or remain a prostitute, or engage in acts of prostitution.

This section makes it a more serious felony if a person promotes prostitution of a person less than 16 years old. There are three types of compulsion which give rise to the offense defined in this subsection: first, by compelling another to enter prostitution by using forcible compulsion; second, by using drugs or intoxicating substances to render another incapable of controlling or appreciating his conduct; and third, by withholding or threatening to withhold drugs from a **drug dependent person.**

"Drug dependent person" is defined by 195.500(2) RSMo 1971 Supp., and that definition should be applicable here. It defines "drug dependent person" as a person who is using dangerous drugs or a narcotic and who is in a state of psychic or physical dependence or both arising from the use of that substance. This definition does not include alcoholics.

A person commits the offense of promoting prostitution in the first degree if he compels another to enter into, engage in, or remain in prostitution. "Enter into" covers the case in which a person has been compelled to enter the prostitution business or enterprise; "remain in" covers the case of a prostitute who would like to leave prostitution, but who is compelled to remain a prostitute.

Included and Related Offenses

Both promoting prostitution in the second and third degree are lesser included offenses.

12.6 Promoting Prostitution in the Second Degree (§567.060) Class C felony

Code

1. A person commits the crime of promoting prostitution in the second degree if he knowingly promotes prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes.
2. Promoting prostitution in the second degree is a class C felony.

Elements

A person commits the crime of promoting prostitution in the second degree if:
1. he knowingly promotes prostitution
2. by managing, supervising, controlling or owning, either alone or in association with others
3. a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes.

Major Changes

See paragraph 12.4.

Source

Based on New York Revised Penal Law §230.25 (1967) and Michigan Revised Criminal Code §6222 (Final Draft 1967).

Comments

The elements of this crime are self-explanatory. To be guilty an individual must promote prostitution in a certain way—by maintaining a house of prostitution or prostitution business involving two or more prostitutes.

Included and Related Offenses

Promoting prostitution in the third degree is a lesser included offense of promoting prostitution in the second degree.

12.7 Promoting Prostitution in the Third Degree (§567.070) Class D felony

Code

1. A person commits the crime of promoting prostitution in the third degree if he knowingly promotes prostitution.
2. Promoting prostitution in the third degree is a class D felony.

Elements

A person knowingly promotes prostitution if, acting other than as a prostitute or a patron of a prostitute, he knowingly
(a) Causes or aids a person to commit or engage in prostitution; or
(b) Procures or solicits patrons for prostitution; or
(c) Provides persons or premises for prostitution purposes; or
(d) Operates or assists in the operation of a house of prostitution or a prostitution enterprise; or

(e) Accepts or receives or agrees to accept or receive something of value pursuant to an agreement or understanding with any person whereby he participates or is to participate in proceeds of prostitution activity; or

(f) Engages in any conduct designed to institute, aid or facilitate an act or enterprise of prostitution.

Major Changes

See paragraph 12.4.

Source

This section is based on New York Revised Penal Law §230.20 (1967) and Michigan Revised Criminal Code §6223 (Final Draft 1967).

Comments

The terminology in the definition of "promoting prostitution" permits this section to cover the entire spectrum of prohibited promotional activity. This section cannot be violated by a person who is solely a prostitute or a patron *unless* the person also promotes the prostitution of another.

12.8 Prostitution—Houses Deemed Public Nuisances (§567.080)

Code

1. Any room, building or other structure used for sexual contact for pay as defined in section 567.010 or any unlawful prostitution activity prohibited by this chapter is a public nuisance.

2. The attorney general, circuit attorney or prosecuting attorney may, in addition to all criminal sanctions, prosecute a suit in equity to enjoin the nuisance. If the court finds that the owner of the room, building or structure knew or had reason to believe that the premises were being used regularly for sexual contact for pay or unlawful prostitution activity, the court may order that the premises shall not be occupied or used for such period as the court may determine, not to exceed one year.

3. All persons, including owners, lessees, officers, agents, inmates or employees, aiding or facilitating such a nuisance may be made defendants in any suit to enjoin the nuisance, and they may be enjoined from engaging in any sexual contact for pay or unlawful prostitution activity anywhere within the jurisdiction of the court.

4. Appeals shall be allowed form the judgment of the court as in other civil actions.

Comments

This is a simplified version of pre-Code §§563.130 and 563.140 RSMo. It also includes the penalty provision of §563.365(3) to prevent landlords from allowing their premises to be used for prostitution activities.

"Structure" in subsection (1) should be broadly construed to include structures such as mobile homes.

Subsection (3) is based on the last sentence of pre-Code §563.140(1) with the added provision that individuals may be enjoined from engaging in unlawful prostitution activities anywhere within the jurisdiction of the court. Thus if an owner of one building declared a nuisance were to permit prostitution in another building controlled by him, he would be in contempt of court under such an in personam injunction.

The prosecutor does not have to establish that the possessor knew his premises were being used regularly for unlawful prostitution activities to deprive him of the use of his premises. If the owner should have known of the regular use of his premises for prostitution, he may lose the use of the premises for up to one year for failing to abate the nuisance. A prosecutor could provide a basis for showing knowledge or that the landlord should have known of the prostitution by giving written notice to the landlord. This should be sufficient to get most landlords to abate the nuisance in view of the possible penalty if it is not abated.

The requirement that premises be "regularly" used for unlawful prostitution is based on the definition of bawdyhouse, excluding premises that are not frequented, *i. e.*, used a number of times for prostitution purposes. "Any unlawful prostitution activity" includes regular use of premises by one person for prostitution and use of either heterosexual or homosexual prostitution.

12.9 Preemption and Standardization (§567.090)

Code

> The general assembly by enacting this chapter intends to preempt any other regulation of the area covered by felony sections 567.050 through 567.070, to promote statewide control of prostitution, and to standardize laws that governmental subdivisions may adopt in other areas covered by this chapter. No governmental subdivision may enact or enforce a law that makes any conduct in the area covered by sections 567.050 through 567.070 subject to a criminal or civil penalty or sanction of any kind. Cities and towns may enact and enforce laws prohibiting and penalizing conduct subject to criminal or civil penalties or sanctions under other provisions of this chapter, but the provisions of such laws shall be the same and the authorized penalties or sanctions under such laws shall not be greater than those of this chapter. Cities and towns may also enact and enforce laws prohibiting and penalizing public solicitation of sexual conduct, whether or not the offer to engage in sexual conduct is in return for something of value, and health laws to prevent the spread of venereal diseases.

Comments

Under this section cities and towns are not permitted to enact and enforce laws in the area covered by the felony provisions of this chapter. However, they may enact and enforce laws prohibiting and penalizing any other conduct subject to criminal or civil sanctions under provisions of this chapter. *E. g.*, a city may feel that state enforcement of the laws against prostitution is inadequate to provide sufficient local control of the problem. As a result, the city may enact an ordinance proscribing prostitution and patronizing prostitution, with authorized penalties not greater than the Class B and C Misdemeanor penalties provided in Code §§567.020 and 567.030. The city could not take an inconsistent approach, *e. g.*, deciding to punish prostitution but not patronizing prostitution, or deciding to define or punish the offenses more severely. A city might choose to adopt Code §567.080, giving the city attorney authority to sue to enjoin prostitution houses.

12.10 Responsibilities of Prosecuting Attorneys and Attorney General (§567.100)

Code

> In addition to the responsibility of circuit attorneys and prosecuting attorneys in their respective jurisdictions to enforce the criminal provisions of this chapter, they shall have the duty to enforce the provisions of section 567.080; and the attorney general shall have a concurrent duty to enforce the civil provisions of section 567.080.

12.11 Chapter Definitions (§567.010)

As used in this chapter, the following terms have the meaning indicated.

(1) "Promoting prostitution", a person "promotes prostitution" if, acting other than as a prostitute or a patron of a prostitute, he knowingly

(a) Causes or aids a person to commit or engage in prostitution; or

(b) Procures or solicits patrons for prostitution; or

(c) Provides persons or premises for prostitution purposes; or

(d) Operates or assists in the operation of a house of prostitution or a prostitution enterprise; or

(e) Accepts or receives or agrees to accept or receive something of value pursuant to an agreement or understanding with any person whereby he participates or is to participate in proceeds of prostitution activity; or

(f) Engages in any conduct designed to institute, aid or facilitate an act or enterprise of prostitution;

(2) "Prostitution", a person commits "prostitution" if he engages or offers or agrees to engage in sexual conduct with another person in return for something of value to be received by the person or by a third person;

(3) "Patronizing prostitution", a person "patronizes prostitution" if

(a) Pursuant to a prior understanding, he gives something of value to another person as compensation for that person or a third person having engaged in sexual conduct with him or with another; or

(b) He gives or agrees to give something of value to another person on an understanding that in return therefor that person or a third person will engage in sexual conduct with him or with another; or

(c) He solicits or requests another person to engage in sexual conduct with him or with another, or to secure a third person to engage in sexual conduct with him or with another, in return for something of value;

(4) "Sexual conduct" occurs when there is

(a) "Sexual intercourse" which means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results; or

(b) "Deviate sexual intercourse" which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person; or

(c) "Sexual contact" which means any touching, manual or otherwise, of the anus or genitals of one person by another, done for the purpose of arousing or gratifying sexual desire of either party;

(5) "Something of value" means any money or property, or any token, object or article exchangeable for money or property.

CHAPTER 13

Offenses Against the Family (§§568.010-568.070)

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13.1 Introduction

This chapter covers the crimes of bigamy and incest and others which are designed to prevent those activities detrimental to family relationships and the welfare of children.

13.2 Bigamy (§568.010) Class A misdemeanor

Code

1. A married person commits the crime of bigamy if he:
   (1) Purports to contract another marriage; or
   (2) Cohabits in this state after a bigamous marriage in another jurisdiction.
2. A married person does not commit bigamy if, at the time of the subsequent marriage ceremony, he reasonably believes that he is legally eligible to remarry.
3. The defendant shall have the burden of injecting the issue of reasonable belief of eligibility to remarry.
4. An unmarried person commits the crime of bigamy if he
   (1) Purports to contract marriage knowing that the other person is married; or
   (2) Cohabits in this state after a bigamous marriage in another jurisdiction.
5. Bigamy is a class A misdemeanor.

Elements

A. A **married person** commits the crime of bigamy if (s)he:
   1. purports to contract another marriage; or
   2. cohabits in this state after a bigamous marriage in another jurisdiction.

However, a married person does not commit bigamy if, at the time of the subsequent marriage ceremony, (s)he reasonably believes (s)he is legally eligible to remarry.

B. An **unmarried person** commits bigamy if (s)he:
   1. purports to contract marriage
   2. knowing that the other person is married.

   OR

   1. cohabits in this state after a bigamous marriage in another state.

Major Changes

The Code makes several significant changes in the offense of bigamy. Pre-Code §563.170 RSMo. defined a bigamist as a "person having a husband or wife living, who shall marry another." Because all marriage ceremonies involving a person who is already married are void under section 451.030 RSMo 1969, the Code changes the language to a "married person" who "purports to contract another marriage."

The Code abolishes one recognized defense to a charge of bigamy and establishes another defense which was previously unrecognized. Section 563.180 RSMo 1969 provided a defense to a charge of bigamy if the defendant's spouse was absent without being known alive or out of the United States for seven consecutive years, or were sentenced to life imprisonment. Since these circumstances are adequate grounds for divorce, the Code does away with them as defenses to a charge of bigamy. The Code allows the defense of reasonable belief in eligibility to remarry. This would apply to the person who has good reason to believe that his spouse is dead, or has obtained a divorce. The validity of foreign divorces is often open to question. If a person obtains such a divorce, and has good reason to believe that it is valid (such as obtaining a legal opinion), he will not be guilty of bigamy if he remarries in reliance on that belief.

Source

See the Kentucky Penal Code §3305 (Final Draft 1971), Michigan Revised Criminal Code §7001 (Final Draft 1967) and Model Penal Code §230.1.

Comments

Under the Code, a married person can commit bigamy in two ways. He can purport to contract another marriage in this state, or he can cohabit in this state after a bigamous marriage in another state. Since no mental state is prescribed by the statute, the married person must act at least recklessly. See Code section 562.021.2. This means that he must consciously disregard a substantial and unjustifiable risk that he is already married.

An unmarried person can commit bigamy in two ways. First, he can purport to marry another *knowing* that the other person is married. Since it is very difficult to ascertain positively the marital statues of another person, an unmarried person is not guilty unless he knows that the other party to the ceremony is already married. Second, an unmarried person is guilty of bigamy if he cohabits in Missouri after a bigamous marriage in another state.

13.3 Incest (§568.020) Class D felony

Code

1. A person commits the crime of incest if he marries or purports to marry or engages in sexual intercourse or deviate sexual intercourse with a person he knows to be, with regard to legitimacy:
   (1) His ancestor or descendant by blood or adoption; or
   (2) His stepchild, while the marriage creating that relationship exists; or
   (3) His brother or sister of the whole or half-blood; or
   (4) His uncle, aunt, nephew or niece of the whole blood.
2. For purposes of this section:
   (1) **"Sexual intercourse"** means any penetration, however slight, of the female sex organ by the male sex organ;
   (2) **"Deviate sexual intercourse"** means any act of sexual gratification between persons not lawfully married to one another, involving the genitals of one person and the mouth, tongue or anus of another.
3. Incest is a class D felony.

Elements

A person commits the crime of incest if (s)he:
1. marries; or
2. purports to marry; or
3. engages in sexual intercourse or deviate sexual intercourse
4. with a person
5. that he knows is his:
   a) ancestor or descendant by blood or adoption; or
   b) stepchild, while the marriage creating that relationship still exists; or
   c) brother or sister of the whole or half-blood; or
   d) uncle, aunt, nephew, or niece of the whole blood.

Major Changes

The Code makes some changes in the definition of incest, but the basic offense is unchanged. Note that the prohibited relationships are the same as those set out in pre-Code §563.220 except that the Code adds stepchildren and adopted relatives to the list.

Comments

The purpose of the statute is to prohibit conduct which poses a biological threat to possible offspring of incestuous relationships and threatens the usual relationships between family members.

Under the Code, a person is guilty of incest if he marries, purports to marry, or has sexual intercourse or deviate sexual intercourse with someone he knows is his relative. Under section 451.020 RSMo 1969, which will still be in effect when the Criminal Code takes effect, attempts to marry between closely related persons are void. Therefore, the Code uses the language "purports to marry." Sexual intercourse and deviate sexual intercourse are defined in the statute.

Note that a person must know that the relationship exists, or he is not guilty under this section.

13.4 Abandonment of a Child (§568.030) Class D felony

Code

1. A person commits the crime of abandonment of a child if, as a parent, guardian or other person legally charged with the care or custody of a child less than eight years old, he leaves the child in any place with purpose wholly to abandon it, under circumstances which may result in serious physical injury, illness or death.
2. Abandonment of a child is a class D felony.

Elements

A person commits the crime of abandonment of a child if he:
1. is a
   a) parent, or
   b) guardian, or
   c) other person legally charged with the care or custody
2. of a child less than eight-years-old; and
3. leaves the child in any place
4. with the purpose wholly to abandon it
5. under circumstances which may result in serious physical injury, illness, or death.

Major Changes

This section replaces pre-Code section 559.330 RSMo 1969, which made it a crime to expose a child under the age of six years with intent to wholly abandon it. The new Code changes the age of children protected by this statute to eight. The language of the new statute also makes it clear that the defendant may be convicted under this section if he leaves the child in **any place,** if he has a purpose to abandon it and the circumstances create a risk of harm to the child.

Source

This section is partially based on Michigan Revised Criminal Code §7030 (Final Draft 1967).

Comments

The gravamen of this offense is the right to the life and health of the very young. Compare this section to §568.040, criminal non-support, where the gravamen of the offense is failure to provide food, clothing, lodging, or medical attention.

13.5 Criminal Nonsupport (§568.040)
Class D felony if the suspect leaves the state for the purpose of avoiding his obligation of support. Otherwise, it is a Class A misdemeanor.

Code

1. A husband commits the crime of nonsupport if he knowingly fails to provide, without good cause, adequate support for his wife; a parent commits the crime of nonsupport if such parent knowingly fails to provide, without good cause, adequate support which such parent is legally obligated to provide for his minor child or his stepchild.
2. For purposes of this section:
   (1) **"Support"** means food, clothing, lodging, and medical or surgical attention;
   (2) **"Child"** means any natural or adoptive, legitimate or illegitimate child;
   (3) **"Good cause"** includes any substantial reason why the defendant is unable to provide adequate support. Good cause does not exist if the defendant purposely maintains his inability to support;
   (4) It shall not constitute a failure to provide medical and surgical attention, if nonmedical remedial treatment recognized and permitted under the laws of this state is provided.
3. The defendant shall have the burden of injecting the issues raised by subdivisions (3) and (4) of subsection 2.
4. Criminal nonsupport is a class A misdemeanor, unless the actor leaves the state for the purpose of avoiding his obligation to support, in which case it is a class D felony.

Elements

A. A **husband** commits the crime of nonsupport if he:
   1. knowingly fails to provide
   2. without good cause
   3. adequate support
   4. which he is legally obligated to provide for his **wife**

B. A **parent** commits the crime of nonsupport if (s)he:
   1. knowingly fails to provide
   2. without good cause
   3. adequate support
   4. which (s)he is legally obligated to provide for his minor child or step-child.

Major Changes

The Code retains criminal sanctions for nonsupport of a wife by her husband or of a child by its parents. The pre-Code statute applied to children under the age of 16; this has been changed to "minor child" (less than 21 years old if the parent is still legally obligated to support them).

Source

See pre-Code §§559.353 and 559.356. See also Texas Penal Code §25.07 (Final Draft 1970).

Comments

Note that the statute says it is a crime for a husband to fail to provide support. The statute probably does not make it a crime for an ex-husband to fail to support his ex-wife.

Also, the Code makes this offense a class D felony if the defendant leaves the state to avoid supporting a wife or children.

13.6 Endangering the Welfare of a Child (§568.050) Class A misdemeanor

Code

1. A person commits the crime of endangering the welfare of a child if:
   (1) He knowingly acts in a manner that creates a substantial risk to the life, body or health of a child less than seventeen years old; or
   (2) He knowingly encourages, aids or causes a child less than seventeen years old to engage in any conduct which causes or tends to cause the child to come within the provisions of subdivision (1)(c) or (1)(d)[1] or (2) of section 211.031, RSMo; or
   (3) Being a parent, guardian or other person legally charged with the care or custody of a child less than seventeen years old, he recklessly fails or refuses to exercise reasonable diligence in the care or control of such child to prevent him from coming within the provisions of subdivision (1)(c) or (1)(d) or (2) of section 211.031 RSMo.
2. Nothing in this section shall be construed to mean the welfare of a child is endangered for the sole reason that he is being provided nonmedical remedial treatment recognized and permitted under the laws of this state.
3. Endangering the welfare of a child is a class A misdemeanor.

[1]§211.031, RSMo Supp. 1976, which was in effect at the time this section was enacted does not contain a paragraph (d) of subdivision (1).

Elements

A person commits the crime of endangering the welfare of a child if he:

1. a) knowingly acts
   b) in a manner that creates substantial risk to the life, body, or health
   c) of a child less than seventeen-years-old
   or
2. a) knowingly encourages, aids, or causes
   b) a child less than seventeen-years-old
   c) to engage in any conduct
   d) which causes or tends to cause the child to come within the provisions of subdivision 1(c) or (2) of section 211.031 RSMo.
   or
3. a) is a parent, guardian, or other person legally charged with the care or custody
   b) of a child less than seventeen-years-old
   c) and he recklessly fails or refuses

d) to exercise reasonable diligence in the care or control of such child
e) to prevent him from coming within the provisions of subdivision (1)(c) or (2) or section 211.031 RSMo.

Major Changes

Subsection 1(1) partially replaces §559.340 RSMo., mistreatment of children. Subsection 1(2) is based on §559.360 RSMo., contributing to the delinquency of a minor, and partially replaces that section. Subsection 1(3) is new. Taken together, these subsections provide a broader general statute for the protection of children than is provided by pre-Code statutes.

Source

See New York Penal Law §260.10(2).

Comments

This section covers acts of child abuse, contributing to the delinquency of a minor, and allowing one's own minor child to become a delinquent. The first subsection provides a misdemeanor penalty for acts of child abuse. This subsection may overlap in some situations with the assault provisions and with the crime of abuse of a child. The precise crime charged in these situations will depend on the seriousness of the threat to the child and the discretion of the prosecutor. This subsection replaces pre-Code section 559.340, which prohibits assaulting, beating, wounding or injuring a child under the age of sixteen. The Code provision is broader in that it protects children under seventeen and includes all conduct which creates a large risk to the child's life, body, or health.

Subsection 1(3) makes it clear that a parent, guardian or other person legally charged with the care or custody of a child under 17 must exercise reasonable diligence in the care and control of the child to prevent it from becoming a neglected or delinquent child within the meaning of §211.031(1) or (2) RSMo. Sections 211.031(1)(c) and (2) give the juvenile courts jurisdiction over children whose behavior, environment, or associations are injurious to his welfare or the welfare of others, and children who are alleged to have violated a state law or municipal ordinance.

Included and Related Offenses

See Abuse of a Child, §568.060 and Unlawful Transactions with a Child, §568.070.

13.7 Abuse of a Child (§568.060) Class D felony

Code

1. A person commits the crime of abuse of a child if he;
   (a) Knowingly inflicts cruel and inhuman punishment upon a child less than seventeen years old, or
   (b) Photographs or films a child less than seventeen years old engaging in a prohibited sexual act or in the simulation of such an act or who causes or knowingly permits a child to engage in in a prohibited sexual act or in the simulation of such an act for the purpose of photographing or filming the act.
   (1) **"Prohibited sexual act"** means any of the following, whether performed or engaged in either with any other person or alone: sexual or anal intercourse, masturbation, bestiality, sadism, masochism, fellatio, cunnilingus, any other sexual activity or nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.
2. Abuse of a child is a class D felony.

Elements

A person commits the crime of abuse of a child if he:

1. a) knowingly inflicts
   b) cruel and inhuman punishment
   c) on a child less than seventeen-years-old; or
2. a) photographs or films
   b) a child less than seventeen-years-old
   c) who is engaging in a prohibited sexual act or in simulation of such an act; or
3. a) causes or knowingly permits
   b) a child less than seventeen-years-old
   c) to engage in a prohibited sexual act or in simulation of such an act
   d) for the purpose of photographing or filming the act.

Major Changes

This section replaces §559.340 RSMo.

Source

Based on Kansas Stat. Ann. §21-3609 (1970) with substantial modification.

Comments

This section prohibits two types of conduct, severe physical or mental cruelty to a child, and use of children in pornography. Most child abuse offenses will come under the misdemeanor provision, Endangering the welfare of a child, paragraph 13.6.

A "prohibited sexual act" includes any of the following acts engaged in alone or with another person: sexual or anal intercourse, masturbation, bestiality, sadism, masochism, fellatio, cunnilingus, or any other sexual activity or nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.

This section provides a felony penalty for acts of extreme abuse. Many acts of abuse can be the basis for any of three possible charges: abuse of a child, endangering the welfare of a child, and assault. Note that the section is not limited to parents and guardians who abuse their own children, but applies to **all** people who abuse any child.

The pornography portion of this section prohibits causing or knowingly permitting a child to engage in sexual conduct for the purpose of photographing or filming it.

Under this section, the state need not prove that the child suffered.

13.8 Unlawful Transactions with a Child (§568.070) Class B misdemeanor

Code

1. A person commits the crime of unlawful transactions with a child if:
   (1) Being a pawnbroker, junk dealer, dealer in secondhand goods, or any employee of such person, he with criminal negligence buys or receives any personal property other than agricultural products from an unemancipated minor, unless the child's custodial parent or guardian has consented in writing to the transaction; or
   (2) He knowingly permits a minor child to enter or remain in a place where illegal activity in controlled substances, as defined in chapter 195, RSMo., is maintained or conducted; or
   (3) He with criminal negligence sells blasting caps, bulk gunpowder, or explosives to a child under the age of seventeen, or fireworks as defined in section 320.110, RSMo., to a child under the age of fourteen, unless the child's custodial parent or guardian has consented in writing to the transaction. Criminal negligence as to the age of the child is not an element of this crime.
2. Unlawful transactions with a child is a class B misdemeanor.

Elements

A person commits the crime of unlawful transactions with a child if he:

1. a) is a pawnbroker, junk dealer, dealer in second-hand goods, or an employee of such persons
   b) and with criminal negligence buys or receives
   c) any personal property other than agricultural products
   d) from an unemancipated minor
   e) unless the child's custodial parent or guardian has consented in writing to the transaction.
   or
2. a) knowingly permits
   b) a minor child
   c) to enter or remain in a place
   d) where illegal activity in controlled substances, as defined in chapter 195 RSMo. is maintained or conducted.
   or
3. a) with criminal negligence sells
   b) blasting caps, bulk gunpowder, or explosives
   c) to a child under the age of seventeen
   d) or fireworks as defined in section 320.110 RSMo.
   e) to a child under the age of fourteen
   f) unless the child's custodial parent or guardian has consented in writing to the transaction.
   g) Criminal negligence as to the age of the child is not an element of the crime specified in subsection (3).

Major Changes

Subsection 1(1) follows pre-Code §563.780. Subsections 1(2) and 1(3) are new.

Source

Subsection 1(2) is based on Michigan Revised Criminal Code §7045(1)(b) and New York Penal Law §260.20(2). Subsection 1(3) is based on Michigan Revised Criminal Code § 7045(1)(f).

Comments

This section covers transactions in certain prohibited items with children. The first subsection provides a penalty for pawnbrokers and junk dealers who negligently buy personal property from an unemancipated minor. An unemancipated minor is a child under the age of 18 who has not yet left his parents' control.

The second subsection prohibits allowing someone who is known to be a child to enter or remain on premises where activity in drugs, such as sale, use, or possession, is carried on.

The third subsection prohibits sales of dangerous items such as gunpowder and explosives to children under the age of seventeen. The word "explosives" does not include firearm ammunition. It also prohibits sales of fireworks to children under the age of fourteen. It is not necessary for the state to show that the seller was aware or even should have been aware of the child's age. If the customer is in fact less than the statutory age, the seller is guilty.

CHAPTER 14

Robbery, Arson, Burglary and Related Offenses

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14.1 Introduction

This chapter covers the offenses of robbery, arson and related offenses, causing catastrophe, tampering, property damage, trespass and burglary. Most of these offenses have been substantially rewritten by the Code and the language is very different from pre-Code language. Also, the Code has made some important substantive changes in most of these offenses.

14.2 Robbery in the First Degree (§569.020) Class A felony

Code

1. A person commits the crime of robbery in the first degree when he forcibly steals property and in the course thereof he, or another participant in the crime,
   (1) Causes serious physical injury to any person; or
   (2) Is armed with a deadly weapon; or
   (3) Uses or threatens the immediate use of a dangerous instrument against any person; or
   (4) Displays or threatens the use of what appears to be a deadly weapon or dangerous instrument.
2. Robbery in the first degree is a class A felony.

Elements

A person commits the crime of robbery in the first degree when he

1. **forcibly steals** property and
2. the person who forcibly steals **or an accomplice**
   a) **causes serious physical injury** to any person; or
   b) is **armed** with a **deadly weapon**; or
   c) **uses** or **threatens** the **immediate use** of a **dangerous instrument** against any person; or
   d) **displays** or **threatens** the use of what **appears to be** a deadly weapon or dangerous instrument.

*See **Comments** and **Major Changes** following 14.3

14.3 Robbery in the Second Degree (§569.030) Class B felony

Code

1. A person commits the crime of robbery in the second degree when he forcibly steals property.
2. Robbery in the second degree is a class B felony.

Elements

A person commits the crime of robbery in the second degree if he forcibly steals property. A person *forcibly steals* (RSMo. 569.010) if, in the course of stealing, he:

1. uses or threatens the immediate use of
2. physical force upon
3. another person
4. for the purpose of
   a) preventing or overcoming resistance to the *taking* of the property *or to the retention thereof,* immediately after the taking; or
   b) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

Major Changes

Under pre-Code Missouri law, there were four statutes dealing with robbery. RSMo. 560.120, 560.125, 560.130 and 560.135. They divided robbery into first, second, and third degrees and robbery by means of a dangerous and deadly weapon. The Code combines and simplifies those former laws into two sections, robbery in the first and second degree. What was third degree robbery is covered by no Code offense of stealing by coercion.

The Code makes some important changes in the crime of robbery. There is no longer a requirement that the property be taken from the person or in the presence of another. The words "forcibly steal" are defined above. A person is guilty if, in the course of stealing, he uses or threatens the immediate use of physical force upon another person for the purpose of:

(a) Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

In other words, if in the course of stealing, force is used upon one person to compel another to deliver property or engage in other conduct which aids the commission of the theft, robbery has been committed. The statute says nothing about taking from the person upon whom the force is used, or whether the taking must be in his presence. If one of the aggravating factors listed under first degree robbery is also present, the crime is first degree robbery.

There is one other important change that should be considered. Under pre-Code statutes the force had to be used in connection with acquiring possession of the property. If a pickpocket grabbed the victim's billfold, ran, and was caught by the victim and the pickpocket then used force to retain the billfold, the individual likely would be charged with stealing and assault.

Under the Code the individual could be charged with robbery. (See paragraph (A) of the definition of "Forcibly Steals".) This is because the term "Forcibly steals" includes the use of force to overcome resistance to the retention of property immediately after it was taken. The theory is that there should be no distinction between using force to acquire property and using force to retain possession immediately after it is stolen.

Comments

The essence of robbery is the use or threatened immediate use of force to steal property. The definition of "forcibly steals" in Code 569.010(1) is based on New York Penal Code 160.00. The robbery statutes are designed to provide a more serious crime and more severe punishment when stealing is combined with the element of force or threat of force used to accomplish the stealing. The term "physical force" cannot satisfactorily be further defined in such a way as to further a jury's understanding and hence no definition is included in the Code.

The robbery sections are essentially the same as section 160.05 of the New York Penal Code, although New York has three degrees of robbery. Missouri has consolidated the crime into two degrees.

Under Pre-Code Missouri sections 560.125 and 560.130 RSMo., robbery in the second and third degree applied when the threat of immediate or future harm was made to the victim's person, property, or to some other person. These sections dealt with robbery and what is commonly called extortion and blackmail. These offenses are now included either in the Code sections on theft offenses or in robbery, depending on whether the threat is to a person and whether it is a threat of immediate force.

Pre-Code law also required the state to prove stealing "from the person or presence of another." The Code eliminates that requirement. Use or threatened immediate use of physical force is still required to accomplish the stealing, but it clearly would be robbery for the actor to place a revolver to his victim's head and order him to telephone his wife to instruct her to place valuable property in a designated spot from which the defendant later retrieves it. Since the essence of robbery is the use or threatened immediate use of force to steal property, it is immaterial if the actual transfer of the property takes place out of the presence of the person injured or threatened.

First degree robbery is really the basic crime of second degree robbery with the addition of certain aggravating factors. This means that before a person can be convicted of first degree robbery he must not only forcibly steal, but he or an accomplice must, in the course of stealing cause serious physical injury to any person; be armed with a deadly weapon; use or threaten the immediate use of a dangerous instrument; or display or threaten the use of what appears to be a deadly weapon or dangerous instrument.

The purpose of this section is to authorize more severe punishment in those situations where the victim is placed in unusually great danger or fear of bodily injury. In accord with its purpose, this section makes robbery in the first degree a class A felony.

The Code section is similar to the current law in that the injury threatened must be to another's person and not to another's property. In order to be first degree robbery, however, one of the aggravating factors listed in 569.020 must be present. For example, suppose X enters a store and strikes the manager with his fist, knocks her down, and then takes the money from the cash register and leaves the store. Under the pre-Code section 560.120, X would be guilty of robbery in the first degree since he had stolen money from the presence of another by violence to the victim's person. **State v. Colbert,** 411 S.W. 2d 92 (Mo. 1967). However, under the Code this would not be robbery in the first degree since none of the required aggravating factors are present.

Included and Related Offenses

An essential element of Robbery in both the first and second degree is that the individual must forcibly *steal*. Stealing is discussed in chapter 15. In other words, if the defendant or an accomplice was not engaged in stealing, he is not guilty of robbery. All elements of stealing must be proven, and defenses to stealing, such as claim of right (570.070) will also be a defense to a robbery charge. Since stealing is an included offense, a jury instruction on stealing should be given if the jury could find that stealing occurred but that it was not "*forcible*" stealing. The included offense will usually be stealing from the person, charged under RSMo. §570.030(2).

Robbery in the second degree is included in robbery in the first degree and must be instructed upon if the jury could fail to find the existence of one of the aggravating circumstances of robbery in the first degree.

An assault upon someone will always be committed in the course of robbery, and, therefore, in appropriate cases, some of the assault crimes (§565.060-565.070) may also be included offenses.

If there is some question whether the robbery charge can be proven because, for example, of a dispute on whether any property was taken, a prosecutor might be well advised to charge both the robbery and an assault, but then submit only one of them to the jury. Conviction of both assault and robbery for the same transaction is prohibited.

Other Related Offenses

Armed Criminal Action	571.015
Assault	565.050-565.070
Felonious Restraint	565.120

14.4 Introduction to Arson and Related Crimes

The Code contains five sections covering damage or destruction of buildings, inhabitable structures, and other property by fire or explosion. The offenses are graded according to the nature of the item damaged or destroyed *and* the mental state of the defendant.

14.5 Arson in the First Degree (§569.040) Class B felony

Code

1. A person commits the crime of arson in the first degree when he knowingly damages a building or inhabitable structure and when any person is then present or in near proximity thereto, by starting a fire or causing an explosion and thereby recklessly places such person in danger of death or serious physical injury.
2. Arson in the first degree is a class B felony.

Elements

A person commits the crime of arson in the first degree if he:
1) knowingly damages a building or inhabitable structure,
2) by starting a fire or causing an explosion, *and*
3) a person is in or near the building or structure at the time the fire is started, and
4) is recklessly put in danger of death or serious physical injury.

*See **Comments** and **Major Changes** following 14.6.

14.6 Arson in the Second Degree (§569.050) Class C felony

Code

1. A person commits the crime of arson in the second degree when he knowingly damages a building or inhabitable structure by starting a fire or causing an explosion.
2. A person does not commit a crime under this section if:
   (1) No person other than himself has a possessory, proprietary or security interest in the damaged building, or if other persons have those interests, all of them consented to his conduct; and
   (2) His sole purpose was to destroy or damage the building for a lawful and proper purpose.
3. The defendant shall have the burden of injecting the issue under subsection 2.
4. Arson in the second degree is a class C felony.

Elements

A person commits the crime of arson in the second degree if he:
1. knowingly damages a building or inhabitable structure
2. by starting a fire
3. or causing an explosion.

Note: Second degree arson is not committed if:
1. the building or structure is destroyed for a lawful and proper reason and
2. defendant had the consent of all persons with
   a) possessory (tenant, lessee)
   b) proprietary (ownership) or
   c) security (mortgagor—lendor) interests.

Major Changes

These Code sections replace pre-Code §§561.010 and 561.035 RSMo. Under the terms of the Code, second degree arson is committed when the defendant knowingly damages or destroys a building or inhabitable structure through fire or explosion. First degree arson requires an additional element: the creation of the risk of death or serious harm to a person in or near the building or structure at the time the fire is started. In other words, first degree arson is second degree arson with the addition of certain aggravating circumstances. A person commits first degree arson if he knows he is setting fire to a building or inhabitable structure and is aware of a substantial and unjustifiable risk that someone is inside or nearby and in danger of death or serious bodily harm from the fire. This is a change from previous Missouri law which defined aggravated arson as the burning of a dwelling house. Under the pre-Code statutes a person could receive 99 years for setting fire to a jail whether or not anyone was endangered because a jail was considered a dwelling house. But, if the defendant torched a church on Sunday morning, knowing it was full of people, the maximum sentence was 10 years because a church was not a dwelling house. Because human life may well be endangered by burning structures other than a dwelling, first degree arson, under the Code, will cover those situations where *inhabitable structures* are burned, and others present when the fire is begun are recklessly placed in danger of death or serious

physical injury. This means the state must convince the jury beyond a reasonable doubt that the actor was aware of a substantial and unjustifiable risk of death or serious physical injury to one or more persons. Such risk creation indicates a callous indifference to human life of a sufficiently greater magnitude than that of the ordinary arsonist, and is deemed sufficient to warrant the possibility of a greater penalty. The requirement that the person endangered be present at the time the risk is created is to prevent all arson from becoming aggravated since firemen and others will be drawn to the scene after the fire has begun. The definition of building or inhabitable structure is contained in Code section 569.010(1) and is included in the comments sections immediately following.

Under the pre-Code law, in some cases a person could be convicted of arson for burning his own property while in other cases if he didn't intend to defraud another or damage the property of another there was no arson. However, the classifications were somewhat arbitrary. For example, if X burned his own manufacturing machinery he was guilty of committing arson even though he didn't intend to defraud another (pre-Code §560.030) but if X burned his own automobile it was not arson as long as there was no intent to injure other property or to defraud. Under the Code, there are two situations in which a person can be convicted of arson even though the building or inhabitable structure is his own. If the defendant recklessly places another in danger of death or serious physical injury, he may be convicted of aggravated (first degree) arson regardless of who owns the property.

Second, if the defendant knowingly damages a building or inhabitable structure (even if it is his own or if he has an ownership interest in it) by starting a fire or causing an explosion, he may still be guilty of arson in the second degree unless the defendant had the consent of all persons with a possessory, proprietary, or security interest, and the building is destroyed for a lawful and proper purpose. The defendant has the burden of injecting the consent and lawful purpose issues.

Note, if the defendant knowingly destroys by fire, his own property even with the intent to defraud an insurance company, he has not committed arson under the Code unless the property was a building or inhabitable structure. The crime would probably be the crime of property damage. (See Code sections 569.100, 569.110, 569.120).

Comments

The Code divides arson into two grades: first degree and second degree arson. These statutes cover the intentional damage or destruction of buildings or inhabitable structures by burning and exploding. According to §569.010(2) an inhabitable structure includes ships, trailers, sleeping cars, airplanes, or other vehicles and structures (1) where people live or do business, (2) where people gather for purposes of business, government, education, religion, entertainment, or public transportation, or (3) used for overnight accommodations. The term building is not defined in the Code. In order to be convicted under one of the arson statutes there must be damage or destruction of a building or one of the structures described above. By providing a broad definition of inhabitable structure which encompasses any place where groups of people congregate, the new arson statutes expand the circumstances under which one can be guilty of first or second degree arson.

Second degree arson is committed when the suspect damages or destroys a structure through fire or explosion and knows to a substantial certainty that the damage or destruction will result. First degree arson requires an additional element: the creation of the risk of death or serious harm to a person in or near the building or structure. In other words, it is second degree arson with aggravating circumstances. A person commits first degree arson if he knows he is damaging a building or inhabitable structure by fire and is aware of the substantial risk that someone is inside or nearby and in danger of death or serious bodily harm from the fire.

First degree arson is now reserved for those who burn buildings or inhabitable structures and in doing so recklessly put others who are present when the fire is begun, in danger of death or serious physical injury. The requirement is that the person endangered be present at the time the risk is created. This is to prevent all arson from becoming first degree since firemen and others will be drawn to the scene after the fire has begun. A greater penalty is provided for first degree arson because of the indifference to human life shown by intentionally creating a risk of death or serious harm. Note: If a person is killed in perpetration of arson, a felony murder charge may be brought regardless of the degree of arson.

Under the Code there are two situations in which a person can be convicted of arson even though the property is his own. If the defendant knowingly damages a building or inhabitable structure by burning it and recklessly places another in danger of death or serious physical injury, he may be convicted of first degree arson regardless of who owns the property. Second, if the defendant destroys a building or inhabitable structure for an unlawful purpose, such as defrauding an insurance company, he is guilty of arson in the second degree.

The new section does provide an exception to second degree arson. If a person has a lawful reason for destroying a building or inhabitable structure and owns it or has the permission of all persons with an interest in the building to destroy it, there is no arson.

Included and Related Offenses

Arson in the second degree is clearly included in the offense of Arson in the first degree, and the jury should be instructed on that offense when they could find either that no one, at the time the fire was started, was placed in danger of death or serious physical injury from the fire, or that the defendant was not aware of the risk of such injury. This will usually come up when the evidence indicates the defendant may not have been aware that anyone was present in or near the building at the time the fire was started.

The crimes of knowingly burning or exploding (569.055), recklessly burning or exploding (569.060), and negligent burning or exploding (569.055) may *not* be included in the arson offenses. Proof of arson requires proof that the defendant acted knowingly (which includes recklessly and negligently) and that a building or inhabitable structure was damaged by starting a fire or causing an explosion. Buildings are property and inhabitable structures are property used for specific purposes, so the proof on this element includes proof that it was property as the term is used in 569.055, and 569.065. However, the latter statutes require proof that it is property *of another*, an additional element not required to be proven to convict of arson. Therefore, if the property damaged was that of another, and if there is some question whether arson was committed, either because the defendant did not act knowingly or there is some question about the nature of the property damaged, a prosecutor should charge arson and one of the other offenses.

Other Related Offenses

Other related offenses include the property damage offenses in sections 569.110, 569.115 and 569.120. Property damage in the first and second degree are *not* included in arson because proof of the amount of the damage is required for those crimes, and that issue does not come up in arson. However, property damage in the third degree does not require proof of the amount of the damage, and can be committed by destroying property (it need not be another's property) for the purpose of defrauding an insurer. It might, therefore, be included in arson in the second degree, but it is only a class B misdemeanor. Rather than rely on one of these being included offenses, it would be better to charge them. The term inhabitable structure is defined in §569.010(2) and the term serious physical injury is defined in §556.061(24).

14.7 Knowingly Burning or Exploding (§569.055) Class D felony

Code

1. A person commits the crime of knowingly burning or exploding when he knowingly damages property of another by starting a fire or causing an explosion.
2. Knowingly burning or exploding is a class D felony.

Elements

A person commits the crime of knowingly burning or exploding if he:

1. knowingly damages

2. property
3. of another
4. accomplished by
   a) starting a fire, or
   b) causing an explosion.

*See §14.9 and **Comments** following.

14.8 Recklessly Burning or Exploding (§569.060) Class A misdemeanor

Code

1. A person commits the crime of reckless burning or exploding when he knowingly starts a fire or causes an explosion and thereby recklessly damages or destroys a building or an inhabitable structure of another.
2. Reckless burning or exploding is a class A misdemeanor.

Elements

A person commits the crime of reckless burning or exploding if he:
1. recklessly damages or destroys
2. a building or inhabitable structure
3. of another
4. accomplished by
   a) knowingly starting a fire, or
   b) knowingly causing an explosion.

*See 14.9 and **Comments** following.

14.9 Negligent Burning or Exploding (§569.065) Class B misdemeanor

Code

1. A person commits the crime of negligent burning or exploding when he with criminal negligence causes damage to property of another by fire or explosion.
2. Negligent burning or exploding is a class B misdemeanor.

Elements

A person commits the crime of negligent burning or exploding if he:
1. with criminal negligence
2. causes damage
3. to property
4. of another
5. accomplished by
   a) fire, or
   b) explosion.

Major Changes

The three preceding statutes were designed to simplify and clarify the law dealing with causing damage by burning and exploding; to make it clear that a person could be guilty of an offense even if he did not act "willfully", and consolidate and logically grade the arson related offenses.

Under the Code, the arson statutes carry the most severe penalty because they cover burning which is done knowingly and in which the risk of death and serious physical injury is greatest. The burning and exploding statutes cover all kinds of property (except as noted in the statute) and make it clear that a person who, with criminal negligence, damages by starting a fire or causing an explosion the property of another has committed a crime.

An important result of the changes is that under the Code some conduct will be criminal that was not previously covered by pre-Code statutes.

Comments

The crime of **knowingly burning or exploding** (§569.055) covers damage by fire and explosion to all kinds of property. The property damaged need not be a building or inhabitable structure or real property. The term property, as used in chapter 569, is not defined by the Code. However, the defendant must damage the property "of another", a requirement not found in the arson statutes. The terms "of another" mean: (§569.010(3)

> Property is that "of another" if any natural person, corporation, partnership, association, governmental subdivision or instrumentality, other than the actor, has a possessory or proprietary interest therein;

The crime of **reckless burning or exploding** (§569.060) is a new offense designed to cover situations in which the actor's purpose is not to damage or destroy but that result nevertheless occurs, and the actor was aware of a substantial and unjustifiable risk that such damage would occur. Not all property is covered by this section; it must be a *building or an inhabitable structure*. However, if such property is recklessly damaged, then any damage, no matter how slight, is all that is necessary for the commission of this offense. The individual must know that he is starting a fire or will cause an explosion and be aware of the substantial risk that a building or inhabitable structure will be damaged. For example, suppose Donald decides to burn his garbage on an extremely windy day and a neighbor's barn is close to where Donald is burning the garbage. The barn is downwind from the spot where the fire will be and is made of wood. Donald is probably aware that if he proceeds to burn his garbage in that location, the flames could carry to the barn and cause it to ignite. He sets the garbage on fire anyway, the wind spreads the flames and the barn is damaged as a result. Since he knowingly started a fire and was aware of the risk of the fire spreading, and the fire did spread and damage a building (barn), Donald has recklessly damaged a building by knowingly starting a fire. Therefore, he has committed the crime of reckless burning or exploding. On these facts, a jury might also be able to find Donald guilty of knowingly burning or exploding if they conclude that he knew to a substantial certainty that the barn would burn.

The crime of **negligent burning or exploding** (§569.065) also deals with those situations where a person creates a fire or explosion that damages property but it is not his purpose or intention to destroy property. However, in contrast to the previous section, (569.060), the defendant does not have to knowingly start a fire or explosion, he only has to start it through criminal negligence. Also in contrast to section 569.060, the defendant is not required to be aware of any risk of property damage. Instead, he must damage property with criminal negligence, which means that he can be convicted if he should have been aware of a substantial risk that property would be damaged and if the risk was not justifiable. Furthermore, his conduct must be a gross deviation from that amount of care an ordinary prudent person would have exercised under the circumstances. It will be a jury question about how careful an ordinary and prudent person would have been in the actor's situation and whether the actor's conduct constituted a gross deviation from that standard of care.

Note that "property damage" as used in this section means damage to *any property of another* and is not limited to buildings or inhabitable structures.

Suppose, for example, that a certain county where there is a lot of agricultural activity is experiencing an extreme drought. The fields and trees are very dry, and fire warnings are displayed frequently on radio, television, and newspaper. Donald is a local resident of the county and has often heard these fire warnings. He tosses a burning cigarette butt out of his car window which causes a fire that burns Smith's corn field. A jury could conclude that Donald should have been aware of the

substantial risk of a fire, and also conclude that Donald's conduct in these circumstances was a gross deviation from the standard of care that a prudent person would have exercised. If so, the fire would have been started due to criminal negligence by Donald and he would be guilty of the crime of negligent burning or exploding. Although this same conduct may have been criminal under the pre-Code statute section 560.585, that statute only covered grasslands, forest lands and other real property. The Code covers *all* property.

Included and Related Offenses

The crime of property damage in the third degree (§569.120) is included in the crime of knowingly burning or exploding (§569.055), but property damage in the third degree is not included in recklessly or negligently burning because those statutes are satisfied with a less culpable mental state.

The crimes of property damage in the first and second degree are not included in the burning and exploding statutes (§§569.055, 569.060, 569.065) because the two most serious property damage statutes (§§569.100, 569.110) require proof of the amount of damage caused, an element which is not included in the burning and exploding sections.

14.10 Causing Catastrophe (§569.070) Class A felony

Code

1. A person commits the crime of causing catastrophe if he knowingly causes a catastrophe by explosion, fire, flood, collapse of a building, release of poison, radioactive material, bacteria, virus or other dangerous and difficult to confine force or substance.
2. **"Catastrophe"** means death or serious physical injury to ten or more people or substantial damage to five or more buildings or inhabitable structures or substantial damage to a vital public facility which seriously impairs its usefulness or operation.
3. Causing catastrophe is a class A felony.

Elements

A person commits the crime of causing catastrophe if he:

1. knowing causes
   a) death or serious physical injury to ten or more people; or
   b) substantial damage to five or more buildings or inhabitable structures; or
   c) substantial damage to a vital public facility which seriously impairs its usefulness or operation
2. accomplished by
   a) explosion; or
   b) fire; or
   c) flood; or
   d) collapse of building; or
   e) release of poison; or
   f) radioactive material; or
   g) bacteria; or
   h) virus; or
   i) other substance or force wbich is dangerous or difficult to confine.

Major Changes

Causing catastrophe is a new section that has no counterpart in present law. This section is designed to deal with conduct that causes either serious personal injury to a number of people (though not necessarily death) or substantial property damage.

Comments

Although the statute covers other things, it will be of primary importance when the damage is to a vital public facility.

A vital public facility includes a facility **maintained** for use as a:

a) bridge over either land or water; or
b) dam; or
c) reservoir; or
d) tunnel; or
e) communications installation; or
f) power station.

If a structure was a vital public facility but has been completely abandoned and is no longer maintained for use, then knowingly damaging the structure will not constitute the crime of causing catastrophe. Also the words "vital public facility" contemplate use by the public and not just a structure owned and maintained for purely private use, such as a small bridge over a creek on private property.

This statute also will be of importance when used in conjunction with attempt charges. If an individual plants a bomb in an airport locker, and the bomb is disarmed before any damage is done, the actor could be charged with attempting to cause a catastrophe (a class B felony).

Included and Related Offenses

In appropriate cases, arson could be an included offense. The more significant included offense is the attempt to cause a catastrophe which is discussed in the comments section.

Other Related Offenses

Related offenses include arson; (§§569.040, 569.050) knowingly, reckless and negligent burning and exploding; (§§569.055, 569.060, 569.065); and the property damage offenses (§§569.100, 569.110, 569.120); tampering (§§569.080, 569.090); Trespass (§569.140, 569.150); Burglary (§§569.160, 569.170).

14.11 Tampering in the First Degree (§569.080) Class D felony

Code

> 1. A person commits the crime of tampering in the first degree if, for the purpose of causing a substantial interruption or impairment of a service rendered to the public by a utility or by an institution providing health or safety protection, he damages or tampers with property or facilities of such a utility or institution, and thereby causes substantial interruption or impairment of service.
> 2. Tampering in the first degree is a class D felony.

Elements

A person commits the crime of tampering in the first degree if:

1. for the purpose of causing a substantial interruption or impairment of a service rendered to the public
2. he damages or tampers with property or facilities
3. of a utility or of an institution providing health or safety protection
4. and does cause a substantial interruption or impairment of service.

Major Changes

The section consolidates a number of pre-Code offenses and enlarges the coverage of the criminal law. It provides a felony penalty for persons who purposely disrupt service vital to the public.

The section replaces a number of statutes in RSMo. 1969, including Injuring railroad property, Sections 560.315-335, Destroying telegraph or telephone wires, Section 560.310, and Injuring electrical equipment, Section 560.300.

Comments

To be guilty, the defendant must tamper with or damage utility property with a purpose to substantially interrupt or impair services of a utility or institution providing health and safety services, and he must succeed. "Tampering" (§569.010(2)) means interfering with something improperly, meddling, displacing, altering, or temporarily depriving the owner or possessor of something. A utility is defined in section 569.010(6) as a publicly or privately owned or operated enterprise which provides gas, electric, steam, water, sewerage disposal or communication services, and any common carrier. Obviously included as health and safety institutions are hospitals, police and fire departments, and ambulance services.

If a person damages utility property but fails to cause a substantial disruption of services, he would be guilty of the crime of attempted tampering in the first degree if he had the required purpose to cause a substantial interruption of services.

Included and Related Offenses

Tampering in the second degree is an included offense. The property damage, arson and burning and exploding offenses are probably not included offenses, although property damage in the third degree may be included if the tampering charge is based on *damage* to property rather than on tampering with property.

14.12 Tampering in the Second Degree (§569.090) Class A misdemeanor

Code

1. A person commits the crime of tampering in the second degree if he:
   (1) Tampers with property of another for the purpose of causing substantial inconvenience to that person or to another; or
   (2) Unlawfully operates or rides in or upon another's automobile, airplane, motorcycle, motorboat or other motor-propelled vehicle; or
   (3) Tampers or makes connection with property of a utility.
2. Tampering in the second degree is a class A misdemeanor.

Elements

A person commits the crime of tampering in the second degree if he:

1. a) tampers with property
   b) of another
   c) for the purpose of causing substantial inconvenience to that person or another

OR

2. a) unlawfully operates or rides
   b) another's automobile, airplane, motorcycle, motor boat, or other motor-propelled vehicle

OR

3. tampers or makes connection with property of a utility.

Major Changes

This section replaces numerous sections of RSMo 1969 dealing with interference with property use. Pre-Code statutes covering specific types of property such as tampering with motor vehicles, §560.175,

and electrical and telephone wires, §§560.320-335 RSMo 1969, have been consolidated under this Code section.

Comments

Tampering means improper interference or meddling with, displacing, or altering property, or temporarily depriving another person of his property. Property belongs to another if any person or entity other than the actor has a possessory or proprietary interest in it.

Subsection 1 of tampering in the second degree covers most cases of deliberate interference with private property. The defendant must have the purpose to cause substantial inconvenience to someone else. "Substantial" inconvenience is not defined in the Code.

Subsection 2 covers "joy riding", the unauthorized use of another person's motor-propelled vehicle. The difference between this crime and stealing is that stealing requires a purpose to deprive the owner of his property. "Deprive" means to withhold property from the owner permanently, or to restore the property only upon payment of reward, or to use or dispose of the property in a manner which makes its recovery by the owner unlikely. Here, tampering only requires the defendant to unlawfully ride in or upon the motor vehicle. He need not intend to keep it for a substantial time.

Subsection 3 covers making unauthorized alteration or connections to property of a utility.

This section prohibits three distinct types of conduct. The first is tampering with property (interfering with property or its use) of another for the purpose of causing substantial inconvenience to that person or another. Property is "of another" if another natural person, corporation, partnership, association, or governmental entity has a possessory or proprietary interest in it (§569.010(3)). The phrase "substantial inconvenience" is not defined in the Code. This offense is meant to cover a wide variety of wrongful interference with property, including hiding another person's property or maliciously scattering files or papers which will take hours to rearrange.

The second subsection prohibits unlawful riding in or operation of another person's motor vehicle. It replaces Section 560.175 RSMo. 1969, Tampering with motor vehicles, which provided a felony penalty for "joy riding." The new Code reduces the punishment for this offense to a misdemeanor, and is not as broad as the pre-Code statutes.

The third subsection concerns tampering with property of a utility. This offense covers minor interference with utility property, and making unauthorized connection with utility sources. For instance, the person who hooks his own telephone into the telephone line without paying for this service, or a person who manipulates an electric company meter so that he receives power without the utility's knowledge would be guilty under this section. A person who receives utility services in this way would also be guilty of stealing. See Chapter 15.

Note: The defense of claim of right, discussed in paragraph 14.16 is applicable to this section.

Included and Related Offenses

Subparagraph 2 of tampering in the second degree is an included offense in stealing, since the state need show only an unauthorized use of another person's motor vehicle for a tampering conviction. Tampering in the second degree is an included offense in tampering in the first degree. The stealing offenses are, of course, related to tampering and should be considered. See chapter 15.

14.13 Property Damage in the First Degree (§569.100) Class D felony

Code

1. A person commits the crime of property damage in the first degree if:
(1) He knowingly damages property of another to an extent exceeding five thousand dollars; or

(2) He damages property to an extent exceeding five thousand dollars for the purpose of defrauding an insurer.
2. Property damage in the first degree is a class D felony.

*See 14.15 and **Comments** following.

14.14 Property Damage in the Second Degree (§569.110) Class A misdemeanor

Code

1. A person commits the crime of property damage in the second degree if:
(1) He knowingly damages property of another to an extent exceeding five hundred dollars; or
(2) He damages property to an extent exceeding five hundred dollars for the purpose of defrauding an insurer.
2. Property damage in the second degree is a class A misdemeanor.

*See 14.15 and **Comments** following.

14.15 Property Damage in the Third Degree (§569.120) Class B misdemeanor

Code

1. A person commits the crime of property damage in the third degree if:
(1) He knowingly damages property of another; or
(2) He damages property for the purpose of defrauding an insurer.
2. Property damage in the third degree is a class B misdemeanor.

Major Changes

Pre-Code statutes covering damage to property are widely scattered throughout RSMo. 1969. Many of these statutes refer to specific types of property, such as animals (560.380), plants (560.510), courthouses (560.470), and bridges (560.525). Since all of these statutes prohibit one type of conduct, damaging property, the Code replaces them with three statutes. Each new section prohibits both knowingly damaging property of another and damaging property for the purpose of defrauding an insurer. Whether the crime is first, second, or third degree depends on the extent of the damage.

Comments

Under all three sections, if the defendant damages another person's property, the state must show that the defendant knew to a substantial certainty that he would cause damage and was aware that the property was someone else's. Property is "of another" if another person or entity has a possessory or proprietary interest in it (§569.010(3)). If the property was damaged in order to get insurance money, the state must show that the defendant acted with purpose to defraud an insurer. The term "defraud" is not defined in the Code.

In each of these crimes, if the defendant was acting under a "claim of right" he may have a defense. See paragraph 14.16.

Section 569.100, property damage in the first degree, provides a felony penalty for damage to property in excess of five thousand dollars. Note that the difference between the degrees of property damage is the *dollar amount of damage done, not the value of the property.*

If the defendant damages property for the purpose of defrauding an insurer, it is not necessary for

conviction to show that the insurer parted with any money because of the defendant's actions. The property damaged need not belong to the defendant. Damage to any property, regardless of who owns or insures it, will fall under these sections if the defendant's purpose was to defraud an insurer.

Section 569.110, property damage in the second degree, provides a misdemeanor penalty for property damage greater than $500. This offense is included in property damage in the first degree.

Section 569.120, property damage in the third degree, covers all property damage regardless of the amount of damage. It also covers destruction of property which has no monetary value, or damage which is so slight that it does not reduce the property value. It is an offense that is included in property damage in the first and second degree, and may be included in some other offenses. See the discussion of arson, knowingly burning or exploding, and tampering.

14.16 Claim of Right (§569.130)

Code

1. A person does not commit an offense by damaging, tampering with, operating, riding in or upon, or making connection with property of another if he does so under a claim of right and has reasonable grounds to believe he has such a right.
2. The defendant shall have the burden of injecting the issue of claim of right.

Comments

This section provides a defense to charges of damaging, tampering with, operating, riding in or upon, or making connection with property of another. "Claim of right" is not defined in this section, but is defined in Chapter 570 as it relates to stealing. It is likely that the same basic concept is intended to be applicable to offenses under 569.100, 569.110, 569.120, 569.080, and 569.090.

Section 570.070 provides:

1. A person does not commit an offense under section 570.030 if, at the time of the appropriation, he
   (1) Acted in the honest belief that he had the right to do so; or
   (2) Acted in the honest belief that the owner, if present, would have consented to the appropriation.
2. The defendant shall have the burden of injecting the issue of claim of right.

There is one major difference between claim of right in stealing cases and claim of right as a defense to certain offenses under Chapter 569. Under Chapter 570 (Stealing), claim of right is a defense. If the defendant's belief was honest, it need not be reasonable. Under the provisions of 569.130 the defendant must also have *reasonable* grounds to believe that he has a claim of right.

Under the Code, a defendant has the burden of injecting this defense into the trial. Once the issue is in the case, the state then has the burden of showing that the defendant's claim of right was not reasonable, or that he had no such belief in fact. Some recent criminal code revisions, notably that of New York, have made the absence of claim of right an element of the State's case in a property damage conviction. See New York Penal Code §§145.00-.20. The Code approach is different since the state will not have to prove the absence of a claim of right unless some evidence is introduced which raises the issue.

It is not clear whether the defense of claim of right in property cases was recognized by Missouri courts in the past. One early case, **State v. Guernsey**, 9 Mo. App. 312, 315 (1880), refused to recognize this defense in a prosecution for malicious destruction of a fence. The fence had been built by the defendant's neighbor, but the defendant believed that it was on his land. This is apparently the only Missouri appellate decision involving this defense in a property damage case. Claim of right has been recognized as a defense to a charge of Tampering with motor vehicles, **State v. Williams**, 541 S.W. 2d 89 (Mo. App. 1976).

14.17 Trespass in the First Degree (§569.140) Class B misdemeanor

Code

1. A person commits the crime of trespass in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure or upon real property.
2. A person does not commit the crime of trespass in the first degree by entering or remaining upon real property unless the real property is fenced or otherwise enclosed in a manner designed to exclude intruders or as to which notice against trespass is given by:
   (1) Actual communication to the actor; or
   (2) Posting in a manner reasonably likely to come to the attention of intruders.
3. Trespass in the first degree is a class B misdemeanor.

Elements

A person commits the crime of trespass in the first degree if he:
1. knowingly enters unlawfully or knowingly remains unlawfully
2. in a building or inhabitable structure, or
3. upon real property if
   a) the property is fenced or otherwise enclosed in a manner designed to exclude intruders, or
   b) notice against trespass is given by
      1. actual communication to the actor, or
      2. posting in a manner reasonably likely to come to the attention of intruders.

*See **Comments** following 14.18.

14.18 Trespass in the Second Degree Infraction

Code

1. A person commits the offense of trespass in the second degree if he enters unlawfully upon real property of another. This is an offense of absolute liability.
2. Trespass in the second degree is an infraction.

Elements

A person commits the offense of trespass in the second degree if he:
1. enters unlawfully upon
2. real property
3. of another.

Major Changes

Prior to the Code, there were many statutes dealing with trespass. To list just a few: Trespass upon state or county lands §560.450; Trespass generally §560.447; Trespass on school lands §560.460; Trespass upon school or church properties §560.465; Taking fish from private ponds §§560.560, 560.565; Hunting or trapping without consent of landowner §§560.570, 560.575. Under the Code, the crime of trespass is divided into two offenses, trespass in the first or second degree.

Comments

The basic crime is trespass in the second degree. This is an offense of liability without fault. As such, no culpable mental state is necessary, and only an unlawful entry onto another's real property is

required. Even if the defendant reasonably and honestly believed he had license or privilege to enter real property when in fact he did not, he would commit second degree trespass since there is no requirement of culpability. The State *need not show* that the defendant was aware or should have been aware that the real property was of another or that defendant was aware of such facts as would constitute lack of license or privilege to enter onto the premises. For example, assume X obtains Y's permission to hunt of Y's land. However, there are no fences and X miscalculates the boundaries of Y's land and inadvertantly enters Z's property. Even though X honestly and reasonably believed he was still on Y's property, since he has no license or privilege to be on Z's land, X has committed trespass in the second degree. In other words, a person travels at his own risk when entering real property. This statute is directed towards those persons who do not bother to determine whether they are on the property of another.

When the basic crime of trespass (second degree) is coupled with a mental state and the presence of one or more aggravating factors, the more serious crime of trespass in the first degree may be committed. The culpable mental state required for first degree trespass is "knowingly": that is, the defendant must be aware that he is entering or remaining unlawfully. Section 569.010(8) defines "enter unlawfully or remain unlawfully" as:

> a person "enters unlawfully or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his purpose, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or by other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

For example, if the defendant honestly believed a particular area of a store was open to the public, he would not, by going into that area, have knowingly entered unlawfully since he believed he was allowed in that area. The mistake need not be reasonable, only honest. See the discussion of the same subject in 14.19 (Burglary).

In addition, guilt requires not only that the defendant knowingly enter or remain unlawfully, but also that he either enter or remain in a building or inhabitable structure as defined in §569.010(2) or that he enter or remain on real property and one of the following other aggravating circumstances is present: The property is fenced in a manner designed to exclude intruders; or the defendant is given notice against trespass. Notice against trespass may be provided by actually addressing the defendant or by posting in a "manner reasonably likely to come to the attention of intruders." The following examples may be helpful.

1. A suspect climbs over a tall security fence at a military institution in order to distribute political leaflets to the soldiers. Since the land is fenced in a manner designed to exclude intruders, if the suspect knows he was not authorized to enter, he has committed first degree trespass.

2. Donald is hunting on John's land. John sees Donald and tells Donald that he is to leave the premises immediately since John does not allow hunting on his property. Donald ignores John, and continues to hunt. Donald has committed first degree trespass since he is remaining on real property without permission and after he has received actual notice against trespass.

3. John has large signs posted which say "No Trespassing," and the signs are placed every 30 yards around his one acre pond. David, who is a stranger to John and has no permission from John, goes swimming in John's pond. Although the final determination whether the land is reasonably posted is for the jury, David has probably committed first degree trespass.

4. David is a student at a university. When the Dean's office is temporarily vacant, he goes in and chains the door shut. David defies repeated orders from the Dean, his staff, and the police to unchain the door and leave the building. Since David has remained unlawfully in a building, he has committed first degree trespass.

Included and Related Offenses

Trespass in the second degree is included in Trespass in the first degree. Both of these are included in the crimes of burglary in the first degree and burglary in the second degree.

14.19 Introduction to Burglary

The Code makes some significant changes in the crime of burglary and divides it into two offenses. Burglary in the second degree is the basic crime, and it becomes burglary in the first degree if certain aggravating circumstances are present.

The crime of burglary no longer requires a "breaking" as an element of the crime. The *act* of burglary is entering unlawfully or remaining unlawfully. This phrase is defined in §569.010(8) as follows:

> a person "enters unlawfully or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his purpose, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or by other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

A person "enters unlawfully or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his purpose, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or by other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

The phrase **"inhabitable structure"** is defined in §569.010(2) as:

(2) **"Inhabitable structure"** includes a ship, trailer, sleeping car, airplane, or other vehicle or structure:
- (a) Where any person lives or carries on business or other calling; or
- (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or
- (c) Which is used for overnight accommodation of persons. Any such vehicle or structure is "inhabitable" regardless of whether a person is actually present.

14.20 Burglary in the First Degree (§569.160) Class B felony

Code

> 1. A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime:
>
> (1) Is armed with explosives or a deadly weapon; or
>
> (2) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or
>
> (3) There is present in the strncture another person who is not a participant in the crime.
>
> 2. Burglary in the first degree is a class B felony.

Elements

A person commits the crime of burglary in the first degree if he:

1. Knowing enters unlawfully or
   Knowingly remains unlawfully
2. In a building or inhabitable structure
3. For the purpose of committing *a crime* therein, *and*
4. While inside or entering the structure or while fleeing from it, he or another participant in the burglary:
   a) is armed with explosives or a deadly weapon, *or*

b) injures or threatens injury to any person who is not a participant in the burglary, *or*
c) someone who is not a participant in the burglary is present in the structure.

*See **Major Changes** and **Comments** after ¶14.21.

14.21 Burglary in the Second Degree (§569.170) Class C felony

Code

1. A person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.
2. Burglary in the second degree is a class C felony.

Elements

A person commits the crime of burglary in the second degree if he:
1. knowingly enters unlawfully or
   knowingly remains unlawfully
2. in a building or inhabitable structure
3. for the purpose of committing *a crime* therein.

Major Changes

Burglary was covered by fifteen statutes in pre-Code law. Separate sections prohibited *breaking in* (§560.040 RSMo. 1969) and breaking out (§560.050 RSMo. 1969) of buildings. The requirement of a "breaking" also led to some strained interpretations. Opening a closed door or window can constitute a "breaking". See **State v. O'Brien,** 249 S.W.2d 433 (Mo. 1952), **State v. Sullivan,** 452 S.W.2d 802 (Mo. 1970). In addition, the first degree burglary statute, §560.040 RSMo. 1969, specified that using a false key or picking a lock is a "breaking". If a person entered a dwelling with the consent of the owners or possessors and later broke out of the dwelling after stealing or committing a felony, he was guilty of burglary in the second degree under §560.050 RSMo. 1969.

The new Code does not use term "breaking". Instead, the element of knowingly entering or remaining unlawfully is used. The word "unlawfully" is defined in terms of license or privilege. A person who enters premises which are open to the public does so with license and privilege unless the owner of the premises or some authorized person orders him to leave. If only a portion of a building is open to the public, a person is not licensed or privileged to enter that portion which is not open to the public. A person who enters or remains in offices marked "private" inside of a retail store may be found to have done so unlawfully. Similarly, a person who enters premises while they are open to the public and remains until after the premises are closed has "remained unlawfully." Ordinarily, when premises are not open to the public, a person enters unlawfully unless he does so with the consent of the owner.

The concepts of entering and remaining unlawfully should adequately cover all conduct included as "breaking" in or out and extend to more situations which are equally culpable but do not involve "breaking." For instance, a person who entered a store while it was open to the public, hid in the building and committed a crime during the night, then left in the morning when the store opened again would not have "broken" in or out. Under the Code, however, he would have knowingly remained unlawfully in the building, and would be guilty of burglary in the second degree.

The pre-Code burglary law designated breaking into a dwelling house as first degree burglary if some other person was present in the building. Breaking into any other type of building was second degree burglary. See sections 560.040 and 560.070 RSMo. 1969. Part of the basis for differentiating between dwelling houses and other buildings was the increased danger posed by an act of burglary where other persons were present. However, the same danger exists when a burglary breaks into any type of building, whether it is a dwelling house or warehouse.

The Code abolishes the distinction between burglarizing dwelling houses and other buildings. Unlawful entry into *any* building or inhabitable structure for the purpose of committing a crime inside is burglary in the second degree. An inhabitable structure is a building, ship, trailer, sleeping car, airplane or other vehicle or structure where a person lives or carries on a business or calling. Also included is any structure where people assemble for purposes of business, government, education, religion, entertainment, or public transportation, or which is used for overnight accommodation of persons. Such a structure is "inhabitable" even if no person is present there at the time of the burglary. Each apartment or hotel room is a separate inhabitable structure.

The pre-Code burglary statute required that the defendant break and enter with intent to commit a felony or steal (section 560.040 RSMo. 1969) or attempts to use explosives (section 560.100 RSMo. 1969). The new Code requires a purpose to commit *any* crime. This includes *all* felonies and misdemeanors. Thus, if a defendant entered a building with a purpose to damage property, he would be guilty of burglary in the second degree under the new Code.

Comments

Under the Code burglary is divided into two degrees. The basic crime is burglary in the second degree, which becomes first degree burglary when certain aggravating circumstances are present. Although the definition of burglary is substantially modified by the Code, the basic offense remains the same.

First degree burglary involves the same elements as second degree burglary plus certain aggravating factors which create danger for other persons. For second degree burglary, the state must show that the defendant knowingly entered or remained unlawfully in a building or inhabitable structure for the purpose of committing a crime. For first degree burglary the state must prove second degree burglary plus one of three aggravating factors which increase the danger to human life and elevate the crime to burglary in the first degree. These factors can be committed by the defendant or another participant in the crime, and may occur while entering or remaining in the structure, or during the immediate flight from the crime. The aggravating factors are: 1) one of the burglars is armed with an explosive or deadly weapon (merely having such a weapon on the person of the burglar is sufficient. He need not use or display it); or 2) one of the burglars causes or threatens immediate physical injury to a non-participant in the crime; or 3) a non-participant in the crime is present in the structure.

Note that it is irrelevant under the Code whether the structure involved is a dwelling house or other type of structure. Burglary in the first degree may be committed in any type of building or inhabitable structure, if one of the aggravating factors is present.

If the defendant is an occupant of an apartment or hotel room, the other apartments and hotel rooms are "inhabitable structures" of another and the defendant commits the crime of burglary if he knowingly enters unlawfully the apartment or hotel room of another for the purpose of committing a crime therein.

If the defendant intends to commit **any crime** while in the building or inhabitable structure, he is guilty of burglary. He need not actually commit a crime inside, all that is required is that he have the intent to commit a crime. The pre-Code burglary statutes required an intent to commit a felony or steal as an element of the crime of burglary. There need not be an intent to commit a felony under the Code. The intent to commit any crime is sufficient.

Examples

1. Douglas enters a department store during business hours with the intent of shoplifting merchandise. He has not committed burglary because, despite his unlawful purpose, he has not entered unlawfully since the building was open to the public. (See §569.010(8))

2. Donald enters a department store with the intent of stealing money. He goes into the manager's office which is a separate room in the back of the building. He has committed burglary because even though the building was open to the public, the manager's office was not. His entry into that portion of the building was unlawful and is sufficient for burglary. In fact, this might be first degree burglary because others are present in the structure. See the discussion of first degree burglary.

3. Douglas, armed with a deadly weapon (a gun), enters a department store during business hours with the intent of shoplifting. He has not committed either first or second degree burglary because, despite his unlawful purpose, the building was open to the public.

4. Donald, armed with a deadly weapon (a gun), enters a department store after hours with the intent of stealing property. He has committed first degree burglary because even though the building was open to the public during the day, he entered when it was closed and his entry was unlawful. Since he was armed, the crime is first degree burglary.

5. Donald goes into a department store during business hours. He hides behind a counter, waiting until the store has closed for the day so that he can steal property. The store closes, but a janitor is present in the building. The defendant has committed first degree burglary because, with the intent to commit a crime, he remained in a building until such time as it was no longer open to the public, and a person who was not a participant in the burglary was present in the structure.

Included and Related Offenses

Burglary in the second degree is included in burglary in the first degree. Trespass in the first degree and Trespass in the second degree are included in both burglary offenses.

Practice Notes

A person who commits burglary and, in the course of the burglary, steals, can be charged and punished for both offenses. Burglary and Stealing are separate offenses. There is no longer a form of stealing known as "burglarious stealing."

14.22 Possession of Burglar's Tools (§569.180) Class D felony

Code

> 1. A person commits the crime of possession of burglar's tools if he possesses any tool, instrument or other article adapted, designed or commonly used for committing or facilitating offenses involving forcible entry into premises, with a purpose to use or knowledge that some person has the purpose of using the same in making an unlawful forcible entry into a building or inhabitable structure or a room thereof.
> 2. Possession of burglar's tools is a class D felony.

Elements

A person commits the crime of possession of burglar's tools if he:

1. possesses
2. any tool, instrument, or other article
3. which is adapted, designed or commonly used
4. for committing or facilitating offenses involving forcible entry into premises, and
5. he has a purpose to use such tools, or
6. he has knowledge that
   a) some other person has
   b) the purpose of using the tools
7. in making an unlawful forcible entry into a building, an inhabitable structure, or room thereof.

Major Changes

This section replaces the pre-Code statute found in RSMo. 560.155. The pre-Code statute makes an effort to list the instruments proscribed. The Code avoids the obvious problem of excluding a possible burglar's tool by using a more encompassing phrase of "any tool, instrument or other article."

Comments

This section makes it a crime to possess certain instruments with the purpose to use, or knowledge that someone else will use, these instruments in performance of an offense involving forcible entry into premises. Possession of an instrument designed or intended for use in some specific criminal venture is not unusual in the Code. Thus, the Code prescribes punishment for possession of a forging instrumentality (§570.100), possession of gambling records (§§572.050 and 572.060), and possession of a gambling device (§572.070).

This section consists of three essential elements: (1) possession of any tool, instrument, or other article, (2) adapted, designed, or commonly used for committing or facilitating offenses involving forcible entry into premises, and (3) a purpose to use or knowledge that some person intends to use the same in the commission of an offense of such character.

The first element—**possession**—will be established whenever it is shown that the defendant had physical possession or otherwise exercised dominion over the tool, instrument, or article in issue. Ownership is not necessary, possession is sufficient.

The second element of this crime requires a showing that the instrument in issue is **adapted, designed, or commonly used for committing or facilitating an offense involving forcible entry into premises.** If the instrument *is not* so adapted, designed, or commonly used, possession will not be an offense under 569.180 regardless of what the defendant's purpose or knowledge may be concerning the instrument. This is not to imply that the instrument must be peculiarly adapted or designed solely for the commission of the proscribed offenses. Usually, such "burglar's tools" will have a legitimate and innocent function. The prosecution must prove beyond a reasonable doubt that the instrument in issue is of the character described by §569.180. Although the jury will often be able to find the nature of the instrument is of the described character, it may sometimes be necessary to bring in expert testimony from a police officer or other witness with special knowledge of "burglar's tools" to establish the character of the instrument.

The final element of the offense, the **mental element,** is the most important and invariably will be the most difficult to prove. Under pre-Code law, the state had to prove intent to use the tools for burglarious purposes. Evidence of defendant's reputation as a burglar, or that he was an associate of burglars, and of defendant's previous convictions of similar crimes was sufficient to give rise to an inference of his intent. **State v. Wing,** 455 S.W. 2d 457 (Mo. 1970). Although the Code requires a purpose to use the tools for an unlawful entry or knowledge that someone else will so use them, the methods of proving this mental state and the evidence sufficient to let the issue go to the jury probably is not changed.

Included and Related Offenses

There are no other offenses included in the crime of possession of burglar's tools.

CHAPTER 15

Stealing and Related Offenses (§§570.010-570.190)

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15.1 Introduction and Definitions

This chapter deals with various crimes against property. The basic crime is stealing. Related crimes are receiving stolen property, forgery, bad check and credit card crimes dealing with fraud in a commercial situation. The statutory language in this chapter is frequently very different than the language in pre-Code statutes, and the definitions of terms contained in section 570.010 should be carefully studied. Section 570.010 provides as follows:

As used in this chapter:

> (1) **"Adulterated"** means varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulations of this state lawfully filed, or if none, as set by commercial usage;
>
> (2) **"Mislabeled"** means varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regulations of this state lawfully filed, or if none, as set by commercial usage; or represented as being another person's product, though otherwise accurately labeled as to quality and quantity;
>
> (3) **"Appropriate"** means to take, obtain, use, transfer, conceal or retain possession of;
>
> (4) **"Coercion"** means a threat, however communicated:
>
> (a) To commit any crime; or
>
> (b) To inflict physical injury in the future on the person threatened or another; or

(c) To accuse any person of any crime; or
(d) To expose any person to hatred, contempt or ridicule; or
(e) To harm the credit or business repute of any person; or
(f) To take or withhold action as a public servant, or to cause a public servant to take or withhold action; or
(g) To inflict any other harm which would not benefit the actor.

A threat of accusation, lawsuit or other invocation of official action is not coercion if the property sought to be obtained by virtue of such threat was honestly claimed as restitution or indemnification for harm done in the circumstances to which the accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful service. The defendant shall have the burden of injecting the issue of justification as to any threat;

(5) **"Credit device"** means a writing, number or other device purporting to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer;

(6) **"Dealer"** means a person in the business of buying and selling goods;

(7) **"Deceit"** means purposely making a representation which is false and which the actor does not believe to be true and upon which the victim relies, as to a matter of fact, law, value, intention or other state of mind. The term "deceit" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. Deception as to the actor's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;

(8) **"Deprive"** means
(a) To withhold property from the owner permanently; or
(b) To restore property only upon payment of reward or other compensation; or
(c) To use or dispose of property in a manner that makes recovery of the property by the owner unlikely;

(9) **"Of another"** property or services is that "of another" if any natural person, corporation, partnership, association, governmental subdivision or instrumentality, other than the actor, has a possessory or proprietary interest therein, except that property shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security arrangement;

(10) **"Property"** means anything of value whether real or personal, tangible or intangible, in possession or in action, and shall include but not be limited to the evidence of a debt actually executed but not delivered or issued as a valid instrument;

(11) **"Receiving"** means acquiring possession, control or title or lending on the security of the property;

(12) **"Services"** includes transportation, telephone, electricity, gas, water or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions and use of vehicles;

(13) **"Writing"** includes printing, any other method of recording information, money, coins, negotiable instruments, tokens, stamps, seals, credit cards, badges, trademarks and any other symbols of value, right, privilege or identification.

These terms as adopted are almost identical with the definitions in the Proposed Missouri Criminal Code. The following comment (with minor changes) is taken from the committee to draft a Modern Criminal Code for Missouri.

(1) "Adulterated". By including this definition, which is similar to Model Penal Code §224.7 and Proposed Montana Code §94-6-309(2), a general criminal provision can be used to prohibit selling products which are not up to the necessary standard of composition. Such standard may be provided by statute or regulation of this state, and such regulations must be lawfully filed. Note that federal law is not incorporated by reference by this definition. Sometimes federal regulations are inconsistent with state regulations, and incorporation of federal regulations by reference might limit the power of Missouri administrative agencies. However, the state administrative agencies could incorporate federal regulations by reference if they choose, and this is not prohibited by this definition.

(2) "Mislabeled" is similar to Model Penal Code §224.7 and Proposed Montana Code §94-6-309(3). Mislabeling is a problem closely related to adulterating. Statute, regulation and commercial usage control the standards, in that order of precedence. It also covers changing brand names. The comments to "adulterated" are generally applicable here.

(3) "Appropriate". The definition is new but it is based on the definition of exercising dominion in §560.156 RSMo. No purpose is served by using both "appropriate" and "exercise dominion".

(4) "Coercion". This definition is new and is based on the Proposed Texas Penal Code §31.01(1) and the Model Penal Code §223.4 (Theft by Extortion). The definition is meant to codify and clarify related concepts used in defining blackmail-extortion type offenses. The gravamen of the concept is a communicated threat of harm. The definition lists the common types of threats which constitute coercion. In addition, a generalized principle is stated in (a)(vii) to cover the less common but inevitable cases. Some examples of situations which might occur and not be covered in the other subsections are: (a) the foreman of a plant requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination; (b) a professor obtains property from a student by threatening to give him a failing grade.

The defense of justification provided in (b) is meant to protect those who threaten to invoke legal action in order to obtain what they honestly believe to be due them.

(5) "Credit device". Pre-Code Missouri statutes do not now define this term as such. §561.415 RSMo. refers to credit device frauds but it is a verbose and difficult to understand provision. By adopting essentially the Model Penal Code §224.6 definition a much simpler approach is possible. It should be clear from this definition that any device evidencing an undertaking to pay for property or services is a credit device. Obviously, this includes such things as a Master Charge or American Express card. It would also include a letter of credit from a bank or an electronic key used to obtain cash from a machine installed to provide such service.

(6) "Dealer". This definition is new and is taken from Model Penal Code §223.6(2). The definition is necessary because a felony penalty is provided for a dealer who is convicted of receiving stolen property. The definition is aimed at the professional "fence" as well as merchants. Both of these types of dealers may have a ready market for stolen goods and therefore constitute a greater incentive for the thief than the ordinary citizen.

(7) "Deceit". Pre-Code Missouri statutes do not define deceit. The Code definition makes it clear that the actor must *purposely* make a representation which is false, which he does not believe is true and upon which the victim relies. Such a representation may relate to a matter of fact, law, value, intention or other state of mind. This is an extension of current law which still clings to the hazy distinction between present fact and future intention. Intention is a present fact, as Justice Holmes realized when he compared a man's state of mind to the state of his digestion. Moreover, the common law traditionally recognized a misrepresentation of intention as sufficient for a conviction for larceny by trick. It was only when the label was "obtaining property by false pretenses" that a misrepresentation of intention would not support a conviction. The Code eliminates the distinction. What little reason existed for it has been covered by the limitation that deception as to the actor's intention is not to be inferred from the fact alone that he did not subsequently perform the promise. If this were not so, persons borrowing money and thereafter suffering financial reverses and failing to meet their obligations to repay might possibly be convicted without more; the fact of nonperformance being used to infer an intention not to perform at the time the loan was obtained. Obviously, such a result would be unjust. If, however, there were evidence that the borrower had sold out his business and made flight reservations to Brazil contemporaneously with obtaining the loan, a jury might find the requisite deceit as to his intent to repay. It should be noted that deceit requires purpose. Recklessness is not enough. Thus, a borrower who knows there is a substantial risk, or even a high likelihood he will not be able to repay is not guilty by that alone. It must be his purpose not to perform his promise in order for there to be deceit from the making of the promise.

A second limitation relates to puffing. Many salesmen exaggerate the qualities of their product and make claims which could be construed as misrepresentations. So long as these are made in a way that ordinary persons would not be deceived, they are expected as part of the commercial world and are understood to be taken with a grain of salt. It is doubtful that the criminal law could reform such salesmen, and more important, the criminal law cannot protect someone who is seemingly set on being misled. The distinction between acceptable and non-acceptable conduct has been drawn in terms of what is likely to deceive ordinary persons in the group addressed. Thus, the jury is asked to draw on its everyday experience to decide whether the misrepresentation involved exceeds acceptable limits.

(8) "Deprive". This definition is new and is based on the Proposed Texas Penal Code §31.01(3). It is a most important definition as it is the concept which replaces the "intent to steal" which was an element of

larceny at common law and which has been found to be an element of stealing under §560.156 RSMo. See **State v. Commenos,** 461 S.W.2d 9 (Mo. 1970).

In essence, the definition is a codification of the case law which has developed over the years relating to the intent to steal. The problem is drawing a line between that intent or purpose which should support a conviction of stealing and that which is less culpable. It is clear that a purpose to convert another's property to one's own use permanently is sufficient. It is equally clear that a purpose to borrow for a brief period is not sufficient. Case law indicates that a purpose to retain property on the condition of payment of reward or other compensation is sufficient, as is a purpose to use or dispose of the property in a manner that will expose it to a substantial risk of loss or destruction.

(9) "Of another". The definition is new. *Cf.* Code §569.010(3) and Model Penal Code §223.0(7). The thrust of the provision is to treat as property of another any property in which someone other than the actor has a proprietary or possessory interest, but to exclude mere security interests from such proprietary or possessory interests. Since this concept is used to determine what property is capable of being stolen, it is apparent that one who appropriates property which is his own except for the security interest of another cannot be guilty of stealing. Such conduct is dealt with under Defrauding Secured Creditors.

(10) "Property". This definition remains essentially as it appears in pre-Code §560.156 RSMo. except that reference to pre-Code §§556.080, 556.070 and 556.090 has been deleted.

(11) "Receiving". This definition is new and is taken from Model Penal Code §223.6(1). It includes not only acquiring possession, title or control, but also lending on the security of the property as in the case of a pawnbroker.

(12) "Services". There is no similar provision in the pre-Code law. The Model Penal Code §223.7 (Theft of Services) and the Proposed Texas Penal Code §31.01(8) are the basis for the formulation, but labor and professional services have been intentionally omitted.

Prior to the 1955 revision of Missouri theft offenses, such things as misappropriating electricity or gas were included by specific provisions. See §§560.290 and 560.295 RSMo. 1949.

(13) "Writing". This section was taken from §224.1 of the Model Penal Code and will replace the general characteristics of a writing outlined in §561.011(1) and (2) RSMo. This definition does not work a change in the theory of the pre-Code Missouri law. It merely makes more specific and clear those items to be considered writings.

15.2 Determination of value (§570.020)

Code

For the purposes of this chapter, the value of property shall be ascertained as follows:

(1) Except as other otherwise specified in this section, "value" means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime;

(2) Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertainable market value such as some public and corporate bonds and securities, shall be evaluated as follows:

(a) The value of an instrument constituting evidence of debt, such as a check, draft or promissory note, shall be deemed the amount due or collectible thereon or thereby, such figure ordinarily being the fact amount of the indebtedness less any portion thereof which has been satisfied;

(b) The value of any other instrument which creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument;

(3) When the value of property cannot be satisfactorily ascertained pursuant to the standards set forth in subdivisions (1) and (2) of this section, its value shall be deemed to be an amount less than one hundred fifty dollars.

Comment

This section is based on New York Penal Law §155.20. Pre-Code Missouri law has no comparable provision. This section sets out reasonably clear standards for ascertaining value. Generally, fair market value at the time and place of the crime is the standard. If fair market value cannot be satisfactorily determined, replacement cost within a reasonable period after the offense is to be used.

Special rules are set out for valuing written instruments which do not have a readily ascertainable market value. If the instrument evidences a debt, its value is deemed to be the amount due or collectable on it. The value of instruments which are not readily marketable and which do not evidence debt is determined by the amount of economic loss the owner might reasonably suffer by virtue of the loss of the instrument.

If value cannot be satisfactorily ascertained by the use of any of the enumerated standards, the value is deemed to be less than $150.00 which is the amount used to distinguish between the two degrees of stealing.

15.3 Stealing (§570.030)
Class C felony or Class A misdemeanor (See discussion below)

Code

1. A person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion.
2. Stealing is a class C felony if:
   (1) The value of the property or services appropriated is one hundred and fifty dollars or more; or
   (2) The actor physically takes the property appropriated from the person of the victim; or
   (3) The property appropriated consists of:
      (a) Any motor vehicle, watercraft or aircraft; or
      (b) Any will or unrecorded deed affecting real property; or
      (c) Any credit card or letter of credit; or
      (d) Any firearms; or
      (e) Any original copy of an act, bill or resolution, introduced or acted upon by the legislature of the state of Missouri; or
      (f) Any pleading notice, judgment or any other record or entry of any court of this state, any other state or of the United States; or
      (g) Any book of registration or list of voters required by chapter 116, RSMo.; or
      (h) Any animal of the species of horse, mule, ass, cattle, swine, sheep, or goat; or
      (i) Any narcotic drugs as defined by section 195.010, RSMo.; otherwise, stealing is a class A misdemeanor.

Elements

A person commits the crime of stealing if he:
1. appropriates
2. property or services
3. of another
4. with the purpose to deprive the other thereof
5. accomplished
   a) without the other's consent, or
   b) by means of deceit, or
   c) by means of coercion.

Penalty

Stealing can be a class A misdemeanor or a class C felony. In order for the felony penalty to be given, additional factors must be present.

Stealing will be a class C felony if any one of the following occurs:

1. The value of the property or services appropriated is $150 or more. In determining the value, §570.050 provides that amounts stolen pursuant to one scheme or course of conduct whether from different persons or at different times may be aggregated in determining the grade of the offense. Section 570.050 provides as follows: "Amounts stolen pursuant to one scheme or course of conduct, whether from the same or several owners and whether at the same or different times, constitute a single criminal episode and may be aggregated in determining the grade of the offense."
2. The suspect has physically taken the property from the person of the victim.
3. The property appropriated consists of (without regard to value):
   a) any motor vehicle, watercraft or aircraft; or
   b) any will or unrecorded deed affecting real property; or
   c) any credit card or letter of credit; or
   d) any firearms; or
   e) any original copy of an act, bill or resolution introduced or acted upon by the legislature of the State of Missouri; or
   f) any pleading, notice, judgment or other record or entry of any court of this state, any other state or of the United States; or
   g) any book of registration or list of voters required by Chapter 116 RSMo.; or
   h) any animal of the species of horse, mule, ass, cattle, swine, sheep or goat; or
   i) any narcotic drug as defined by §195.010 RSMo.
4. §570.040 provides that any person who has two prior convictions for stealing and who is convicted of a third offense of stealing is guilty of a felony. That is, the third offense of stealing is a felony without regard to the value of the property or services appropriated. Although the title of section 570.040 says "fourth offense", the language in the section make it clear that only two prior offenses are required. It provides as follows:

> **570.040. Stealing, fourth offense**
>
> 1. Every person who has been previously convicted of stealing two times, and who is subsequently convicted of stealing is guilty of a class C felony and shall be punished accordingly.
>
> 2. Evidence of prior convictions shall be heard by the court, out of the hearing of the jury, prior to the submission of the case to the jury, and the court shall determine the existence of the prior convictions.

Major Changes

This section consolidates most of the theft offenses into one crime. It includes acquiring property or services by means that are commonly thought of as stealing or embezzlement (appropriation without consent), fraud (appropriation by deceit), and extortion and blackmail (appropriation by coercion).

Note that one can appropriate property not only by **taking** the property, but also by using, transferring, concealing or retaining possession of it.

Note also that services as well as property can be stolen. The individual must appropriate the property with the intent to "deprive" another person. The word deprive means "to withhold property from the owner permanently, to restore property only upon payment of reward or other compensation, or to use or dispose of property in a manner that makes recovery of the property by the owner unlikely." Note the defenses discussed in paragraphs 15.4 and 15.5.

Comments

In 1955, the legislature extensively revised theft law in Missouri, with the enactment of §§560.156 and 560.161. While this did much to improve the law of theft (if nothing else, it eliminated a multitude of overlapping statutes), the case law interpreting these new sections indicates there is still a good deal of confusion.

The first case to interpret the 1955 revision was **State v. Zammar,** 305 S.W.2d 441 (Mo. 1957). The court stated that the purpose of the revision was to eliminate the technical distinctions among the offenses of larceny, embezzlement and obtaining property under false pretenses. This was, of course, one

of the purposes of the revision but it was not necessarily the only one. In any event, **State v. Zammar** has become the leading case on the issue of what the legislature intended to accomplish by the revision. The subsequent cases indicate there is still a good deal of confusion as to the law of theft. These cases fall uneasily into two categories: (1) what must be alleged in an information or indictment and (2) what proof is required for conviction.

After **State v. Zammar**, one would think there would no longer be much difficulty in drafting an information or indictment because of the elimination of the common law "technical distinctions." Such was not the case. Although not entirely clear, the language of **State v. Mace,** 357 S.W.2d 923 (Mo. 1962), **State v. Fenner,** 358 S.W.2d 867 (Mo. 1962) and **State v. Miles,** 412 S.W.2d 473 (Mo. 1967) comes close to requiring that a common law label, such as "larceny" or "embezzlement", be included in the information or indictment.

Of course, a defendant is entitled to know with what offense he is charged. Under the Code provision, a defendant may be charged with stealing without consent or stealing by deceit or stealing by coercion. No other labels are necessary or desirable. The common law theft offenses no longer exist in Missouri. The Code re-defines the theft offenses. These offenses may encompass conduct covered by the old common law offenses, but the elements of the Code offenses are the only relevant elements.

This is not to say that if an information or indictment specifies one of the forms of stealing under the Code, the defendant is entitled to no more. He is entitled (either in the information or indictment or in a bill of particulars) to such specificity in terms of alleged facts as to enable him to prepare his defense and to avail himself of his conviction or acquittal for protection against a further prosecution for the same cause. In addition, sufficient facts must be alleged so that the court may decide whether they are sufficient in law to support a conviction. **State v. Mace,** 357 S.W.2d 923 (Mo. 1962). But the allegations need only be sufficient to allege a form of stealing under the Code provision, and need not relate to a common law form of stealing.

As to the proof required for conviction, it is hornbook law that the State must prove each element of the offense beyond a reasonable doubt. The problem, of course, is determining what those elements are. The old theft offenses each had specific elements. When these were eliminated in the 1955 revision, one might have thought that the elements of the theft offenses would be found exclusively in the new statute. However, the court, in **State v. Zammar,** viewed the revision as basically only an effort to avoid the problems arising from the technical distinctions among the old theft offenses, and the court seems to have taken the view that the elements of the theft offenses are determined, at least in part, by reference to the former theft offenses. See **State v. Miles** 412 S.W.2d 472 (Mo. 1967) indicating that the State must prove a taking and carrying away even though the statute refers only to taking, and **State v. Commenos,** 461 S.W.2d 9 (Mo. 1970), indicating that the "intent to steal" as in the offense of larceny was still required.

Because of these problems, the Code provides for a new stealing statute, which more clearly lists the elements of the offense.

Under the Code, the following are the essential elements:

1. There must be an *appropriation*
2. of *property* or *services*
3. *of another*
4. with the *purpose to deprive* the other thereof
5. accomplished
   a. *without* the owner's *consent,* or
   b. *by means of deceit,* or
   c. *by means of coercion.*

These are the only essential elements and are defined by statute. See definitions in paragraph 15.1.

Under the Code, stealing without consent includes, but is not necessarily limited to, conduct which would have constituted larceny, larceny by bailee and embezzlement under prior law. Stealing by deceit includes, but is not necessarily limited to conduct which would have constituted larceny by trick and false pretenses. Stealing by coercion includes, but is not necessarily limited to, conduct which would have constituted extortion and blackmail. The important thing is that the elements of the crime of stealing are to be determined by reference to the statute, not to the former definitions of the various theft offenses.

The penalty provision is similar to the pre-Code penalty provision with some changes. The first change is that the value distinction between felony and misdemeanor stealing is raised from $50.00 to $150.00. Under present day conditions this is a more appropriate figure.

Pre-Code section 560.161(2) RSMo. lists a number of types of property the stealing of which is a felony without regard to the monetary value of the property. Section 570.030.2(3)(h) retains most of that listing.

Section 570.030.2(2) is based on pre-Code §560.161(2)(1) RSMo. which made it a felony to steal if the property stolen was "taken from a dwelling house or a person." With the enlargement of the crime of burglary, see chapter 14, there is no need for a special offense of stealing by taking from a dwelling. The taking from the person, however, is retained, as this will not, in all cases, be robbery. Stealing, and this form of stealing, can be lesser included offenses of robbery.

15.4 Lost Property (§570.060)

Code

1. A person who appropriates lost property shall not be deemed to have stolen that property within the meaning of section 570.030 unless such property is found under circumstances which gave the finder knowledge of or means of inquiry as to the true owner.
2. The defendant shall have the burden of injecting the issue of lost property.

Comments

This section corresponds to §560.156(4) RSMo. It was retained without substantive change. Once the issue is raised, the state has the burden of proving that the property was found under circumstances which gave the finder knowledge of or means of inquiry as to the true owner.

15.5 Claim of right (§570.070)

Code

1. A person does not commit an offense under section 570.030 if, at the time of the appropriation, he
   (1) Acted in the honest belief that he had the right to do so; or
   (2) Acted in the honest belief that the owner, if present, would have consented to the appropriation.
2. The defendant shall have the burden of injecting the issue of claim of right.

Comments

This section is based on §31.10 of Proposed Texas Penal Code and §206.10, Model Penal Code. The object of the theft offense is to deter those who would acquire something of value knowing they have no right to it. "Persons who take only what they believe themselves entitled to constitute no significant threat to our property system and manifest no character trait worse than ignorance." Model Penal Code comment, Tent. Draft No. 2 at 98 (1954).

Note: the defendant need only have an honest belief, it need not be a reasonable belief.

Thus, a person who takes goods due to a mistaken claim of right does not commit stealing since his belief would negate the culpable mental state required for stealing. If a person honestly believes he is entitled to take the goods in question, the felonious intent required for stealing is lacking since he has not appropriated property of another with the purpose to deprive the other of his lawful interest therein.

15.6 Receiving Stolen Property (§570.080) Class C felony or Class A misdemeanor (see discussion below)

Code

1. A person commits the crime of receiving stolen property if for the purpose of depriving the owner of a lawful interest therein, he receives, retains or disposes of property of another knowing that it has been stolen, or believing that it has been stolen.
2. Evidence of the following is admissible in any criminal prosecution under this section to prove the requisite knowledge or belief of the alleged receiver:
   (1) That he was found in possession or control of other property stolen on separate occasions from two or more persons;
   (2) That he received other stolen property in another transaction within the year preceding the transaction charged;
   (3) That he acquired the stolen property for a consideration which he knew was far below its reasonable value.
3. Receiving stolen property is a class A misdemeanor unless the property involved has a value of one hundred fifty dollars or more, or the person receiving the property is a dealer in goods of the type in question, in which cases receiving stolen property is a class C felony.

Elements

A person commits the crime of receiving stolen property if:

1. he
   a) receives, or
   b) retains, or
   c) disposes of
2. property
3. of another
4. for the purpose to deprive the owner of a lawful interest therein,
5. and he
   a) knows the property has been stolen; or
   b) believes the property has been stolen.

Penalty

Receiving stolen property can be a class A misdemeanor or a class C felony. In order for the felony penalty to be given, additional factors must be present. Receiving stolen property will be a class C felony if any one of the following occurs:

1. The value of the property received is $150 or more.
2. The person receiving the property is a dealer in goods of the type involved.

Major Changes

This section replaces pre-Code section 560.270 RSMo.

Under the Code it is sufficient if the defendant knew *or believed* the property being received was stolen. Pre-Code law required knowledge. Regardless of the standard used, it has often been difficult to prove the defendant's mental state. The Code provides that the following evidence is admissible to establish the defendant's knowledge or belief:

a) that the defendant was found in possession of property which had been stolen on separate occasions and from more than one person.

b) that the defendant has received stolen property in another transaction during the preceding year.

c) that the defendant acquired the stolen property in question for a consideration which he knew was far below its reasonable value.

Such evidence is not conclusive but can be considered by the jury to determine whether the defendant knew or believed the property in question was stolen.

Comments

Convictions for receiving stolen goods were difficult to obtain under pre-Code law which required the state to prove both that the defendant had the intent to defraud and the knowledge that the property was stolen. The Code changes these requirements slightly. The intent to defraud is replaced by a phrase which is the definition of the intent to defraud: the purpose to deprive the owner of a lawful interest in his property. See State v. Ciarelli, 366 S.W.2d 63 (K.C.App. 1963).

The state can make its case by proving that the defendant knew the property had been stolen or believed it had been stolen. The second is a lesser burden, but is justified because it corresponds more closely to reality. The fence "knows" the property was stolen in the sense that he has good reason to believe it was stolen. By putting the standard in terms of belief as well as knowledge, the section avoids the problem of a juror putting too restrictive a meaning to "know".

Prosecutors have faced major problems in proving the offense, no matter what the standard is. As an aid, some jurisdictions and the Model Penal Code, §223.6(2) have resorted to presumptions. It seems appropriate to set out rules of evidence relating to proving the mental state in this crime. Hence, subsection 2 makes it clear that evidence that the person charged has been found in possession of stolen property (stolen from more than one person and on separate occasions); that he received stolen property in another transaction during the preceding year; or that he acquired the stolen property in question for a consideration which he knew was far below its reasonable value, is admissible on the issue of his knowledge or belief.

The grading of the offense is similar to that of stealing except that the dealer in goods of the type involved, may be sentenced as for a Class C Felony without regard to the value of the goods. This special penalty is provided because dealers present a special problem by virtue of the fact they presumably have a regular clientele and perhaps a legitimate business to facilitate their illegal trade.

15.7 Forgery (§570.090) Class C felony

Code

1. A person commits the crime of forgery if, with the purpose to defraud, he
   (1) Makes, completes, alters or authenticates any writing so that it purports to have been made by another or at another time or place or in a numbered sequence other than was in fact the case or with different terms or by authority of one who did not give such authority; or
   (2) Erases, obliterates or destroys any writings; or
   (3) Makes or alters anything other than a writing, so that it purports to have a genuineness, antiquity, rarity, ownership or authorship which it does not possess; or
   (4) Uses as genuine, or possesses for the purpose of using as genuine, or transfers with the knowledge or belief that it will be used as genuine, any writing or other thing which the actor knows has been made or altered in the manner described in this section.
2. Forgery is a class C felony.

Elements

A person commits the crime of forgery if:

A. 1. he has a purpose to defraud and he
   2. makes, completes, alters, or authenticates
   3. any writing
   4. so that it purports to have been made:
      a) by another person, or
      b) at another time or place, or
      c) in a numbered sequence other than the actual sequence, or
      d) with different terms, or

e) by authority of one who in fact did not give such authority.

or

B. 1. with a purpose to defraud he
2. erases, obliterates or destroys
3. any writings.

or

C. 1. with a purpose to defraud he
2. makes or alters
3. anything other than a writing
4. so that it purports to have a genuineness, antiquity, rarity, ownership or authorship which it does not possess.

or

D. 1. with a purpose to defraud he
2. a) uses as genuine, or
b) possesses for the purpose of using as genuine, or
c) transfers with the knowledge or belief that it will be used as genuine
3. any writing or other thing which the actor knows has been made or altered as described in this section.

Major Changes

None.

Comments

This section is essentially similar to pre-Code §561.011(1), (2), (3) and (4) RSMo. with some changes in form. That statute was adopted in 1955 and covered forgery of documents having legal significance. Included within this definition would be the forging of false coins and slugs. It also covers a thing other than a writing when it is made or altered so as to appear to have some valuable attribute which it does not in fact have.

15.8 Possession of a Forging Instrumentality (§570.100) Class C felony

Code

1. A person commits the crime of possession of a forging instrumentality if, with the purpose of committing forgery, he makes, causes to be made or possesses any plate, mold, instrument or device for making or altering any writing or anything other than a writing.
2. Possession of a forging instrumentality is a class C felony.

Major Changes

None.

Comments

This section is based on pre-Code section 561.011(4), (5) and (6) RSMo., which prohibited making or possessing instrumentalities that could be used for forgery, if there was an accompanying purpose to use them to commit forgery. The phrase "with the purpose to defraud" contained in the pre-Code sections has been replaced with "with the purpose of committing forgery".

15.9 Issuing a False Instrument or Certificate (§570.110) Class A misdemeanor

Code

1. A person commits the crime of issuing a false instrument or certificate when, being authorized by law to take proof or acknowledgment of any instrument which by law may be recorded, or being authorized by law to make or issue official certificates or other official written instruments, he issues such an instrument or certificate, or makes the same with the purpose that it be issued, knowing:
   (1) That it contains a false statement or false information; or
   (2) That it is wholly or partly blank.
2. Issuing a false instrument or certificate is a class A misdemeanor.

Major Changes

This section is based on New York Revised Penal Code §175.40 and pre-Code §§561.060 (False Acknowledgment of a Deed) and 561.220 (Affixing False Jurat). It covers any instrument which, under law, is recordable. It also covers the issuing of any official certificates or other written instruments, e.g. jurats, affidavits, statements. The section covers attesting to false statements or false information, as well as the issuing of instruments which are wholly or partly blank.

The section is intended to cover all of the conduct proscribed under pre-Code §§561.060 and 561.220.

The mental state required is "knowingly" and the crime has been made a Class A Misdemeanor.

Comments

The new Code section covers both recordable instruments (deeds, deeds of trust, mortgages, liens, some notes evidencing debts, and anything else which is recordable by law) and official certificates such as affadavits, notarized statements, and jurats (certificates of officials who take sworn statements).

Only an official authorized by law to acknowledge recordable instruments, i.e., a judge or notary public, or one who is authorized to issue official written instruments, can violate this section. The defendant must know (know to a substantial certainty) that the information in the certificate is false, or that the instrument is blank.

15.10 Passing bad checks (§570.120) Class D felony or class A misdemeanor (See Penalty discussion)

Code

1. A person commits the crime of passing a bad check when, with purpose to defraud, he issues or passes a check or other similar sight order for the payment of money, knowing that it will not be paid by the drawee, or that there is no such drawee.
2. If the issuer had no account with the drawee or if there was no such drawee at the time the check or order was issued, this fact shall be prima facie evidence of his purpose to defraud and of his knowledge that the check or order would not be paid.
3. If the issuer has an account with the drawee, failure to pay the check or order within ten days after notice in writing that it has not been honored because of insufficient funds or credit with the drawee is prima facie evidence of his purpose to defraud and of his knowledge that the check or order would not be paid.
4. Notice in writing means notice deposited as first class mail in the United States mail and addressed to the issuer at his address as it appears on the dishonored check or to his last known address.
5. The face amounts of any bad checks passed pursuant to one course of conduct within any ten-day period, may be aggregated in determining the grade of the offense.
6. Passing bad checks is a class A misdemeanor, unless
   (1) The face amount of the check or sight order or the aggregated amounts is one hundred fifty dollars or more; or
   (2) The issuer had no account with the drawee or if there was no such drawee at the time the check or order was issued, in which cases passing bad checks is a class D felony.

Elements

A person commits the crime of passing a bad check if:
1. with purpose to defraud
2. he issues or passes a check
3. knowing
   a) that it will not be paid by the drawee (bank, or
   b) that there is no drawee (bank).

Penalty

Passing a bad check can be a class A misdemeanor or a class D felony. In order to have the felony penalty, one of the following must occur:

1. The face amount of the check is $150 or more. The face amount of any bad checks passed pursuant to one course of conduct within a 10 day period may be aggregated to reach the $150 amount for the felony penalty.
2. The person making the check had no account with the drawee bank.
3. There is no drawee bank.

Major Changes

Subsection 1 replaces pre-Code §561.460, and requires a person to act "with purpose to defraud" and "knowing" that the check "will not be paid by the drawee". The terms "check" and "pass" have not been defined because they are sufficiently familiar concepts. The section is intended to cover checks written with no funds, insufficient funds, no account and no bank.

Subsections 2 and 3 make it clear that the state fulfills its initial burden of proving purpose to defraud and knowledge that the check will not be honored, if it shows either that the issuer had no account with the drawee, or there was no drawee or that the check was not paid within ten days after notice of dishonor. If a person has no account at a given bank, the inference is strong that he knew that a check drawn on such bank by him would be dishonored and that he had a purpose to defraud by drawing such check. If a person is shown not to have had sufficient funds on deposit at the time a check is written, there is an inference that he knew that fact simply because it was his account.

Under subsection 3, the state need not wait to prosecute until after the ten day period has elapsed. What subsection 3 means is simply that the prima facie evidence provisions are not available in the case of a defendant who has an account with the drawee until this time period has gone by. This approach is followed by the Michigan Revised Criminal Code §4040 (Final Draft 1967).

Subsection 4 is intended to clarify the notice provision. All that is meant by this subsection is that certain steps must be taken in order to notify the issuer of the dishonor of his check, and this includes notice in writing as defined.

Subsection 5 is intended to cover the "check writing spree" cases. Bad check artists may write a series of small checks over a short period of time and then leave town. If the checks are kept under $150 each, there would be only a series of misdemeanors without this subsection. This permits aggregation of the amounts of checks within a ten-day period.

Subsection 6 provides the penalties for passing bad checks. Its provisions are substantially similar to pre-Code Missouri law.

Source

This section is based on pre-Code §§561.450, 561.460 and 561.470.

Comments

This section combines three sections of RSMo. 1969. It was intended to simplify the law on bad checks and facilitate the job of the prosecuting attorney. Section 561.450 RSMo. 1969 covered "no funds" checks, a felony. Section 561.460 RSMo. 1969 concerned "insufficient funds" checks and provided a felony

penalty for checks with a face value of $100 or more. The Code section combines both of the above statutes and shortens and simplifies the language.

The new Code provision should make it easier for the state to establish the required elements of purpose to defraud and knowledge that the instrument will not be paid. The crime of passing a bad check requires the purpose to defraud and knowledge that the check will not be paid or that there is no drawee bank. If the defendant passes a "no account" check, either by naming a non-existent bank as drawee or by naming a drawee with whom he has no account, the state can show that no such drawee or account existed when the check was passed. This showing will he prima facie evidence of purpose to defraud and knowledge that the drawee would not pay the check. Thus, it will be inferred that the defendant acted with the required mental states unless he offers evidence in rebuttal. See **State v. Phillips,** 430 S.W.2d 635, 637 (Mo. App. 1968). All "no account" and "no drawee" checks are class D felonies.

The Code section also retains a similar prima facie evidence provision, which was formerly contained in section 561.470 RSMo. 1969, for insufficient funds checks. A showing of the defendant's failure to pay the check within ten days after written notice that the drawee will not honor it creates a rebuttable inference of purpose to defraud and knowledge that the check will not be paid. Written notice means notice deposited as first class mail addressed to the defendant at his last known address or as his address appears on the check. Note that the ten day period runs from the mailing of the notice, not from its receipt by the defendant.

The ten day period mentioned in the statute does not require the state to wait for the ten days to pass before filing charges. It means only that the prima facie evidence provision will not be available in an "insufficient funds" case until this period passes.

The new Code section also allows aggregation of bad checks passed within a ten-day period pursuant to one course of conduct. If a person wrote a series of insufficient funds checks within a short period of time, each check having a face value of less than one hundred fifty dollars would be a misdemeanor without this provision. However, this subsection will allow the state to add together the face values of such checks and increase the charge to a single class D felony. Note that the dividing line between misdemeanor bad checks and felony bad checks has been changed from one hundred dollars to one hundred fifty dollars.

15.11 Fraudulent use of a credit device (§570.130) Class A misdemeanor or class D felony (See Penalty Discussion)

Code

1. A person commits the crime of fraudulent use of a credit device if he uses a credit device for the purpose of obtaining services or property, knowing that:
   (1) The device is stolen, fictitious or forged; or
   (2) The device has been revoked or cancelled; or
   (3) For any other reason his use of the device is unauthorized.
2. Fraudulent use of a credit device is a class A misdemeanor unless the value of the property or services obtained or sought to be obtained within any thirty-day period is one hundred fifty dollars or more, in which case fraudulent use of a credit device is a class D felony.

Elements

A person commits the crime of fraudulent use of a credit device if he:

1. uses a credit device
2. for the purpose of obtaining services or property
3. knowing that
   a) the device is stolen, fictitious, or forged; or
   b) the device has been revoked or cancelled; or
   c) for any other reason, his use of the device is unauthorized.

Penalty

Fraudulent use of a credit device is a class A misdemeanor unless the value of services or property obtained by using the credit device amounts to $150 or more during a 30 day period, in which case, the crime is a class D felony.

Major Changes

This section replaces pre-Code §561.415 RSMo. The definition of "credit device" is in paragraph 15.1 and covers not only the standard charge cards, but also electronic keys that can be used at a bank for money, or anything used to evidence an undertaking to pay for property or services delivered or rendered.

Source

This section is based on Model Penal Code §224.6, proposed New Jersey Code §2C:21-6 and proposed Montana Code §94-6-508.

Comments

This section is designed to fill a gap in the law of fraudulent taking. When the defendant uses a stolen credit device to acquire property, he does not defraud the seller of the property, because the issuer of the credit device will usually pay the seller even when the card is used improperly. This Code section and its predecessor, section 561.415 RSMo. 1969 classify improper use of credit devices as a distinct crime.

The Code provision makes it clear that the state must establish only two facts for conviction: that the defendant had a purpose to obtain services or property; and that the defendant knew his use of the device was unauthorized for one of the three listed reasons. It is not necessary to show a purpose to defraud, or that the victim actually parted with services or property.

The new Code defines "credit device" as a writing, number, or other device purporting to evidence an undertaking to pay for property or services. This would include credit cards, magnetic banking cards, letters of credit from banks, and telephone credit numbers.

The Code makes this offense a class A misdemeanor, but provides for aggregation of the value of any property and services obtained within a thirty-day period. If the aggregated value is one hundred fifty dollars or more, the offense is a class D felony. The thirty-day period was used because it is the usual billing period for credit companies.

15.12 Deceptive business practice (§570.140) Class A misdemeanor

Code

1. A person commits the crime of deceptive business practice if in the course of engaging in a business, occupation or profession, he recklessly
   (1) Uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or
   (2) Sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service; or
   (3) Takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnishes the weight or measure; or
   (4) Sells, offers or exposes for sale adulterated or mislabeled commodities; or
   (5) Makes a false or misleading written statement for the purpose of obtaining property or credit.
2. Deceptive business practice is a class A misdemeanor.

Major Changes

This section replaces pre-Code §561.400 RSMo. It supplements pre-Code §413.425 RSMo. 1969 which remains in effect.

Source

This section is based on Model Penal Code §224.7, proposed South Carolina Code §19.1, proposed Montana Code §94-6-309 and proposed New Jersey Code §2C:21-7.

Comments

Sections 1(1), (2), and (3) cover situations where either the consumer or a merchant may be defrauded by the use of inaccurate weights, measuring devices, or packages labeled with false quantities. In simple terms, this covers the butcher with his thumb on the scale.

No specific intent to cheat or defraud is required by this section. All that is required is a knowledge that a false weight is being used, or recklessness in regard to its use. Neither must there be any actual damage incurred for a conviction under this section. The penalty provided is relatively small and it is sufficient for conviction that these devices or weights are recklessly used. If actual loss occurs the possibility of prosecution for theft by deceit is present, except in the case where the practice occurs through recklessness and there is no purpose to misrepresent which is required for deceit. See paragraph 15.3.

Section 1(4) is intended to proscribe the sale of or offering for sale items which are not what they seem to be. Either the quality of the goods does not meet the standards prescribed by law or they are mislabeled. This section is designed to complement those sections of the Food and Drug chapter which prescribe the quality of certain items of food and drugs. Examples would include the amount of butterfat required in goods labeled as butter, or the amount of beef present in items marked "all beef" hamburger.

It is felt that section 1(5) covers adequately the conduct prohibited by pre-Code §561.400 (False Statements to Obtain Property or Credit, or Discount, Prohibited). It is not necessary that the person to whom the statement is made part with any property in reliance on the statement. The making of such a false written statement is sufficient for liability. Again, the possibility of prosecution for stealing by deceit is present if the victim parts with property. This section applies only to persons who make such statements in the course of a business, occupation or profession. The conduct prohibited here would include the person who misrepresents his financial worth or property when applying for a loan in the course of his business, occupation or profession or making similar false or misleading statements for the purpose of obtaining property. It is not necessary to show that the defendant knew that his statement was false, only that he disregarded a substantial risk that the statement was false or misleading. Note that the statement must be made in writing.

15.13 Commercial bribery (§570.150) Class A misdemeanor

Code

1. A person commits the crime of commercial bribery:
   (1) If he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:
      (a) Agent or employee of another;
      (b) Trustee, guardian or other fiduciary;
      (c) Lawyer, physician, accountant, appraiser or other professional adviser or informant;
      (d) Officer, director, partner, manager or other participant in the direction of the affairs of an incorporated or unincorporated association; or
      (e) Arbitrator or other purportedly disinterested adjudicator or referee;

(2) If as a person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal or criticism of commodities or services, he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism;
(3) If he confers or offers or agrees to confer any benefit the acceptance of which would be criminal under subdivisions (1) and (2) of this section.

2. Commercial bribery is a class A misdemeanor.

Elements

A person commits the crime of commercial bribery if he:

A. 1. solicits, accepts, or agrees to accept
   2. any benefit
   3. in return for knowingly violating or agreeing to violate
   4. a duty of fidelity which he owes as:
      a) agent or employee of another;
      b) trustee, guardian, or other fiduciary;
      c) lawyer, physician, accountant, appraiser, or other professional adviser or informant;
      d) officer, director, partner, manager or other participant in the direction of the affairs of an incorporated or unincorporated association;
      e) arbitrator or other purportedly disinterested adjudicator or referee; OR

B. 1. if he holds himself out to the public as one engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services and
   2. solicits, accepts, or agrees to accept
   3. any benefit to influence his selection, appraisal, or criticism; OR

C. if he offers or confers or agrees to confer any benefit which it would be a crime to accept under A and B above.

Major Changes

This is a new section.

Comments

This section is new, and extends criminal sanctions to bribery of persons who occupy positions of special trust. The section requires conscious violation of a known duty of fidelity. A lawyer, physician, accountant or other member of a profession will often be subject to censure by his professional organization if he betrays the confidence and trust of a client. Agents, employees, and officers of associations are often liable for damages in civil suits if they breach their duty of loyalty. The law imposes a duty on such persons, and this section provides criminal sanctions to enforce this duty.

Subsection 1(2) extends criminal liability even further, to include any person who claims to make honest appraisal of services or commodities but is corrupted by bribery. This might include radio "disc jockeys" who claim to play the most popular songs, but accept benefits from record promoters in return for playing other songs. A consumer organization which claims to provide unbiased ratings of products or services, and even a reviewer of entertainment employed by a newspaper, radio or television station, would be included in this subsection.

Subsection 1(3) extends liability to the person who offers or confers a bribe. Note that this section includes "any benefit" as a bribe, not just money.

15.14 False advertising (§570.160) Class A misdemeanor

Code

1. A person commits the crime of false advertising if, in connection with the promotion of the sale of, or to increase the consumption of, property or services, he recklessly makes or causes to be made a false or misleading statement in any advertisement addressed to the public or to a substantial number of persons.

2. False advertising is a class A misdemeanor.

Elements

A person commits the crime of false advertising if:
1. in connection with promoting the sale of property or services, or to increase their consumption
2. he recklessly makes or causes to be made
3. a false or misleading statement
4. in an advertisement addressed to the public or a substantial number of persons.

Major Changes

This section combines, shortens, and simplifies two sections of RSMo. 1969. Section 561.660 covered untrue, misleading, and deceptive advertisements and section 561.663 prohibited false claims that products are made by blind persons. The new Code section is designed to cover all such false claims.

Comment

The false advertisement will only come within the purview of this section if it is made to a substantial number of persons or to the public at large. It is not necessary that the maker of the statement know of its falsity. Recklessness as to falsity is sufficient. It is sufficient if the defendant has consciously disregarded a substantial and unjustifiable risk that his statement might be false or misleading.

15.15 Bait advertising (§570.170) Class A misdemeanor

Code

1. A person commits the crime of bait advertising if he advertises in any manner the sale of property or services with the purpose not to sell or provide the property or services:
   (1) At the price which he offered them; or
   (2) In a quantity sufficient to meet the reasonably expected public demand, unless the quantity is specifically stated in the advertisement; or
   (3) At all.
2. Bait advertising is a class A misdemeanor.

Major Changes

This section replaces pre-Code §561.665.

Comments

The conduct prohibited by this section is a specific type of false advertising. It is meant to cover deceitful practices and claims made by merchants to lure people into their stores. The section requires a purpose not to sell the goods or services as advertised, either at the price advertised or in sufficient quantity to meet the reasonably expected demand. A merchant can violate this section by advertising to only one person or a small number of persons, unlike §570.160 False Advertising, which involves advertising to a substantial number of persons.

15.16 Defrauding secured creditors (§570.180) Class A misdemeanor or class D felony (See Penalty Discussion)

Code

1. A person commits the crime of defrauding secured creditors if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with purpose to defraud the holder of the security interest.

2. Defrauding secured creditors is a class A misdemeanor unless the amount remaining to be paid on the secured debt, including interest, is five hundred dollars or more, in which case defrauding secured creditors is a class D felony.

Elements

A person commits the crime of defrauding secured creditors if he:
1. destroys, removes, conceals, encumbers, transfers or otherwise deals with
2. property subject to security interest
3. with purpose to defraud the holder of the security interest.

Penalty

Defrauding secured creditors is a class A misdemeanor unless the amount remaining on the secured debt (including interest) is $500 or more in which case it is a class D felony.

Major Changes

This section replaces several sections of RSMo. 1969 which dealt with disposition of specific types of property subject to liens and mortgages. Pre-Code section 430.070 prohibited dealing with vehicles, mules, and horses with intent to defraud a lien holder. Section 430.190 concerned disposing of other animals subject to a lien. Sections 560.425 and 561.570 dealt with fraudulent disposition of any chattel subject to a lien. The new Code covers all property subject to a security interest.

Comments

The state must show that the defendant dealt with the property with a purpose to defraud. The fraudulent purpose need not exist at the time the property is mortgaged or acquired, but must be present at the time of destruction, concealment, or encumbrance. Note that placing a subsequent lien or mortgage on already secured property is prohibited if the purpose is to defraud the holder of the original security interest. A security interest is the right of a creditor to take possession of specific property of the debtor if the debtor fails to pay the debt that the specific property is "securing". Automobiles and appliances are often sold on this basis where the automobile or appliance is "security" for the payment of the purchase price plus interest. This section makes it a crime for a person to dispose of or otherwise deal with the property for the purpose of defrauding the creditor.

Subsection 2 provides a felony penalty for this offense if the remaining debt, including interest, is $500 or more. Otherwise, this is a class A misdemeanor.

15.17 Telephone service fraud (§570.190) (See Penalty Discussion)

Statute

1. A person commits the crime of telephone service fraud if the person by deceit obtains or attempts to obtain telephone service without paying the lawful charge, except that it shall not be unlawful for a person to purchase, rent or use telephones or telephone receiving equipment acquired from a lawful source, other than the telephone utility certified to serve the area in which such person resides.

2. A person commits the crime of electronic telephone fraud if the person knowingly
   (1) Uses, in connection with the making or receiving of a telephone call; or
   (2) Has possession of; or
   (3) Transfers possession or causes the transfer of possession to another; or
   (4) Makes or assembles an electronic or mechanical device which, when used in connection with a telephone call, will cause the billing system of a telephone company to record incorrectly, or omit to record correctly, any fact by which the person responsible for paying the charge for a telephone call is determined.

3. Venue for trial shall be as follows:
(1) An offense under sections 1 and 2(1) which involve the placing of telephone calls may be deemed to have been committed at either the place at which the telephone calls were made, or at the place where the telephone calls were received.
(2) An offense under sections 2(2), 2(3) and 2(4) may be deemed to have been committed where the device was found, or at the place where the device was transferred or fabricated.
4. (1) An offense under section 1 shall be punished by a fine not to exceed five hundred dollars or by confinement in jail for not more than six months, or both; except that if the telephone charges avoided or attempted to be avoided pursuant to one scheme or course of conduct exceed fifty dollars, the offense shall be punished by a fine of not more than one thousand dollars, or by confinement in jail for not more than one year, or both.
(2) An offense under sections 2(1) through 2(5) shall be punished by a fine of not more than one thousand dollars, confinement in jail for not more than one year, or both; except that if defendant received consideration from another as a consequence of the use, transfer, or fabrication of the device, the offense shall be punished as provided in subsection 4(3).
(3) If the defendant has been convicted previously of an offense under this section or of an offense under the laws of another state of the United States which would have been an offense under this section if committed in this state, then the offense shall be punished by a fine of not more than five thousand dollars or by imprisonment by the division of corrections for not less than two nor more than five years, or both.
5. A search warrant shall be issued by any court of competent jurisdiction upon a finding of probable cause to believe an instrument or device described in sections 1 and 2 is housed in a particular structure, vehicle or upon the person.

Major Changes

This is not a Code offense. Although it was passed at the same time as the Code in 1977, it is part of Senate Bill 96 and not Senate Bill 60. This statute prohibits two distinct types of conduct. The first is obtaining telephone service without paying the proper charges. The second is use of mechanical devices to defraud the telephone company. Each will be discussed separately.

(A) TELEPHONE SERVICE FRAUD

Elements

A person commits the crime of telephone service fraud if he:
1. obtains or attempts to obtain
2. telephone service
3. by deceit
4. without paying the lawful charge

Penalty

If the charges avoided or attempted to be avoided amount to fifty dollars or less, the maximum punishment under this section is a fine of five hundred dollars or six months in jail, or both. If the charges would have exceeded fifty dollars, the maximum punishment is a fine of $1000.00 or one year in jail, or both.

Comments

Two types of conduct constitute telephone service fraud. First, a person is guilty of this offense if he obtains or attempts to obtain service by deceit without paying the charge. This involves more than merely failing to pay a telephone bill. The defendant must have made some false representation to the phone company at the time he acquired or attempted to acquire telephone service.

The deceitful act may be obtaining service under a false name or paying for service with a bad check. The statute makes it clear that it is not criminal to acquire a telephone from some lawful source other than the local telephone company. This section also does not extend to tapping into telephone lines without paying the service charge. Unauthorized connection constitutes tampering in the second degree §569.060.

(B) ELECTRONIC TELEPHONE FRAUD

Elements

A person commits the crime of electronic telephone fraud if he:

1. knowingly
   a) uses in connection with the making or receiving of a telephone call; or
   b) has possession of; or
   c) transfers possession, or causes the transfer of possession to another; or
   d) makes or assembles
2. an electronic or mechanical device which, when used in connection with a telephone call, will cause the billing system of a telephone company to record incorrectly, or omit to record correctly any fact by which the person responsible for paying the charge for the call is determined.

Penalty

The maximum punishment for using, making, possessing or transferring such a device is one thousand dollars fine, one year in jail, or both. But if the defendant received anything of value in return for making, transferring or using the device, the maximum punishment is five thousand dollars fine, or not less than two nor more than five years imprisonment, or both. This higher punishment also applies to persons convicted previously under this section, or convicted in other jurisdictions for the same conduct.

Comments

This subsection makes it a crime to use, possess, make, or transfer any electronic device which allows the user to avoid being billed for telephone calls. The most common such device is called a "blue box." They electronically by-pass the telephone company's billing systems. Anyone who makes, possesses, transfers, or uses such a device is guilty under this section.

Special Notes

For purposes of venue, offenses involving the use of phone services may be placed where the phone call is made or received. Offenses involving illegal mechanical devices may be tried where the device was made, transferred, or possessed.

Search Warrants

A section of the statute authorizes a court of competent jurisdiction to issue a search warrant for such an illegal device on a showing of probable cause to believe that such a device is in a particular structure or vehicle, or on a person.

CHAPTER 16

Armed Criminal Action and Weapons Offenses

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16.1 Introduction

Chapter 571 (Armed Criminal Action) is a part of the Code and is discussed in paragraph 16.2 of this book.

Sections 571.100—571.140, formerly §§564.580—564.660, which deal with possession and use of certain weapons (bombs, machine guns and carrying concealed weapons) are pre-Code statutes which are still in force since they were not repealed by the Code. Section 571.115 is discussed in paragraph 16.3 of this book.

16.2 Armed Criminal Action (§571.015) Felony—not less than 3 years imprisonment—see below.

Code

1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

(Please note that 564.590, 564.610, 564.620, 564.630 and 564.640, R.S.Mo. have been renumbered as 571.105, 571.115, 571.120, 571.125 and 571.130 respectively)

Elements

A person commits the crime of Armed Criminal Action if:
(1) he commits *any* felony other than one of the following:
(a) 571.105 Possession of a machine gun, formerly 564.590
(b) 571.115 Dangerous and concealed weapons, formerly 564.610
(c) 571.120 Marking of pistols, revolvers and firearms, formerly 564.620
(d) 571.125 Concealed weapons permits, formerly 564.630
(e) 571.130 Weapons must be stamped, formerly 564.640
(2) and commits the felony by, with or through the use, assistance or aid of a dangerous instrument or deadly weapon.

Penalty

First offense—not less than three years imprisonment.
Second offense—not less than five years imprisonment.
Third offense—not less than ten years imprisonment.

Comments

This section provides for aggravation of the penalty for people who use dangerous instruments or deadly weapons in the commission of felonies. Thus, a person who robs another by using a pistol may be tried, convicted, and sentenced for the offenses of first degree robbery and armed criminal action, and separate sentences may be imposed.

The section does not apply to people who are armed while commiting only a misdemeanor.

The statute also provides aggravated punishment for the repeat offender. The aggravation "peaks" at the third conviction, where the offender who is convicted three **or more** times for armed criminal action receives a minimum **mandatory** sentence of ten years.

The statute states that the minimum sentences which may be imposed for a conviction under this section are to run without interruption by parole or pardon.

16.3 Dangerous and Concealed Weapons (§571.115) Felony—up to five years in prison, or fifty days to one year in county jail.

Elements

A person commits a crime in violation of Section 571.115 if he:

A. (1) carries a dangerous or deadly weapon of any kind or description
(2) concealed
(3) on or about his person; or
B. (1) goes into
a) a church or assembly for religious worship, or
b) school room or place where people are assembled for educational, political, literary or social purposes, or
c) any election precinct on election day, or
d) any courtroom during the sitting of court, or
e) any other public assemblage of persons meeting for any lawful purpose other than militia drill or meetings called under militia law of this state
(2) having upon or about his person
(3) concealed or exposed any kind of
(4) firearms, bowie knife, spring back knife, razor, metal knuckles, billy, sword cane, dirk, slingshot, dagger, or other similar deadly weapons; or

C. (1) exhibits any of the weapons listed in (B) (4) above
   (2) in the presence of one or more persons
   (3) in a rude, angry or threatening way; or
D. (1) has such a weapon in his possession
   (2) while intoxicated; or
E. (1) directly or indirectly sells, delivers or loans
   (2) any such weapon
   (3) to any minor
   (4) without the consent of the minor's parent or guardian.

This statute does not apply to legally qualified sheriffs, police officers or other persons whose duty is to execute process, make arrests, or aid in preserving the public peace. The statute does not apply to persons peaceably traveling through the state on a continuous journey.

Comments

The more important parts of the statute deal with carrying a deadly weapon concealed on or about the person, subsection (A), and exhibiting weapons in a rude, angry or threatening manner, subsection (C).

Carrying a concealed weapon is composed of two elements. The state must prove (1) that the defendant intended to carry a weapon in a concealed manner, and (2) the weapon must have actually been concealed on the defendant's person or in such close proximity as to be under his easy and convenient control.

Intent to carry a concealed weapon is presumed from a demonstrated concealment. The state does not have to show the defendant intended to use the weapon; intent to carry it suffices for conviction. A weapon not discernable by ordinary observation is deemed "concealed."

The second element of the crime requires the weapon to be on the person of defendant. A weapon is "on the **defendant's** person" if it is carried by the defendant in an attache case, in a crevice of the front seat of a car the defendant is driving, under the driver's seat of defendant's car, or in the defendant's purse.

If the weapon is not within easy access of or on the person, there is no violation of this statute. Thus, where a person places a gun into the trunk of a car and immediately locks it, no crime is committed.

Convictions are also frequent for exhibiting a deadly weapon in a rude, angry or threatening manner in the presence of others. The state **does not** have the burden of proving the **manner** in which the weapon was exhibited was rude, angry and threatening. Proof that it was rude, angry, or threatening is all that is required. This issue is for the jury to decide from the evidence presented.

An essential element is that the instrument involved must be a dangerous or deadly weapon. The statute lists several items which are "per se" deadly. Many of these items are not firearms. Knives, slingshots, sword canes, metal knuckles, billy club, and even a razor can be a deadly weapon. The statutory listing is by no means exhaustive, and whether or not an instrument is within the category of "deadly weapon" depends on the use made of the instrument in light of the surrounding circumstances.

An **unloaded** firearm is considered a deadly weapon for purpose of this statute.

The statute exempts certain persons. Sheriffs, police officers, and court officers who are in performance of their lawful duties of serving process or making an arrest are exempted from this statute. The special duties of their job merit that they carry a weapon for protection and to facilitate the performance of their jobs. However, if a sheriff or other such officer is out of the county where he was commissioned and **is not** on official business, but rather on private business, he is not within the exemptions of the statute.

CHAPTER 17

Gambling
(§§572.010-572.125)

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17.1 Introduction

The sections in this chapter deal with gambling and related offenses. Section 572.100—Preemption—states:

"The General Assembly, by enacting this chapter, intends to preempt any other regulation of the area covered by this chapter. **No governmental subdivision or agency may enact or enforce a law** that regulates or makes any conduct in the area covered by this chapter an offense, or the subject of a criminal or civil penalty or sanction of any kind."

As a result of Section 572.100, all future arrests and prosecutions for gambling must be under the state statutes and not under city ordinances. Section 572.090 gives the prosecuting attorney the power to commence a civil action to force gambling houses to close.

Section 572.120 provides for the seizure and forfeiture of gambling devices, records and money. It states:

"Any gambling device or gambling record, or any money used as bets or stakes in unlawful gambling activity, possessed or used in violation of this chapter may be seized by any peace officer and is forfeited to the state...."

This Code chapter basically follows the pre-Code approach to gambling, comprehensively proscribing gambling activity. Both commercial and noncommercial (private) gambling in all its forms are prohibited. The pre-Code laws contained approximately 35 statutes dealing with various forms of prohibited gambling. These statutes specified various kinds of conduct rendering a person guilty of a gambling offense. Some are very prolix and overspecific and attempt to cover every type of act by which

a given form of gambling may be promoted (e.g. 563.350—563.360 RSMo Bookmaking and pool selling, 563.450—563.520 RSMo dealing with "bucket shops" and 563.530—563.560 RSMo proscribing "option dealing"). The Code is based on the premise that formulation of gambling offenses does not require a statute for each form of gambling or detailed explanations in each section of the kinds of conduct proscribed. Instead, the Code employs a definition section (see 572.010) to lay the foundation for simplifying the gambling provisions.

The offenses are aimed at two groups: the player (572.020 Gambling) and the promoter (572.030—.040 Promoting gambling, 572.050—.060 Possession of gambling records and 572.070 Possession of gambling devices).

Section 572.010 contains special definitions which relate to the gambling offenses. Section 572.010 provides:

As used in this chapter:

(1) "**Advance gambling activity**", a person "advances gambling activity" if, acting other than as a player, he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, lottery, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement or communication of any of its financial or recording phases, or toward any other phase of its operation. A person advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue or makes no effort to prevent its occurrence or continuation;

(2) "**Bookmaking**" means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events;

(3) "**Contest of chance**" means any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor therein;

(4) "**Gambling**", a person engages in "gambling" when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health or accident insurance; nor does gambling include playing an amusement device that confers only an immediate right of replay not exchangeable for something of value;

(5) "**Gambling device**" means any device, machine, paraphernalia or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person with a machine. However, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices within this definition;

(6) "**Gambling record**" means any article, instrument, record, receipt, ticket, certificate, token, slip or notation used or intended to be used in connection with unlawful gambling activity;

(7) "**Lottery**" or "**policy**" means an unlawful gambling scheme in which for a consideration the participants are given an opportunity to win something of value, the award of which is determined by chance;

(8) "**Player**" means a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein does not otherwise render material assistance to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefor and supplying cards or other eqiupment used therein. A person who engages in "bookmaking" as defined in subdivision (2) of this section is not a "player";

(9) "**Professional player**" means a player who engages in gambling for a livelihood or who has derived at least twenty percent of his income in any one year within the past five years from acting solely as a player;

(10) "**Profit from gambling activity**", a person "profits from gambling activity" if, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity;

(11) "**Slot machine**" means a gambling device that as a result of the insertion of a coin or other object operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value. A device so constructed or readily adaptable or convertible to such use is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because apart from its use or adaptability as such it may also sell or deliver something of value on a basis other than chance;

(12) "**Something of value**" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge;

(13) "**Unlawful**" means not specifically authorized by law.

17.2 Gambling (§572.020)
Penalty varies, see elements below

Code

1. A person commits the crime of gambling if he knowingly engages in gambling.
2. Gambling is a class C misdemeanor unless:
   (1) It is committed by a professional player, in which case it is a class D felony; or
   (2) The person knowingly engages in gambling with a minor, in which case it is a class B misdemeanor.

Elements

A person commits the crime of gambling if he:

A. 1. Knowingly
   2. engages in gambling *or*
   Class C misdemeanor

B. 1. Knowingly
   2. engages in gambling
   3. with a minor *or*
   Class B misdemeanor

C. 1. as a Professional player
   2. knowingly
   3. engages in gambling
   Class D felony.

Major changes

Substantively, there is little change between the pre-Code laws on gambling and this section replacing them. Section 572.010(4) sets out a comprehensive definition of gambling encompassing any activity which brings a profit based on reward. This broad definition eliminates the need to list gambling games by name as has been done in the past. For example, pre-Code laws included specific statutes outlawing "Betting on games (563.380)", "Betting on billiard and pool games (563.390)", "Betting on election (563.400)", and "Throwing dice (563.410)". To simplify the gambling provisions and avoid redundancy all of these activities are now covered by this Code section.

The Code does increase the maximum penalty for gambling from $200 to $300 *and* allows up to 15 days in jail. Following the pattern of the pre-Code law, the penalty is greater for gambling with a minor. *Note:* the consent of the minor's parents is irrelevant. The maximum fine for gambling with a minor has increased from $200 to $500 but the possible jail term (6 months) remains unchanged. The professional player (see 572.010 (9)) is singled out for a felony penalty. Note that the professional gambler is not being punished for his status but for his acts of gambling.

Comments

This section makes all types of gambling illegal, including friendly bets and friendly games. A person gambles if he risks something of value (usually money, but it can also include property, tokens, credit, service, entertainment, free games, etc.) on the outcome of a contest of chance (any contest, game, or device whose outcome depends in material degree on chance) or future contingent event not under his influence or control with the understanding that he will receive something of value upon a certain outcome. (§572.010(4)).

This codifies the previous judicial definition as to the elements of gambling: (1) risk, (2) chance, and (3) reward. See *State v. One "Jack and Jill' Pinball Machine,* 224 S.W. 2d. 854 (Spr. App. 1949). Such codification eliminates the need to list gambling games by name as all forms of gambling are included and knowing participation in such activities is made illegal by this section.

The definition of gambling is very broad, and does not mention any gambling games by name. Games of pure skill, like chess, will not be considered gambling, if the contestants merely bet against each other. However, a person placing a side bet on the game would be gambling because, from his point of view, the outcome depends on chance in the sense that he has no control over the outcome. There are some specific exceptions to the definition of gambling. Engaging in bona fide business transactions, including stock, commodity, and insurance dealings is not deemed gambling. In addition, playing pinball machines is not deemed gambling if the only return is a free game. A free game is considered too trivial to be something of value. However, if the free game is redeemable in cash the person may be convicted of gambling.

The penalty for gambling depends upon a number of factors. For an ordinary player, that is, a contestant who is to receive only his personal winnings, the maximum penalty is a fine of $300.00 *and* imprisonment up to 15 days. A more severe penalty is provided when a minor is involved even though his parents may have consented. The individual may be fined up to $500 and receive up to 6 months in jail. If a professional player is involved, a felony penalty is invoked. A professional player is either a person who earns his living by gambling or who has earned 20 per cent or more of his income from gambling in one of the past five years.

17.3 Promoting Gambling in the First Degree (§572.030) Class D felony

Code

1. A person commits the crime of promoting gambling in the first degree if he knowingly advances or profits from unlawful gambling or lottery activity by:
   (1) Setting up and operating a gambling device to the extent that more than one hundred dollars of money is gambled upon or by means of the device in any one day, or setting up and operating any slot machine; or
   (2) Engaging in bookmaking to the extent that he receives or accepts in any one day more than one bet and a total of more than one hundred dollars in bets; or
   (3) Receiving in connection with a lottery or policy or enterprise:
   (a) Money or written records from a person other than a player whose chances or plays are represented by such money or records; or
   (b) More than one hundred dollars in any one day of money played in the scheme or enterprise; or
   (c) Something of value played in the scheme or enterprise with a fair market value exceeding one hundred dollars in any one day.
2. Promoting gambling in the first degree is a class D felony.

Elements

A person commits the crime of promoting gambling in the first degree if he:
1. knowingly advances *or*
2. knowingly profits from
3. unlawful gambling or lottery activity
4. in one of the following ways:
   a) by setting up and operating a gambling device on which more than $100 is gambled per day, or
   b) by setting up and operating a slot machine, or
   c) by engaging in bookmaking, accepting more than one bet and more than $100 per day, or
   d) receiving in connection with a lottery, policy, or enterprise
      (1) money or written records from a non-player, whose chances or plays are represented by such money or records, or
      (2) more than $100 per day played in the scheme, or
      (3) something of value played in the scheme with a fair market value over $100 in any one day.

Comments

See comments after paragraph 17.4.

17.4 Promoting Gambling in the Second Degree (§572.040) Class A misdemeanor

Code

1. A person commits the crime of promoting gambling in the second degree if he knowingly advances or profits from unlawful gambling or lottery activity.
2. Promoting gambling in the second degree is a class A misdemeanor.

Elements

A person commits the crime of promoting gambling in the second degree if he:
1. knowingly advances, *or*
2. knowingly profits from
3. unlawful gambling or lottery activity

Major Changes

The two preceding sections, prohibiting the unlawful promotion of every type of gambling activity, replace fifteen pre-Code statutes: knowingly providing equipment or premises for gambling purposes (563.350, 563.360, 563.420, 563.570, 563.630, 563.640 RSMo), establishing or advertising a lottery (563.430 and 563.440 RSMo), establishing a weather ticket game (563.445 RSMo), and engaging in option dealings (563.530 and 563.550 RSMo). The Code sections are broad enough to encompass all of these pre-Code laws and anything falling outside these statutes which aids gambling.

Comments

The basic crime is promoting gambling in the second degree. This section is aimed at the small scale promoter who commits the crime by knowingly advancing or profiting from gambling or lottery activity. Thus, the two methods of promotion proscribed by statute are advancing gambling and profiting from gambling. Guilt requires a showing that the defendant knew to a substantial certainty that his activities would advance unlawful gambling or that he would profit from unlawful gambling. The first, advancing gambling, is defined in 572.010 (1). One does not advance gambling by merely acting as a player, but if

one goes beyond the actions of a player and intentionally aids in some other way, gambling activity he will be subject to punishment under the Code section 572.030 or 572.040. The second method, profiting from gambling, is defined in 572.010(10) as receiving money or property, other than as a player, as proceeds from unlawful gambling based upon a prior agreement to that effect. A person may profit from gambling activity without advancing that activity. Any person not in the pure "player" category who voluntarily provides what he knows will be material aid in the creation or operation of a gambling scheme or who allows property owned, possessed, or controlled by him to be used for gambling or who receives a portion of the gambling proceeds by virtue of a prior understanding to that effect may be guilty of promoting gambling in the second degree.

If certain aggravating factors are added, second degree promotion of gambling is raised to first degree promotion of gambling. Again the basic act required is advancing or profiting from gambling. The aim of the first degree offense is to reach those who exploit the urge to gamble on a scale of any magnitude. For this reason, the statute (in all but one instance) sets a minimum dollar amount which *must be gambled* before a person can be guilty of first degree promotion of gambling in one of the following enumerated ways:

(1) set up and operate a gambling device on which more than $100 per day is gambled
(2) set up and operate a slot machine; no minimum amount need be gambled
(3) receive or accept in bookmaking more than $100 and more than one bet per day
(4) receive in connection with a lottery or policy or enterprise
   a) money or written records from a nonplayer representing chances to win or
   b) more than $100 or something of value with a fair market value of $100 played in the scheme in any one day.

The requirement that the defendant advance or profit from gambling in the specified ways and amounts distinguishes first degree from second degree promotion of gambling.

Another distinction exists with regard to the penalty. Second degree promotion of gambling provides a misdemeanor penalty while promoting gambling in the first degree provides a felony penalty. Thus, Missouri's felony penalty for setting up and operating any gambling device or slot machine is retained. But see 572.125 which provides an exception for antique slot machines. RSMo 563.430 made it a felony to establish a lottery or similar scheme, but persons advertising or selling tickets paid only an infraction type penalty of up to $1,000 (563.440 RSMo). Under the Code if a person advances or profits from lottery activity he may be convicted of a misdemeanor or a felony depending on whether the statutory minimum of the first degree offense is met.

Included and Related offenses

Promoting Gambling in the second degree is included in promoting gambling in the first degree. Gambling is *not* an included offense because proof of promoting gambling does not require proof that the person gambled.

17.5 Possession of Gambling Records in the first degree (§572.050) Class D Felony

Code

1. A person commits the crime of possession of gambling records in the first degree if, with knowledge of the contents thereof, he possesses any gambling record of a kind used:
   (1) In the operation or promotion of a bookmaking scheme or enterprise, and constituting, reflecting or representing more than five bets totaling more than five hundred dollars; or
   (2) In the operation, promotion or playing of a lottery or policy scheme or enterprise, and constituting, reflecting or representing more than five hundred plays or chances therein.
2. A person does not commit a crime under subdivision (1) of subsection 1 of this section if the gambling record possessed by the defendant constituted, reflected or represented bets of the defendant himself in a number not exceeding ten.
3. The defendant shall have the burden of injecting the issue under subsection 2.
4. Possession of gambling records in the first degree is a class D felony.

Elements

A person commits the crime of possession of gambling records in the first degree if he:

1. Possesses gambling records of the kind used:
   a) In bookmaking and representing over 5 bets totaling more than $500 *or*
   b) In lottery schemes and representing more than 500 plays or chances therein
2. With knowledge of their contents.

Note: There is an **exception to this crime.** If the record represents only the suspect's own bets numbering 10 or less, this crime is not committed.

Comments

See comments in paragraph 17.6.

17.6 Possession of Gambling Records in the Second Degree (§572.060) Class A Misdemeanor

Code

1. A person commits the crime of possession of gambling records in the second degree if, with knowledge of the contents thereof, he possesses any gambling record of a kind used:
   (1) In the operation or promotion of a bookmaking scheme or enterprise; or
   (2) In the operation, promotion or playing of a lottery or policy scheme or enterprise.
2. A person does not commit a crime under subdivision (1) of subsection 1 of this section if the gambling record possessed by the defendant constituted, reflected or represented bets of the defendant himself in a number not exceeding ten.
3. The defendant shall have the burden of injecting the issue under subsection 2.
4. Possession of gambling records in the second degree is a class A misdemeanor.

Elements

A person commits the crime of possession of gambling records in the second degree by:

1. Possessing gambling records of the kind used:
   a) in bookmaking *or*
   b) in lottery schemes
2. With knowledge of the contents of the records.

Note: There is an **exception to this crime.** If the record represents only the suspect's own bets and represents no more than ten bets, this crime has not been committed.

Major Changes

These sections replace several pre-Code statutes which directly or indirectly prohibited possession of gambling records. For example, 563.350 RSMo made it a felony to occupy a room with a book for the purpose of recording bets. Section 563.360 was an almost identical section covering "sheets" and "blackboards" as well as books used for recording bets. And section 463.445 prohibited as a misdemeanor the knowing possession of items used in the "weather ticket" game and similar schemes. The Code sections expand the basic coverage of Missouri statutes in order to better suppress bookmaking and lottery activities.

The statutes describe the records illegal to possess as gambling records "of a kind used" in bookmaking or lottery schemes. Similar language was challenged as being unconstitutionally vague in *People v. Forlano*, (1971) 67 Misc. 2d. 996, 325 N.Y.S. 2d. 523, affd. 73 Misc. 2d. 722, 342 N.Y.S. 2d. 78. The defendant, found in possession of slips recording lay off bets on baseball games, contended that the statute was void because the language "of a kind commonly used" could result in an application to other persons who might not realize their conduct was prohibited. The Court held that the statute as applied to the defendant set forth sufficiently ascertainable standards giving him notice that his conduct was

forbidden. The Court would not hold the statute unconstitutional on the grounds that it might be unconstitutionally applied to others.

Comments

The basic crime is the second degree offense. The crime is one of possession rather than use. If a person has within his possession a record used *or* intended to be used in connection with unlawful gambling activity, the possessor is guilty if he had knowledge of the contents. The second degree offense is designed to cover the small scale operator of a bookmaking, lottery, or policy scheme and so is graded a misdemeanor.

The first degree section raises the crime to a felony when the records possessed indicate the possessor is engaged in larger scale operations. One of the specific aggravating factors must be present. They include: possession of records representing over 5 bets totalling more than $500 in a bookmaking scheme or representing more than 500 plays in a lottery scheme.

Subdivisions (2) of both 572.050 and 572.060 provide a limited exception permitting the private bettor to show that he is not a bookmaker. This is in accord with *People v. Dicarlo*, (1970) 62 Misc. 2d. 638, 309 N.Y.S. 2d. 791, a decision interpreting New York Revised Penal Law section 225.15 (1967) (Possession of gambling records in the second degree) on which these Code sections are based. The Court states at page 639:

> Article 225 is intended and designed to sanction and facilitate the prosecution of the professional bookmaker and other professional operators and promoters of unlawful gambling activity. The individual player or bettor is excluded from its prohibitions.

While the Missouri statute does not provide a blanket exclusion for private bettors, it does provide a limited exclusion. The reason for this is to focus police and prosecutorial attention on the commercial operator rather than the individual player. However, if the individual possesses records of more than 10 bets, he is considered commercial for purposes of these sections. If the defendant wishes to take advantage of this exclusion, he has the burden of injecting the issue.

Included and related offenses

Possession of gambling records in the second degree is included in Possession of gambling records in the first degree. Gambling and promoting gambling probably are not included offenses because the elements differ.

17.7 Possession of a Gambling Device (§572.070) Class A Misdemeanor

Code

1. A person commits the crime of possession of a gambling device if, with knowledge of the character thereof, he manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of:
   (1) A slot machine; or
   (2) Any other gambling device, knowing or having reason to believe that it is to be used in the state of Missouri in the advancement of unlawful gambling activity.
2. Possession of a gambling device is a class A misdemeanor.

Elements

A person commits the crime of possession of a gambling device if he:

1. Manufactures, sells, transports, places, possesses, or conducts a transaction which does or is intended to affect ownership, custody, or use of:
   a) a slot machine or
   b) any other gambling device knowing it is to be used in Missouri to advance illegal gambling
2. With knowledge of its character.

Major Changes

This section replaces pre-Code sections 563.350 and 563.360 RSMo which imposed a felony penalty for providing equipment for gambling, 563.370 which imposed a felony penalty for possession of gambling devices and 563.374 which made it a misdemeanor to sell, store, possess or transport gaming devices. The Code section requires more than mere possession of a gambling device to secure a conviction. The defendant must have knowledge of the character of the device *and* he must know or have reason to know the device is to be *used in Missouri* for unlawful gambling.

Comments

This section replaces 563.374 RSMo 1969 which made it a misdemeanor to sell, store, possess, or transport gaming devices. Likewise, the Code provision makes the specified acts (e.g. manufacture, sale, transport, or negotiation of sale, rental, etc.) a misdemeanor providing the defendant has knowledge of the character of the device. The section is modeled after New York Revised Penal Law section 225.30 (1967). Subsection (1) of the Missouri statute is identical to the New York provision. Both treat slot machines as instruments necessarily designed for illegal use. However, there is one exception provided by section 572.125 for antique slot machines. Possession of a slot machine over thirty (30) years old which is not used or intended for use in gambling is not a crime under this or any other section. Subsection (2) covers all other gambling devices: anything which can be adapted to gambling. It requires that the defendant know or have reason to believe the device is to be used in Missouri for unlawful gambling. This subsection has been interpreted by the New York Court in *People v. Berk*, (1975) 373 N.Y.S. 201 748, 83 Misc. 2d. 711. The defendants contended that they could not be convicted of 225.30 Possession of a gambling device because they believed that the "Las Vegas Nights" conducted by them on behalf of various charities were lawful. Thus, they argued they did not know the devices were to be used in unlawful gambling. The Court, affirming their conviction, said at page 751,

> What the statute makes lawful is the possession of gambling devices where there is a belief that the devices will be used for nongambling purposes...One cannot evade the prohibition by simply asserting a belief that gambling activity such as here involved is lawful.

It is the New York Court's view that the defendant need only have knowledge of the character of the device and that it will be used for gambling. The defendant's belief as to the lawfulness of the gambling is irrelevant for "unlawful gambling" is that activity proscribed by the Legislature, the defendant's belief notwithstanding.

Included and Related Offenses

There are no other offenses included in this offense.

17.8 Lottery offenses—no defense (§572.080)

Code

> It is no defense under any section of this chapter relating to a lottery that the lottery itself is drawn or conducted outside Missouri and is not in violation of the laws of the jurisdiction in which it is drawn or conducted.

Comments:

This section, adapted from New York Revised Penal Law section 225.40 (1967), takes account of legally conducted lotteries like the Irish Sweepstakes, the Illinois State Lottery, Readers Digest Sweepstakes, and also covers "policy" and related schemes. The fact that these lotteries are legally operated and drawn outside the state of Missouri cannot be used as a defense to a charge of violating the Missouri statutes making Lottery Activity illegal. Such activities have been Constitutionally prohibited in Missouri; Art. III, section 39(9) deprives the Legislature of the power to "authorize lotteries or gift enterprises for any purpose."

Missouri case law has defined the elements of lottery as: (1) consideration, (2) prize, (3) chance. State ex inf. *McKittrick v. Globe-Democrat Pub. Co.*, 341 Mo. 862, 110 S.W. 2d. 705, 713 (1937). These elements have been construed to cover an oil company's promotional game even though the participant was not required to purchase anything. *Mobil Oil Corporation v. Danforth*, 455 S.W. 2d. 505 (Mo. 1970). This explains the inclusion of Readers Digest Sweepstakes and other promotions not requiring outright payment of consideration.

No specific provision is included to cover taking bets on the outcome of events occurring outside Missouri. But, the definition of bookmaking (572.010 (2)) is broad enough to cover this situation as it encompasses the taking of bets on future contingent events. The site of the event is not specified and so must be irrelevant.

17.9 Gambling houses, public nuisances—abatement (§572.090)

Code

1. Any room, building or other structure regularly used for any unlawful gambling activity prohibited by this chapter is a public nuisance.
2. The attorney general, circuit attorney or prosecuting attorney may, in addition to all criminal sanctions, prosecute a suit in equity to enjoin the nuisance. If the court finds that the owner of the room, building or structure knew or had reason to believe that the premises were being used regularly for unlawful gambling activity, the court may order that the premises shall not be occupied or used for such period as the court may determine, not to exceed one year.
3. Appeals shall be allowed from the judgment of the court as in other civil actions.

Comments

According to this section, which replaces 563.365 RSMo, any structure which is regularly used for gambling is a public nuisance. The possessor may be enjoined from operating the nuisance in an equitable proceeding brought by either the attorney general, the circuit attorney, or the prosecuting attorney. Although the possessor may be enjoined from conducting the nuisance, the owner should not be prevented from using the premises unless he knew or should have known of the unlawful gambling use.

17.10 Preemption (§572.100)

Code

The general assembly by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, or the subject of a criminal or civil penalty or sanction of any kind.

Comments

This section seeks to eliminate conflict and confusion between state and local law by preventing municipalities from enacting gambling ordinances. The grant of authority previously conferred on municipalities by sections 73.110 (18) and 75.110 (19) RSMo is repealed. This provides for a uniform and comprehensive set of laws on gambling throughout the state.

17.11 Duties of Prosecuting Attorneys (§572.110)

Code

It shall be the duty of the circuit attorneys and prosecuting attorneys in their respective jurisdictions to enforce the provisions of this chapter, and the attorney general shall have a concurrent duty to enforce the provisions of this chapter.

Comments

This section is basically the same as 563.610 RSMo which gives the attorney general power to enforce the gambling laws along with prosecuting attorneys. This is particularly important in view of the preemption provided under Code section 572.100.

17.12 Forfeiture of gambling devices, records and money (§572.120)

Code

> Any gambling device or gambling record, or any money used as bets or stakes in unlawful gambling activity, possessed or used in violation of this chapter may be seized by any peace officer and is forfeited to the state. Forfeiture procedures shall be conducted as provided by rule of court. Forfeited money and the proceeds from the sale of forfeited property shall be paid into the school fund of the county. Any forfeited gambling device or record not needed in connection with any proceedings under this chapter and which has no legitimate use shall be ordered publicly destroyed.

Comments

This section authorizes the seizure and forfeiture of unlawful gambling devices, records, and money to the state. These items can be seized as contraband. Following forfeiture the gambling devices and records must be publicly destroyed unless needed in a gambling proceeding. Any money seized will be placed in the school fund.

Rule of Criminal Procedure 33.05 presently provides procedures for forfeiture and destruction proceedings when any item has been seized under authority of a search warrant. It seems appropriate to leave the forfeiture procedures to rule of court rather than setting up procedures for gambling devices in the Code.

17.13 Antique slot machines exempt from section 572.120, when (§572.125)

Code

> 1. It shall be an affirmative defense to any prosecution under this chapter relating to slot machines, if the defendant shows that the slot machine is an antique slot machine and was not operated for gambling purposes while in the defendant's possession. For the purposes of this section, an antique slot machine is one which is over thirty years old.
>
> 2. Notwithstanding section 572.120, whenever the defense provided by subsection 1 of this section is offered, no slot machine seized from any defendant shall be destroyed or otherwise altered until after a final court determination that such defense is not applicable. If the defense is applicable, any such slot machine shall be returned pursuant to provisions of law providing for the return of property.

Comments

This section provides an *affirmative defense* to prosecutions for the possession or operation of slot machines in cases where it is an antique and has not been used for gambling purposes.

Subsection (2) provides that when a defendant utilizes this affirmative defense, the slot machine shall not be destroyed pending a final determination as to the validity of the defense. In the event the machine comes within the bounds of this section, possession shall not be a crime and the slot machine shall be returned to the defendant.

The defendant has the *burden* of persuasion on the defense. He must prove, by the preponderane of the evidence, that the slot machine is over 30 years old and not used for gambling purposes while in the defendant's possession.

CHAPTER 18

Pornography and Related Offenses (§§573.010-573.080)

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18.1 Introduction

This chapter defines and penalizes pornography offenses. The provisions contained in this chapter are consistent with the guidelines set forth in the decisions of the United States Supreme Court on pornography. The leading case is **Miller v. California**, 413 U.S. 15, 93 S.Ct. 2607, 2617, 37 L.Ed. 2d. 419 (1973).

Prior to **Miller** the most commonly used definition of obscenity was based on the plurality opinion of **Memoirs v. Massachusetts**, 383 U.S. 413, 86 S.Ct. 975 (1966). In **Miller** the Court abandoned the **Memoirs** test and prescribed a new test to determine what state laws may provide to regulate "patently offensive hard core material." The definition of pornographic (§573.010 (1)) is based on the constitutional definition in **Miller**. Works or performances which depict or describe sexual conduct *may* be banned if the following tests are met:

(1) The work, taken as a whole, must appeal to the prurient interest in sex; *and*
(2) it must portray sexual conduct in a patently offensive way; *and*
(3) taken as a whole, it must not have serious literary, artistic, political, or scientific value.

The changes between **Memoirs** and **Miller** may be summarized as follows:

(1) The Court abandoned any idea that all parts of the country must follow a national standard. Thus, contemporary, community standards means to some degree local standards, but this is not necessarily the standards of a specific isolated community. In both **Miller** and **Kaplan v. California,** 93 S. Ct. 2680 (1973) the Court approved the California approach of instructing the jury that they must evaluate the materials by the contemporary, community standards of the State of California. A smaller community has been approved in Missouri. **McNary v. Carlton,** 527 S.W. 2d. 343, 347-8 (1975).

(2) No longer must the state prove a work is "utterly without redeeming social value" before it can be prohibited. Instead, the state has the burden of proving another negative, that the work, taken as a whole, does not have "serious literary, artistic, political, or scientific value." In other words, it need not be worthless to be seriously lacking in value. In making the determination, the work is to be judged in its entirety; one passage in a book or one scene in a movie does not make the work pornographic.

(3) The Miller test requires that the material depict or describe "in a patently offensive way, sexual conduct specifically defined by state law." Memoirs spoke only of "description or representation of sexual matters" without requiring the state to define the physical sexual conduct covered. The definition of

"sexual conduct" required by Miller is found in §573.010(10). It is specific in order to conform to the intent of Miller to limit regulation of obscenity to hard core pornography.

Finally, most of the pornography offenses require the defendant have *knowledge* of the *content* and *character* of the material. "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." **Mishkin v. N.Y.**, 383 U.S. 502, 86 S.Ct. 958, 965, 16 L.Ed. 2d. 56 (1966). This does not mean that the defendant must know the contents are obscene nor must he consider them obscene. **State v. Flynn**, 519 S.W. 2d. 10,13 (1975), **State v. Richardson**, 506 S.W. 2d. 488, 490 (St. L. App. 1974). Knowledge of the nature of the contents is sufficient. The following cases have held the evidence sufficient to prove knowledge:

(1) **State v. Flynn**, 519 S.W. 2d. 10 (1975). Defendant's verbal response and action in selecting a book based on police officer's request sufficient evidence of scienter.

(2) **State v. Ward**, 512 S.W. 2d. 245 (St.L.App. 1974) Sale of magazine encased in clear plastic, showing close-up pictures of explicit nature on the cover sufficient evidence of scienter.

(3) **State v. Hughes**, 508 S.W. 2d. 6 (St. L. App. 1974) In sale of deck of cards, defendant had actual knowledge of top card making it reasonable to infer that he was aware that the rest of the cards portrayed similar sexual activity.

(4) **State v. Richardson**, 506 S.W. 2d. 488 (St.L.App. 1974) Defendant pointed to magazine rack upon request for magazine "showing everything."

Bearing these things in mind, a **three-pronged test** is applied to determine whether material is pornographic. First, the work must predominantly appeal to prurient interest in sex. That means, the **primary emphasis** must be **on creating lustful desires** or thoughts. Second, the work must show or describe sexual conduct in a **patently offensive** way. Sexual conduct is defined in 573.010(10) and includes any act of sexual arousal or response, including masturbation, intercourse, the touching of another's sex organs and so on. Whatever the sexual conduct, the description must be repulsive or distasteful to the average person. Finally, the work must lack **serious literary, artistic, political** and **scientific value.** This does not mean that it must be totally worthless; a work may have some value and still be pornographic. Keep in mind, **each** of the above three **elements must be present for the material to be pornographic.**

Some offenses refer to material which is **pornographic for minors.** A different, more stringent standard applies to minors in order to protect them from pornography. (For purposes of this chapter a minor is any person under the age of eighteen. §573.010(7)) This category of material necessarily includes anything which is pornographic for adults and in addition, it includes material which is pornographic for children even though acceptable for adults. The definition of pornographic for minors is: Any material or performance is "pornographic for minors" if it is primarily devoted to description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) It lacks serious literary, artistic, political, or scientific value for minors.

Again, a three pronged test applies. First, the **primary emphasis** must be on the **creation of lustful desires.** Second, it must be **patently offensive;** that is, distasteful according to adult standards of acceptability **for minors.** And, it must lack **serious** literary, artistic, political, or scientific **value for minors.**

Section 573.080 prohibits cities and towns from enacting pornography laws in the area covered by section 573.020 (promoting pornography in the first degree). However, to provide more adequate local control, a city or town may enact an ordinance proscribing anything else covered by the state pornography laws. Such local laws must have the same provisions as the state laws and the penalty must not be greater than those provided by state laws.

Section 573.070 provides that the prosecuting attorney, circuit attorney, or municipal attorney can seek an injunction or declaratory judgment against one who violates or who allegedly violates the

pornography laws. In many instances there will be serious questions whether or not the material sought to be suppressed is pornographic. This section provides a method other than criminal prosecution for determination of that question.

The following definitions are contained in section 573.010.

As used in this chapter

(1) "**Pornographic**", any material or performance is "pornographic" if, considered as a whole, applying contemporary community standards:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It depicts or describes sexual conduct in a patently offensive way; and

(c) It lacks serious literary, artistic, political or scientific value.

In determining whether any material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults;

(2) "**Material**" means anything printed or written, or any picture, drawing, photograph, motion picture film, or pictorial representation, or any statue or other figure, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or may be used as a means of communication. "Material" includes undeveloped photographs, molds, printing plates and other latent representational objects;

(3) "**Performance**" means any play, motion picture film, dance or exhibition performed before an audience;

(4) "**Promote**" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same;

(5) "**Furnish**" means to issue, sell, give, provide, lend, mail, deliver, transfer, circulate, disseminate, present, exhibit or otherwise provide.

(6) "**Wholesale promote**" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purposes of resale;

(7) "**Minor**" means any person under the age of eighteen;

(8) "**Pornographic for minors**", any material or performance is "pornographic for minors" if it is primarily devoted to description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) It lacks serious literary, artistic, political, or scientific value for minors;

(9) "**Nudity**" means the showing of post-pubertal human genitals or pubic area, with less than a fully opaque covering;

(10) "**Sexual conduct**" means acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification;

(11) "**Sexual excitement**" means the condition of human male or female genitals when in a state of sexual stimulation or arousal;

(12) "**Sadomasochistic abuse**" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification;

(13) "**Explicit sexual material**" means any pictorial or three dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation or unclothed genitals, sadomasochistic, abuse, or emphasizing the depiction of post-pubertal human genitals; provided, however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition;

(14) "**Displays publicly**" means exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway or public sidewalk, or from the property of others.

18.2 Promoting pornography in the first degree (§573.020) Class D Felony

Code

1. A person commits the crime of promoting pornography in the first degree if, knowing its content and character:
   (1) He wholesale promotes or possesses with the purpose to wholesale promote any pornographic material; or
   (2) He wholesale promotes for minors or possesses with the purpose to wholesale promote for minors any material pornographic for minors.
2. Promoting pornography in the first degree is a class D felony.

Elements

A person commits the crime of promoting pornography in the first degree if:

A.
1. he wholesale promotes or possesses in order to wholesale promote
2. pornographic material
3. knowing its content and character

or

B.
1. he wholesale promotes for minors or possesses in order to wholesale promote for minors
2. material pornographic for minors
3. knowing its content and character.

Comment

See comments for paragraph 18.3.

18.3 Promoting pornography in the second degree (§573.030) Class A Misdemeanor

Code

1. A person commits the crime of promoting pornography in the second degree if, knowing its content and character, he:
   (1) Promotes or possesses with the purpose to promote any pornographic material for pecuniary gain; or
   (2) Produces, presents, directs or participates in any pornographic performance for pecuniary gain.
2. Promoting pornography in the second degree is a class A misdemeanor.

Elements

A person commits the crime of promoting pornography in the second degree if:

A.
1. he promotes or possesses in order to promote
2. pornographic material
3. for pecuniary gain
4. knowing its content and character

or

B.
1. he produces, presents, directs, or participates in a pornographic performance
2. for pecuniary gain
3. knowing its character and content.

Major Changes

The promoting pornography offenses replace pre-code statutes which prohibit publishing obscene newspapers, etc. (563.270); circulating obscene matter (563.280); placing obscene matter in post office (563.290); advertising secret drugs (563.300); and Stallion or Jack to be kept from public view—when (563.320). The major change is in language and specificity of the statutes. There is very little substantive change.

Source

These sections are based on New York Revised Penal Law, §§235.05 and 235.06 and replace §563.280 RSMo.

Comments

The basic offense is promoting pornography in the second degree which is aimed solely at the commercial distributor or merchant who profits from retail circulation of pornographic material. The definition of promote is found in §573.010 (4) and means:

> manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise.

This definition covers all activities prohibited by pre-Code law and is more comprehensive. As with all pornography offenses, the offender must meet the scienter requirement. In addition, the actor must intentionally promote pornographic material or participate in an obscene performance in return for pecuniary gain to be convicted under this statute. The requirement of pecuniary gain emphasizes that this section is concerned with commercial distribution. This requirement should not exempt "private clubs" that promote pornographic performances, as the concept of pecuniary gain should be broad enough to cover indirect consideration via additional sales of liquor, food, etc.

Promoting pornography in the first degree differs from the basic offense in that it employs the term "wholesale promotes." This term is defined in §573.010 (6) and includes manufacturing, selling, providing, mailing, etc. material for the purposes of resale. The key words distinguishing "promote" from "wholesale promote" are "for purposes of resale." **People v. Bravman,** 89 Misc. 2d. 596, 393 N.Y.S.2d. 266 (1977) distinguishes obscentity in the first degree from obscenity in the second degree. The first degree offense is designed to distinguish between the local bookshop operator who sells one obscene magazine and a publisher who engages in the wholesale dissemination of obscene material. In addition, it imposes a felony penalty to deter such activity.

The first degree statute is violated by wholesale promotion of pornographic material as wholesale promotion for minors of material pornographic for minors. *Note,* two different standards are invoked. See introductory comments.

Included and Related Offenses

Promoting Pornography in the second degree is included in promoting pornography in the first degree. The other offenses in this chapter are not included offenses.

18.4 Furnishing pornographic materials to minors (§573.040) Class A Misdemeanor

Code

> 1. A person commits the crime of furnishing pornographic material to minors if, knowing its content and character, he:
>
> (1) Furnishes any material pornographic for minors, knowing that the person to whom it is furnished is a minor or acting in reckless disregard of the likelihood that such person is a minor; or

(2) Produces, presents, directs or participates in any performance pornographic for minors that is furnished to a minor knowing that any person viewing such performance is a minor or acting in reckless disregard of the likelihood that a minor is viewing the performance.

2. Furnishing pornographic material to minors is a class A misdemeanor.

Elements

A person commits the crime of furnishing pornographic materials to minors if:

A. 1. a) knowing that a person is a minor or
   b) with reckless disregard as to the minority of a person
   2. he furnishes the minor material which is pornographic for minors
   3. and he knows the character and content of the material
   or

B. 1. knowing the content and character
   2. he produces, presents, directs, or participates in a performance pornographic for minors
   3. which is furnished to a minor
   4. a) knowing the viewer is a minor *or*
   b) with reckless disregard as to the minority of the viewer.

Major Changes

Pre-Code section 563.310, which prohibited the sale of certain books and papers to minors, is repealed. The code lanaguage deals only with material relating to sexual conduct and, in that sense, is not as broad as the pre-code statute.

Comments

This section is designed to protect minors from exposure to pornographic *material* or *performances*. It specifically deals with material *pornographic for minors*. The decisions of the United States Supreme Court indicate that the state has the power to establish more stringent standards prohibiting the distribution of materials to minors,

> Because of the state's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare, and morals of its community by barring distribution to children of books recognized to be suitable to adults. *Ginsberg v. N.Y.* 390 U.S. 629, 637, 88 S.Ct. 1274, 20 L.Ed. 2d. 195(1968).

This statute expresses the Legislature's desire to shelter the young and inexperienced from such materials. Since this is the aim, the statute does not require furnishing for pecuniary gain. The purpose is broader than merely combatting commercial exploitation of obscenity. Of course, conviction requires proof that the offender was aware of the content and character of the material, although he need not know it is pornographic for minors. In addition, he must either know he is furnishing the material to a minor or consciously fail to determine whether a minor is involved. Thus, a mental state is required as to age.

Included and related offenses.

No other offense is included in this offense.

18.5 Evidence in pornography cases (§573.050)

Code

1. In any prosecution under this chapter evidence shall be admissible to show:
   (1) What the predominant appeal of the material or performance would be for ordinary adults or minors;
   (2) The literary, artistic, political or scientific value of the material or performance;

(3) The degree of public acceptance in this state and in the local community;
(4) The appeal to prurient interest in advertising or other promotion of the material or performance;
(5) The purpose of the author, creator, promoter, furnisher or publisher of the material or performance.

2. Testimony of the author, creator, promoter, furnisher, publisher, or expert testimony, relating to factors entering into the determination of the issues of pornography, shall be admissible.

Comments

This section specifies certain evidence that *shall be* admissible in pornography cases. It does not purport to exclude other relevant evidence. In addition it provides for the testimony of those who create and distribute the material as well as testimony by experts.

Of course, this section applies to both the prosecution and defense. Subsection (1) permits the introduction of evidence relating to the definition of the term "pornographic:" the dominant appeal, the value of the material, the degree of acceptance in the local community.

Subsection (2) does change Missouri law with regard to the use of expert testimony. Past Missouri decisions have disallowed expert testimony on the grounds that the value of the work and community standards were subjects not within the scope of expert testimony. **State v. Hartstein,** 469 S.W.2d, 329 (Mo. 1971). This change is necessary to comply with **Kaplan v. California,** 413 U.S. 115, 121, 93 S.Ct. 2680 (1973) where the court stated,

"The defense should be free to introduce appropriate expert testimony." The courts have regarded the materials as sufficient in themselves for the determination of the question.

The state now has an option; it can use expert testimony, it can simply introduce the materials into evidence, or it can do both. While the state does not have to use expert testimony, the defense should be allowed to use it.

18.6 Public display of explicit sexual material (§573.060) Class A Misdemeanor

Code

1. A person commits the crime of public display of explicit sexual material if he knowingly:
   (1) Displays publicly explicit sexual material; or
   (2) Fails to take prompt action to remove such a display from property in his possession after learning of its existence.
2. Public display of explicit sexual material is a class A misdemeanor.

Elements

A person commits the crime of public display of explicit sexual material if:

A. 1. he knowingly displays publicly
   2. explicit sexual material

   or

B. 1. he knowingly fails to promptly remove
   2. a public display of explicit sexual material
   3. on property he possesses
   4. after learning it exists.

Comments

This section, based on the Obscenity Commission's recommendation, prohibits the open public display of certain sexual materials, in order to protect persons from involuntary exposure to such materials.

Note, the materials involved need not rise to the level of pornography, but they must be explicit sexual material as defined in section 573.010(13).

Explicit sexual material means pictorial or three dimensional materials which show masturbation, deviate sexual intercourse, sexual intercourse, physical stimulation, or sadomasochistic abuse excluding works of art. (573.010(13)) The individual must be aware of the contents of the display and aware it can be seen by the public.

Also of importance is the fact that the display need not be on public property to constitute a public display. It may be set upon private property so long as it is visible and the subject matter recognizable from a street, sidewalk, or another's property. See 573.010(14).

Apparently, there are no constitutional problems in this area if the offense is sufficiently defined. See **Rabe v. Washington,** 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed. 2d. 258 (1972), a per curiam opinion using a "void for vagueness" approach to strike down a conviction because the statute in question did not give fair notice that the location of the exhibition was an essential element of the offense. In a concurring opinion, Chief Justice Burger said,

> Public displays of explicit materials...are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and...involve no significant countervailing First Amendment considerations.

18.7 Injunctions and declaratory judgments (§573.070)

Code

> 1. Whenever material or a performance is being or is about to be promoted, furnished or displayed in violation of sections 573.030, 573.040 or 573.060, a civil action may be instituted in the circuit court by the prosecuting or circuit attorney or by the city attorney of any city, town or village against any person violating or about to violate those sections in order to obtain a declaration that the promotion, furnishing or display of such material or performance is prohibited. Such an action may also seek an injunction appropriately restraining promotion, furnishing or display.
>
> 2. Such an action may be brought only in the circuit court of the county in which any such person resides, or where the promotion, furnishing or display is taking place or is about to take place.
>
> 3. Any promoter, furnisher or displayer of, or a person who is about to be a promoter, furnisher or displayer of, the material or performance involved may intervene as of right as a party defendant in the proceedings.
>
> 4. The trial court and the appellate court shall give expedited consideration to actions and appeals brought under this section. The defendant shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. No restraining order or injunction of any kind shall be issued restraining the promotion, furnishing or display of any material or performance without a prior adversary hearing before the court.
>
> 5. A final declaration obtained pursuant to this section may be used to form the basis for an injunction and for no other purpose.
>
> 6. All laws regulating the procedure for obtaining declaratory judgments or injunctions which are inconsistent with the provisions of this section shall be inapplicable to proceedings brought pursuant to this section. There shall be no right to jury trial in any proceedings under this section.

Comments

This section, based on 563.285 RSMo, allows the prosecuting attorney, circuit attorney, or city attorney to seek a declaratory judgment and an injunction against those violating the pornography laws.

In many instances there will be serious questions whether the material sought to be suppressed is pornographic. This section provides a method outside of criminal prosecution for the determination of that question. In addition, it can provide a more effective method of getting rid of pornographic material. Note, an adversary hearing before a court is required before any restraining order or injunction of any kind can be issued,

> ...because only a judicial determination in an adversary proceeding insures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. **Freedman v. Maryland,** 380 U.S. 51, 58, 85 S.Ct. 734, 13 L.Ed. 2d. 649 (1965).

This hearing is constitutionally required, and definite time limits for having a trial are also required under the doctrine of **Freedman v. Maryland, supra,** p. 59. This decision has been repeatedly cited in striking down civil censorship procedures which in effect turn temporary injunctions into final ones because of extended delays in securing final court adjudication.

18.8 Preemption and standardization (§573.080)

> The general assembly by enacting this chapter intends to preempt any other regulation of the area covered by section 573.020, to promote statewide control of pornography, and to standardize laws that governmental subdivisions may adopt in other areas covered by this chapter. No governmental subdivision may enact or enforce a law that makes any conduct in the area covered by section 573.020 subject to a criminal or civil penalty of any kind. Cities and towns may enact and enforce laws prohibiting and penalizing conduct subject to criminal or civil sanctions under other provisions of this chapter, but the provisions of such laws shall be the same and authorized penalties or sanctions under such laws shall not be greater than those of this chapter.

Comments

This section prohibits cities and towns from enacting and enforcing pornography laws which covers the conduct proscribed by section 573.020, promoting pornography in the first degree. However, if a city or town believes that state enforcement of the criminal laws against pornography is inadequate to provide sufficient control of a local problem, the city may enact an ordinance proscribing anything else covered by this chapter. The provisions of the local ordinances must conform to the state laws and the penalty must not be greater than those provided by the state laws. Thus a city or town could not define pornography in broader terms than those found in state law. Since a city attorney may bring a declaratory judgment action or seek an injunction under 573.070, no local legislation is required for that.

CHAPTER 19

Offenses Against Public Order (§§574.010-574.060)

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19.1 Introduction

This chapter covers the crimes of peace disturbance, unlawful assembly, rioting, and refusal to disperse. The Code makes some substantial changes in the law and much of the language is new, so the elements of the crimes should be studied carefully.

19.2 Peace Disturbance (§574.010) Class B misdemeanor

Code

A person commits the crime of peace disturbance if:

1. he unreasonably and knowingly causes alarm to another person or persons not physically on the same premises by:
   a) loud and unusual noise; or
   b) loud and abusive language; or
   c) threatening to commit a crime against any person; or
   d) fighting; or
   e) creating a noxious and offensive odor;
   or

2. he is in a public place or on private property of another without consent and unreasonably and knowingly causes alarm to another person or persons by:
   a) loud and unusual noise; or
   b) loud and abusive language; or
   c) threatening to commit a crime against any person; or
   d) fighting; or
   e) creating a noxious and offensive odor;
   or

3. he is in a public place or on private property of another without consent and purposely causes inconvenience to another person or persons by unreasonably and physically obstructing
   a) vehicular or pedestrian traffic; or
   b) the free ingress or egress to or from public or private places.

Major Changes

Although some of the Code language is new to Missouri law, the types of conduct covered by the peace disturbance statutes (§§574.010 and 574.020) are based on pre-Code law. "Loud and unusual noise" is taken from the pre-Code statute. "Abusive languge" is substituted for "offensive or indecent conversation". "Threatening to commit a crime against any person" replaces "threatening, quarreling" or "challenging". "Fighting" remains the same. The "creating noxious and offensive odors" language replaces the statutes dealing with "stink bombs". See pre-Code §§562.290, 562.300 and 562.310 RSMo.

Please refer to§19.4 for definitions applicable to §§574.010 and 574.020.

Source

Section 574.010.1 (3) dealing with obstructing traffic and entrances is based on Michigan Revised Criminal Code §5525 (Final Draft 1967) and Proposed Montana Criminal Code §94-8-101.

Comments

The first part of this section makes it a crime for a person to unreasonably and knowingly cause alarm to another person not on the same premises. The individual must cause alarm to a person not on the same premises in circumstances where it is not reasonable to cause alarm. Causing alarm by yelling: "Watch out for the truck!", in order to avoid an accident is reasonable. The individual must also *knowingly* alarm someone. In other words, he must be aware that his conduct is causing alarm to others. Knowledge could be shown by prior complaints to the defendant. In order to convict under subsection 1, the state must prove the person alarmed was on different premises.

"Causing alarm" is not defined by the Code but probably means causing anxiety, frightening or upsetting another person. Finally, a person must cause alarm to another by one of the five methods specified in the statute. Causing alarm in some other way is not sufficient for criminal liability.

The second part of this section covers the same type of behavior as is covered in Section 1, but committed by a person who is in public or on private property without consent. This section applies to a loud and obnoxious drunk who is causing alarm to people in a public bar or on the street. To convict under this subsection there is no need to prove where the person alarmed was.

The third subsection deals with unreasonably obstructing traffic and entrances. By using the words "physically obstructing" it is clear the section does not apply to picket lines where persons are not physically prevented from crossing. Cf. **St. Louis v. Goldman**, 467 SW2d 99 (St.L. App. 1971). Remember that subsection 3 applies only if a person is in a public place or on private property of another without consent.

19.3 Private Peace Disturbance (§574.020) Class C misdemeanor

Code

A person commits the crime of private peace disturbance if:

1. he is on private property and
2. unreasonably and purposely causes alarm to another person or persons on the same premises
   a) by threatening to commit a crime against any person, or
   b) by fighting

Major Changes

See the "changes" section under 19.2

Comments

This section is designed to cover the situation where the defendant is at home (or visiting friends) and alarms someone else on the same premises by threatening to commit a crime or by fighting. The individual must have the "purpose" to alarm, and it must be unreasonable.

If the person causing alarm is on his own private property or the private property of another, and the person alarmed is on the same property, the offense will be under this section. If the suspect is not on the same premises as the complainant, or is on private property without consent or in a public place, then one of the subsections of ¶19.2 will apply.

19.4 Peace Disturbance Definitions (§574.030)

For the purposes of sections 574.010 and 574.020

1. **"Property of another"** means any property in which the suspect does not have a possessory interest;

2. **"Private property"** means any place which at the time is not open to the public. It includes property which is owned publicly or privately;

3. **"Public place"** means any place which at the time is open to the public. It includes property which is owned publicly or privately;

4. If a building or structure is divided into separately occupied units, such units are separate premises.

19.5 Unlawful Assembly (§574.040) Class B misdemeanor

Code

A person commits the crime of unlawful assembly if he:

1. knowingly assembles
2. with six or more other persons and
3. agrees with such persons to violate any of the criminal laws of the State or the United States
4. with force or violence

Major Changes

Pre-Code statute 562.150 RSMo required the assembly of only three persons to constitute unlawful assembly. The Code requires a total of at least 7 people.

Comments

This section is aimed at punishing the seven or more persons who meet and form a common purpose to violate any of the criminal laws. They do not have to *actually* violate the law. If they do violate one of the laws of the State or the United States they would be guilty of rioting, §574.050. All seven persons who engaged in the unlawful assembly are guilty of this same offense.

19.6 Rioting (§574.050) Class A misdemeanor

Code

A person commits the crime of rioting if he:

1. knowingly assembles
2. with six or more other persons, and
3. agrees with such persons to violate any of the criminal laws of this State or the United States with force or violence, and
4. does violate any of said laws with force or violence while still so assembled.

Major Changes

This section is a revision of pre-Code section 562.160 RSMo. As with unlawful assembly the number required has been increased from three to seven, and "any unlawful act" has been changed to "any of the criminal laws . . ." The phrase "to the terror or disturbance of peaceful citizens" has been eliminated as an unnecessary element for the state to prove.

Comments

This crime is simply an aggravated form of the unlawful assembly offense with the added requirement that the criminal law must actually be violated with force or violence.

19.7 Refusal To Disperse (§574.060) Class C misdemeanor

Elements

A person commits the crime of refusal to disperse if:

1. being present at the scene of an unlawful assembly, or at the scene of a riot
2. he knowingly fails or refuses to obey
3. the lawful command of a law enforcement officer to depart from the scene of such unlawful assembly or riot.

Major Changes

This section is a revision of pre-Code sections 542.150 and 542.200 RSMo. Section 542.150 directed "conservators of the peace" such as mayors, aldermen, legislators, sheriffs, etc. to disperse rioters. The Code directs only law enforcement officers to disperse an unlawful assembly or a riot.

Comment

This section requires a "knowing" failure to obey and is limited to commands of law enforcement officers. To be guilty a person must be at the scene of a riot or unlawful assembly and *know* of the command to disperse, and still refuse to obey.

CHAPTER 20

Offenses Against the Administration of Justice (§§575.010-575.320)

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20.1 Introduction

This chapter covers misconduct related to judicial proceedings whether it be by a witness or juror. The chapter also contains the crimes committed by public servants or law enforcement officers. Also contained in this chapter is the new crime of refusal to identify as a witness (§575.190).

20.2 Concealing an Offense (§575.020)
Class D felony—if offense concealed is a felony
Class A misdemeanor—if offense concealed is a misdemeanor or infraction

Code

1. A person commits the crime of concealing an offense if:
(1) He confers or agrees to confer any pecuniary benefit or other consideration to any person in consideration of that person's concealing of any offense, refraining from initiating or aiding in the prosecution of an offense, or withholding any evidence thereof; or
(2) He accepts or agrees to accept any pecuniary benefit or other consideration in consideration of his concealing any offense, refraining from initiating or aiding in the prosecution of an offense, or withholding any evidence thereof.
2. Concealing an offense is a class D felony if the offense concealed is a felony; otherwise concealing an offense is a class A misdemeanor.

Elements

A person commits the crime of concealing an offense if he:

A. 1. confers or agrees to confer pecuniary or other type of benefit
   2. on a person in consideration of that person's
      a) concealing an offense;
      b) refraining from starting or aiding in the prosecution of an offense; or
      c) withholding evidence of the offense

   OR

B. 1. accepts or agrees to accept a pecuniary or other type of benefit
   2. in consideration for
      a) concealing an offense; or
      b) refraining from starting or aiding in the prosecution of an offense; or
      c) withholding evidence of the offense.

Major Changes

This section replaces pre-Code §§557.170, 557.180 and 557.190. These sections were commonly referred to as "compounding" statutes and covered "compounding" felonies as well as misdemeanors. The Code covers the concealment of all offenses: felonies, misdemeanors and infractions.

The pre-Code statutes made only the **receipt** of a benefit a crime. The Code expands the crime to cover the person giving the benefit as well as the person receiving it.

Source

Cf. New York Penal Code §415.45; Ill. Criminal Code Ch. 30 §32-1, and Proposed New Jersey Penal Code §2C:29-4.

Comments

This section deals with the crime sometimes called "compounding." The purpose of the statute is to discourage people from **giving or receiving** any type of benefit in return for concealing an offense or refusing to aid in the prosecution of an offense.

A person violates the statute if, in order to receive money or other benefit, he conceals the fact that an offense has been committed, withholds evidence, or agrees not to prosecute an offense. Likewise, the person who pays the money or gives the benefit for the reasons specified above is also guilty. The statute does not cover a mere failure to report a crime.

20.3 Hindering Prosecution (§575.030)
Class D felony—if felony was committed
Class A misdemeanor—if misdemeanor was committed

Code

1. A person commits the crime of hindering prosecution if for the purpose of preventing the apprehension, prosecution, conviction or punishment of another for conduct constituting a crime he:
   (1) Harbors or conceals such person; or
   (2) Warns such person of impending discovery or apprehension, except this does not apply to a warning given in connection with an effort to bring another into compliance with the law; or
   (3) Provides such person with money, transportation, weapon, disguise or other means to aid him in avoiding discovery or apprehension; or
   (4) Prevents or obstructs, by means of force, deception or intimidation, anyone from performing an act that might aid in the discovery or apprehension of such person.
2. Hindering prosecution is a class D felony if the conduct of the other person constitutes a felony; otherwise hindering prosecution is a class A misdemeanor.

Elements

A person commits the crime of hindering prosecution if he:

1. with the purpose of preventing the apprehension, prosecution, conviction, or punishment of a person who has committed a crime
   a) harbors or conceals the person, or
   b) warns the person that he is soon to be discovered and apprehended (unless done in an effort to bring that person into compliance with the law), or
   c) provides money, transportation, weapons, disguises, or other means to help the person avoid discovery or apprehension, or
   d) prevents or obstructs another by using force, deception, or intimidation against him from doing something to aid the discovery or apprehension of the suspect.

Major Changes

This section replaces pre-Code §556.180 RSMo. which dealt with "accessory after the fact." The present section differs from pre-Code law in three respects: (1) only the acts specified are sufficient to constitute hindering prosecution, (2) the statute applies when a person aids a misdemeanant as well as a felon, and (3) it does away with the exemption based on family relationship.

Source

This section is based on Michigan Revised Criminal Code (Final Draft 1967) §§4635, 4636 and 4637 which is derived from New York Revised Penal Law §§205.55-205.60 and Model Penal Code §242.3.

Comments

A person violates this statute by preventing or obstructing the apprehension, prosecution, conviction, or punishment **of another.** In other words, a person can only be convicted of hindering the prosecution of another and not of hindering his own apprehension.

The penalty is geared to the underlying offense. That is, if the conduct of the other person would constitute a felony, the person hindering prosecution may be charged with a felony. Likewise, if the conduct of the other person would constitute a misdemeanor, the hinderer may be charged with a misdemeanor.

Included and Related Offenses

Related offenses are concealing an offense (§575.020) and tampering with physical evidence (§575.100).

20.4 Perjury (§575.040)

Class D felony—if committed in a proceeding not involving a felony charge.
Class C felony—if committed in a proceeding involving a felony charge.
In some cases the penalty is greater.
Class A felony—if committed to secure the conviction of the accused for murder.
Class B felony—if committed to secure the conviction of the accused for a felony other than murder.

Code

1. A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths.

2. A fact is material, regardless of its admissibility under rules of evidence, if it could substantially affect, or did substantially affect, the course or outcome of the cause, matter or proceeding.

3. Knowledge of the materiality of the statement is not an element of this crime, and it is no defense that:

(1) The defendant mistakenly believed the fact to be immaterial; or

(2) The defendant was not competent, for reasons other than mental disability or immaturity, to make the statement.

4. It is a defense to a prosecution under subsection 1 of this section that the actor retracted the false statement in the course of the official proceeding in which it was made provided he did so before the falsity of the statement was exposed. Statements made in separate hearings at separate stages of the same proceeding, including but not limited to statements made before a grand jury, at a preliminary hearing, at a deposition or at previous trial, are made in the course of the same proceeding.

5. The defendant shall have the burden of injecting the issue of retraction under subsection 4 of this section.

6. Perjury committed in any proceeding not involving a felony charge is a class D felony.

7. Perjury committed in any proceeding involving a felony charge is a class C felony unless:

(1) It is committed during a criminal trial for the purpose of securing the conviction of an accused for murder, in which case it is a class A felony; or

(2) It is committed during a criminal trial for the purpose of securing the conviction of an accused for any felony except murder, in which case it is a class B felony.

Elements

A person commits the crime of perjury if:

1. with the purpose to deceive, he
2. knowingly testifies falsely about a material fact

3. under oath or affirmation
4. in an official proceeding before a
   —court
   —public body
   —notary public
   —other officer authorized to administer oaths.

Major Changes

The elements of perjury are not changed substantially from pre-Code law. The pre-Code statute required the false statement to be made "willfully and corruptly." The Code uses "with the purpose to deceive".

Subsection 4 is new. There are no Missouri cases on this, but see **State v. Brinkley,** 354 Mo. 337, 189 S.W.2d 314, 320 (1945).

Source

See Model Penal Code §241.1(4) and New York Penal Code §210.25.

Comments

Perjury is limited to oral statements by the definition of testimony §575.010(8), "any oral statement under oath or affirmation." Perjury can be committed in any official proceeding. The definition of "official proceeding" in §575.010(6) is intended to be as broad as the proceedings included under pre-Code §557.010 RSMo.

Subsection 2 defines "material fact" as one which could or did substantially affect the outcome of the cause, matter or proceeding.

Subsection 3 makes it clear that the state does not have to prove the defendant knew the statement was material and that his mistaken belief as to materiality is no defense. It is, however, required that the defendant know the statement is false.

Subsection 4 which provides a defense to perjury, is new in Missouri. The comments to the Michigan Revised Criminal Code (Final Draft 1967) may be helpful:

> . . .The common law rule is that while retraction may be used to show inadvertence in making the statement, perjury once committed cannot be purged even by a correction during the same hearing. . .There is, however, some contrary authority based on the theory that it is socially desirable to keep the door open as an incentive for a witness to correct his misstatement and tell the truth before the end of the proceeding.

Note that the Code does not specifically include the crime of "subornation of perjury." Such offense is covered by the general rules on accessorial liability. See chapter 7.

20.5 False Affidavit (§575.050)

Class C misdemeanor—usually.

Class A misdemeanor—if done for the purpose of misleading a public servant in the performance of duty.

Code

1. A person commits the crime of making a false affidavit if, with purpose to mislead any person, he, in an affidavit, swears falsely to a fact which is material to the purpose for which said affidavit is made.
2. The provisions of subsections 2 and 3 of section 575.040 shall apply to prosecutions under subsection 1 of this section.

3. It is a defense to a prosecution under subsection 1 of this section that the actor retracted the false statement by affidavit or testimony but this defense shall not apply if the retraction was made after:

(1) The falsity of the statement was exposed; or

(2) Any person took substantial action in reliance on the statement.

4. The defendant shall have the burden of injecting the issue of retraction under subsection 3 of this section.

5. Making a false affidavit is a class A misdemeanor if done for the purpose of misleading a public servant in the performance of his duty; otherwise making a false affidavit is a class C misdemeanor.

Elements

A person commits the crime of making a false affidavit if he:

1. swears falsely
2. in any affidavit
3. to a fact material to the purpose of the affidavit
4. with the purpose to mislead any person.

Major Changes

This section replaces pre-Code §557.070 RSMo.

Source

See Colo. Rev. Stat. §§40-8-503 and 40-8-504 and Michigan Revised Criminal Code §§4906 and 4907.

Comments

An affidavit is defined in §575.010(1) as "any written statement which is authorized or required by law to be made under oath, and which is sworn to before a person authorized to administer oaths."

The application of subsections 2 and 3 of §575.040 (perjury) is new, as is the requirement that the false statement be material. Note also that the defense of retraction is allowed.

20.6 False Declarations (§575.060) Class B misdemeanor

Code

1. A person commits the crime of making a false declaration if, with the purpose to mislead a public servant in the performance of his duty, he:

(1) Submits any written false statement, which he does not believe to be true

(a) In an application for any pecuniary benefit or other consideration; or

(b) On a form bearing notice, authorized by law, that false statements made therein are punishable; or

(2) Submits or invites reliance on

(a) Any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(b) Any sample, specimen, map, boundary mark, or other object which he knows to be false.

2. The falsity of the statement or the item under subsection 1 of this section must be as to a fact which is material to the purposes for which the statement is made or the item submitted; and the provisions of subsections 2 and 3 of section 575.040 shall apply to prosecutions under subsection 1 of this section.

3. It is a defense to a prosecution under subsection 1 of this section that the actor retracted the false statement or item but this defense shall not apply if the retraction was made after:

(1) The falsity of the statement or item was exposed; or

(2) The public servant took substantial action in reliance on the statement or item.

4. The defendant shall have the burden of injecting the issue of retraction under subsection 3 of this section.
5. Making a false declaration is a class B misdemeanor.

Elements

A person commits the crime of making a false declaration if:

A. 1. with the purpose of misleading a public servant in the performance of his duty
2. he makes a written false statement about a material fact, believing it is not true
3. a) in an application to receive a payment or other type of benefit, or
b) on a form which declares that false statements are punishable at law
OR

B. 1. with the purpose of misleading a public servant in the performance of his duty
2. a person makes or encourages another to rely on
a) a writing he knows is forged, altered, or otherwise not authentic, or
b) a sample, specimen, map, boundary mark, or other object he knows is false.

Major Changes

This section is new to Missouri law.

Source

This section is based on Model Penal Code §241.3.

Comments

This section covers the making of false statements or supplying false items to public servants for the purpose of misleading them. It requires that the falsity be material and provides for a limited retraction of false statements.

20.7 Proof of Falsity of Statements (§575.070)

This section specifically sets out the type of evidence required to prove perjury, the making of a false affidavit, or the making of a false declaration.

The statute provides:

No person shall be convicted of a violation of sections 575.040, 575.050 or 575.060 based upon the making of a false statement except upon proof of the falsity of the statement by:
1. the direct evidence of two witnesses; or
2. the direct evidence of one witness together with strongly corroborating circumstances; or
3. demonstrative evidence which conclusively proves the falsity of the statement; or
4. a directly contradictory statement by the defendant under oath together with
a) the direct evidence of one witness; or
b) strongly corroborating circumstances; or
5. a judicial admission by the defendant that he made the statement knowing it was false. An admission, which is not a judicial admission, by the defendant that he made the statement knowing it was false may constitute strongly corroborating circumstances.

Comments

This section provides for a significant change in the evidence sufficient to prove perjury. Missouri follows the common law "quantum of evidence" rule with regard to proof of the falsity of the statement. Under this rule, the falsity of the statement can be proved only by the direct evidence of two witnesses, or by the direct evidence of one witness plus strongly corroborating circumstances. These methods are covered by subsections 1 and 2. The succeeding sections broaden the rule and ease the prosecutor's burden by providing for three other methods of proof.

Subsection 3 allows the state to prove falsity solely on the basis of "demonstrative evidence which conclusively proves the falsity." Fingerprint and firearms identification evidence are two examples which, though technically "circumstantial evidence", are far more reliable than the "direct" evidence of an eyewitness. If the defendant has denied being inside a certain vehicle, but his fingerprints are found inside, it is unreasonable to say the state cannot prove the falsity of his denial. In using the phrase "conclusively proves" the intent is to use the strongest language possible to indicate that any ordinary circumstantial evidence will not suffice.

Subsection 4 allows the state to prove falsity by means of "directly contradictory statement" under oath *plus* strongly corroborating circumstances or the direct evidence of one witness. In effect, this substitutes the contradiction for the direct evidence of one witness under subsection 1. See Model Penal Code §241.1(5); Colo.Rev.Stat. §40-8-505; Ill. Criminal Code Ch. 38, §32-2(b); Michigan Revised Criminal Code §4915 (Final Draft 1967) and New York Penal Code §210.20.

Subsection 4 is based on several considerations. First, the Model Penal Code approach would allow the state to charge perjury as an either/or type of crime and force the defendant to defend himself against two inconsistent charges. This violates the concept that the defendant is entitled to be charged with specific acts violating the law and that he is entitled to notice of what he is charged with, and that the state must elect where it has alternative theories of prosecution. Second, as a practical matter, the situations where the contradiction would be completely clear cut would be rare, and the defendant in many instances would be placed in the position of having both to negate the inconsistency and to prove the truth of both statements. Third, most perjury prosecutions arise out of criminal cases, and the state will have taken a position in most cases of urging the truth of one of the two statements in the prior case. Finally, if one of the statements in fact contradicts the state's position in another case, as it often will, the state should have little difficulty corroborating the other statement.

Subsection 5 is also new. The general rule is that a judicial admission of a specific crime does away with the requirement that a corpus delicti be proved and is itself sufficient for a submissible case. The factors that distinguish perjury from other crimes do not justify a different standard of proof insofar as judicial admissions are concerned. The second sentence indicates that a non-judicial admission may satisfy the requirement of "strongly corroborating circumstances" even though it would not be sufficient evidence by itself.

Under pre-Code Missouri law the "quantum of evidence" rule also applies to the conduct involved in making a false affidavit. This section also applies to that offense as well as the new offense of making a false declaration. Note that it does not apply to a false declaration made under section 575.060.1(2) as that does not involve making a false statement.

20.8 False Reports (§575.080) Class B misdemeanor

Code

1. A person commits the crime of making a false report if he knowingly:
   (1) Gives false information to a law enforcement officer for the purpose of implicating another person in a crime; or
   (2) Makes a false report to a law enforcement officer that a crime has occurred or is about to occur; or
   (3) Makes a false report or causes a false report to be made to a law enforcement officer, security officer, fire department or other organization, official or volunteer, which deals with emergencies involving danger to life or property that a fire or other incident calling for an emergency response has occurred.
2. It is a defense to a prosecution under subsection 1 of this section that the actor retracted the false statement or report before the law enforcement officer or any other person took substantial action in reliance thereon.
3. The defendant shall have the burden of injecting the issue of retraction under subsection 2 of this section.
4. Making a false report is a class B misdemeanor.

Elements

A person commits the crime of making a false report if he:

A. 1. knowingly gives false information
   2. to a law enforcement officer
   3. for the purpose of implicating another in a crime
   OR
B. 1. knowingly makes a false report
   2. to a law enforcement officer
   3. that a crime has occurred or is about to occur
   OR
C. 1. knowingly makes or causes a false report to be made
   2. to a law enforcement officer, security officer, fire department, or other organization which deals with emergencies
   3. that a fire or other emergency has occurred.

Major Changes

This section replaces pre-Code §§562.285 and 564.535 RSMo.

Source

This section is based on Model Penal Code §241.

Comments

If the defendant retracts the false statement or report prior to anyone taking action in reliance on the statement, he may have a defense.

This section makes it a crime to make any type of false reports or statements to police officers or organizations which handle emergencies.

20.9 False Bomb Report (§575.090) Class A misdemeanor

Code

1. A person commits the crime of making a false bomb report if he knowingly makes a false report or causes a false report to be made to any person that a bomb or other explosive has been placed in any public or private place or vehicle.
2. Making a false bomb report is a class A misdemeanor.

Elements

A person commits the crime of making a false bomb report if he:

1. knowingly makes or causes to be made a false report
2. to any person
3. that a bomb or other explosive
4. has been placed in a public or private place or vehicle.

Comments

This is an aggravated false report statute which carries with it a greater penalty. It covers any false report that a bomb has been placed in a place or vehicle. It is no longer necessary to make the report to a law enforcement agency to commit the crime. A report to anyone will suffice under the new section.

Included and Related Offenses

Under an appropriate set of facts, making a false report under §575.080.1(3) could be a lesser included offense.

20.10 Tampering with Physical Evidence (§575.100) Class D felony—if the actor impairs or obstructs the prosecution or defense of a felony; a Class A misdemeanor in all other cases

Code

1. A person commits the crime of tampering with physical evidence if he:
   (1) Alters, destroys, suppresses or conceals any record, document or thing with purpose to impair its verity, legibility or availability in any official proceeding or investigation; or
   (2) Makes, presents or uses any record, document or thing knowing it to be false with purpose to mislead a public servant who is or may be engaged in any official proceeding or investigation.
2. Tampering with physical evidence is a class D felony if the actor impairs or obstructs the prosecution or defense of a felony; otherwise, tampering with physical evidence is a class A misdemeanor.

Elements

A person commits the crime of tampering with physical evidence if he:

1. alters, destroys, suppresses or conceals any record, document or thing with purpose to impair its verity, legibility or availability in any official proceeding or investigation; or

2. makes, presents or uses any record, document or thing, knowing it to be false, with purpose to mislead a public servant who is or may be engaged in any official proceeding.

Major Changes

This section is new.

Source

This section is based on Model Penal Code §241.8.

Comments

The first subsection forbids tampering with or concealing evidence for the purpose of impairing its usefulness in an official proceeding or investigation. The second subsection deals with presenting and using false documents with the purpose to mislead public servants.

20.11 Tampering with a Public Record (§575.110) Class A misdemeanor

Code

1. A person commits the crime of tampering with a public record if with the purpose to impair the verity, legibility or availability of a public record:
   (1) He knowingly makes a false entry in or falsely alters any public record; or
   (2) Knowing he lacks authority to do so, he destroys, suppresses or conceals any public record.
2. Tampering with a public record is a class A misdemeanor.

Elements

A person commits the crime of tampering with a public record if, with the purpose to impair the verity, legibility or availability of a public record:

1. he knowingly makes a false entry in or falsely alters any public record; or
2. knowing he lacks authority to do so, he destroys, suppresses or conceals any public record.

Major Changes

This section is new.

Source

This section is based on the Model Penal Code §241.8.

Comments

This new section has a rather limited scope. "Public record" is defined in §575.010 (7) as documents which a public servant is *required* by law to keep. Tampering with any other public document is not a crime under this section, although it could be a violation of section 575.100, tampering with physical evidence.

20.12 False Impersonation (§575.120)

Class A misdemeanor—if the person falsely represents himself to be a law enforcement officer

Class B misdemeanor—in all other cases

Code

1. A person commits the crime of false impersonation if he:
   (1) Falsely represents himself to be a public servant with purpose to induce another to submit to his pretended official authority or to rely upon his pretended official acts, and
      (a) Performs an act in that pretended capacity; or
      (b) Causes another to act in reliance upon his pretended official authority; or
   (2) Falsely represents himself to be a person licensed to practice or engage in any profession for which a license is required by the laws of this state with purpose to induce another to rely upon such representation, and
      (a) Performs an act in that pretended capacity; or
      (b) Causes another to act in reliance upon such representation.
2. False impersonation is a class B misdemeanor unless the person represents himself to be a law enforcement officer, in which case false impersonation is a class A misdemeanor.

Elements

A person commits the crime of false impersonation if he:

1. falsely represents himself to be a public servant with purpose to induce another to submit to his pretended official authority or to rely upon his pretended official acts, and
   a) performs an act in that pretended capacity, or
   b) causes another to act in reliance upon his pretended official authority, or
2. falsely represents himself to be a person licensed to practice or engage in any profession for which a license is required by the laws of this state with purpose to induce another to rely upon such representation, and
   a) performs an act in that pretended capacity; or
   b) causes another to act in reliance upon such representation.

Major Changes

This section is new to Missouri law.

Source

Cf. Model Penal Code §241.9; Colo. Rev. Stat. §§40-8-112 and 40-8-113, and Michigan Revised Criminal Code §§4545 and 4550.

Comments

Under this section, anyone who impersonates a law enforcement officer, public servant or licensed professional with the purpose that his impersonation be relied on by another and who performs an act while playing that role is guilty of a crime. Public servants and licensed professionals were included because the potential harm from impersonation of either can be great. This section requires the suspect to intend that his impersonation be relied on. The requirement that an act be performed helps distinguish innocent from guilty conduct.

20.13 Simulating Legal Process (§575.130) Class B misdemeanor

Code

1. A person commits the crime of simulating legal process if, with purpose to mislead the recipient and cause him to take action in reliance thereon, he delivers or causes to be delivered:
   (1) A request for the payment of money on behalf of any creditor that in form and substance simulates any legal process issued by any court of this state; or
   (2) Any purported summons, subpoena or other legal process knowing that the process was not issued or authorized by any court.
2. This section shall not apply to a subpoena properly issued by a notary public.
3. Simulating legal process is a class B misdemeanor.

Elements

A person commits the crime of simulating legal process if:
1. with purpose to mislead the recipient and cause him to act in reliance thereon
2. he delivers or causes to be delivered:
   a) a request for the payment of money on behalf of any creditor that in form and substance simulates any legal process issued by any court of this state; or
   b) any purported summons, subpoena or other legal process knowing that the process was not issued or authorized by any court.

This section does not apply to a subpoena properly issued by a notary public.

Major Changes

This section is new.

Source

The section is based on Colo. Rev. Stat. §40-8-611; Illinois Criminal Code Ch. 38 §32-7; Michigan Revised Criminal Code §5055 (Final Draft 1967).

Comments

This section makes it clear that as long as a subpoena is properly issued by a notary public, the delivery of such subpoena will not constitute the crime of simulating legal process, even if it was not

authorized by any court. Any other type of unauthorized legal process which the suspect delivered with the purpose to mislead the recipient and to cause him to rely on it will be the type of simulation of legal process which this section prohibits and penalizes.

20.14 Resisting or Interfering with Arrest (§575.150)
Class D felony—if resisting or interfering with arrest for a felony other than resisting by fleeing
Class A misdemeanor—all other cases.

Code

1. A person commits the crime of resisting or interfering with arrest if, knowing that a law enforcement officer is making an arrest, for the purpose of preventing the officer from effecting the arrest, he:
   (1) Resists the arrest of himself by using or threatening the use of violence or physical force or by fleeing from such officer; or
   (2) Interferes with the arrest of another person by using or threatening the use of violence, physical force or physical interference.
2. This section applies to arrests with or without warrants and to arrests for any crime or ordinance violation.
3. It is no defense to a prosecution under subsection 1 of this section that the law enforcement officer was acting unlawfully in making the arrest. However, nothing in this section shall be construed to bar civil suits for unlawful arrest.
4. Resisting, by means other than flight, or interfering with an arrest for a felony is a class D felony; otherwise, resisting or interfering with arrest is a class A misdemeanor.

Elements

A person commits the crime of resisting arrest if:
1. he knows that a **law enforcement officer** is making an arrest and
2. for the purpose of preventing the officer from effecting the arrest, he
3. resists the arrest of himself by use or threat of violence, physical force or flight from the officer, or
4. interferes with the arrest of another by using or threatening the use of violence, physical force or physical interference.

Major Changes

The Code uses the term "law enforcement officer" whereas pre-Code statutes used the terms "sheriffs" and "other ministerial officers." It is clear that this section applies to arrests made with or without warrants. It is also clear that the Code precludes the defendant from asserting unlawful arrest as a defense to resisting arrest.

Source

This section is based on Colo. Rev. Stat. §40-8-103 and Michigan Revised Criminal Code §4625 (Final Draft 1967).

Comments

This section applies to resisting or interfering with both lawful and unlawful arrests which are effected either with or without a warrant. Making it a crime to resist an unlawful arrest may be a major change in Missouri law. No cases have been found squarely in point, although the language seems to indicate that the pre-Code statute did not apply to resistance to an unlawful arrest.

Please note that this section applies only to resistance for the purpose of preventing the officer from effecting the arrest. It does not apply to the use of force for other purposes. It would not, for example, affect the lawful use of force in self-defense against a police officer who is using excessive force and

illegally threatening serious harm. See the discussion of the use of force permitted police officers and the discussion of justification (self defense) in chapter 8 of this book. See also **State v. Nunes,** 546 S.W. 2d 759 (Mo. App. K.C. 1977) for the opinion of Judge Shangler relating to the issue of self defense.

Note that this statute deems fleeing an arrest to be resisting an arrest.

20.15 Interference with Legal Process (§575.160) Class B misdemeanor

Code

1. A person commits the crime of interference with legal process if, knowing any person is authorized by law to serve process, for the purpose of preventing such person from effecting the service of any process, he interferes with or obstructs such person.
2. "Process" includes any writ, summons, subpoena, warrant other than an arrest warrant, or other process or order of a court.
3. Interference with legal process is a class B misdemeanor.

Elements

A person commits the crime of interference with legal process if:

1. knowing any person is authorized by law to serve process, and
2. for the purpose of preventing such person from effecting the service of any process
3. he interferes with or obstructs such person.

"Process" includes any writ, summons, subpoena, warrant other than an arrest warrant, or other process or order of a court.

Major Changes

This is basically the same as pre-Code §557.210. Note that the words "person authorized by law to serve process" has been substituted for "sheriff or any other ministerial officer."

Comments

A person must actually interfere with or obstruct the person who is serving process to commit a crime under this section.

20.16 Refusing to Make an Employee Available for Service of Process (§575.170) Class C misdemeanor

Code

1. Any employer, or any agent who is in charge of a business establishment, commits the crime of refusing to make an employee available for service of process if he knowingly refuses to assist any officer authorized by law to serve process who calls at such business establishment during the working hours of an employee for the purpose of serving process on such employee, by failing or refusing to make such employee available for service of process.
2. Refusing to make an employee available for service of process is a class C misdemeanor.

Elements

A person commits the crime of refusing to make an employee available for service of process if when an officer calls at a business establishment to serve process on an employee during his working hours:

1. the employer or agent in charge
2. knowingly refuses to assist an officer authorized by law to serve
3. by failing or refusing to make the employee available for service of process.

Major Changes

This section is basically pre-Code §557.225 RSMo. It has been changed to make it clear that if the agent is the one who refuses to assist, it is the agent who is guilty.

20.17 Failure to Execute an Arrest Warrant (§575.180) Class D felony—if felony offense involved Class A misdemeanor—if offense involved is not a felony

Code

1. A law enforcement officer commits the crime of failure to execute an arrest warrant if, with the purpose of allowing any person charged with or convicted of a crime to escape, he fails to execute any arrest warrant, capias, or other lawful process ordering apprehension or confinement of such person, which he is authorized and required by law to execute.

2. Failure to execute an arrest warrant is a class D felony if the offense involved is a felony; otherwise, failure to execute an arrest warrant is a class A misdemeanor.

Elements

The crime of failing to execute an arrest warrant is committed if:

1. for the purpose of allowing a person charged with or convicted of a crime to escape,
2. a law enforcement officer fails to execute
   a) an arrest warrant, capias, or
   b) other lawful process ordering apprehension or confinement of a person
3. which he is authorized and required to execute.

Major Changes

This section is a revision of pre-Code §557.440 RSMo. It adds the requirement that the failure to execute the warrant must be for the specific purpose of permitting escape.

20.18 Refusal to Identify as a Witness (§575.190) Class C misdemeanor

Code

1. A person commits the crime of refusal to identify as a witness if, knowing he has witnessed any portion of a crime, or of any other incident resulting in physical injury or substantial property damage, upon demand by a law enforcement officer engaged in the performance of his official duties, he refuses to report or gives a false report of his name and present address to such officer.

2. Refusal to identify as a witness is a class C misdemeanor.

Elements

A person commits the crime of refusal to identify as a witness if:

1. he knows he has witnessed a portion or all of a crime, or
2. he knows he has witnessed an incident resulting in physical injury or substantial property damage; and
3. upon demand of a law enforcement officer engaged in the performance of his duties
4. he refuses to report or falsely reports his name and present address.

Major Changes

This section is new to Missouri law.

Source

The section is based on Proposed Texas Penal Code §38.02.

Comments

This section imposes a limited duty on persons who witness any portion of a crime or property damage to identify themselves to law enforcement officers after proper demand. The purpose of this statute is to facilitate police investigations and to encourage those with information about a crime to surrender it.

20.19 Escape from Commitment (§575.195) Class D felony

Code

1. A person commits the crime of escape from commitment if he has been committed to a state mental hospital under the provisions of sections 202.700 to 202.770 or of sections 552.010 to 552.080, RSMo., and he escapes from commitment.
2. Escape from commitment is a class D felony.

Elements

A person commits the crime of escape from commitment if he:
1. has been committed
2. to a state mental hospital
3. under the provisions of RSMo. sections
   a) 202.700 to 202.770; or
   b) 552.010 to 552.080
4. *and* he escapes from commitment.

Comments

This section only applies to people who escape from a state mental hospital to which they have been committed pursuant to a court order as provided by one of the two sections listed above. Sections 202.700 to 202.770 deal with the criminal sexual psychopath. Sections 552.010 to 552.080 deal with the offender whose conduct is the result of a mental disease or defect which is so severe that he is not responsible for his conduct. If a person is in a mental hospital under a court order for other than one of the reasons cited above, the crime will not be escape from commitment. It will be either escape from confinement or escape from custody.

20.20 Escape from Custody (§575.200) Penalty varies (see below)

Code

1. A person commits the crime of escape from custody if, while being held in custody after arrest for any crime, he escapes from custody.
2. Escape from custody is a class A misdemeanor unless:
   (1) It is effected by means of a deadly weapon or dangerous instrument or by holding any person as hostage, in which case escape from custody is a class A felony;
   (2) The person escaping is under arrest for a felony, in which case escape from custody is a class D felony.

Elements

A person commits the crime of escape from custody if he:
1. is being held
2. in custody
3. after arrest
4. for any crime and
5. he escapes from custody.

Major Changes

Pre-Code statutes required that the custody, confinement, or imprisonment be "lawful". This word is not used in the Code sections, and this is an important difference. Under the Code, if a person escapes after being placed in custody pursuant to an unlawful arrest, the fact of the illegal arrest is a mitigating factor but not a complete defense.

Comments

Custody is defined in §556.061(6) as follows: a person is in custody when he has been arrested but has not been delivered to a place of confinement. If a person is arrested, placed in confinement, and then is subsequently transferred to another place of confinement, he is deemed to be in confinement and not custody during this period of transfer. See paragraph 20.21.

Note that the escape of a person being held on a municipal ordinance violation or an infraction is not a violation of this section.

Penalty

Normally, escape from custody is a Class A misdemeanor. However, it will become
1. a Class A felony if:
   a) the escape if effected
   b) by means of
      1) a deadly weapon, or
      2) a dangerous instrument, or
      3) by holding any person hostage
      or
2. a Class D felony if:
   a) the person escaping
   b) is under arrest for a felony.

20.21 Escape from Confinement (§575.210) Penalty varies (see below)

Code

1. A person commits the crime of escape from confinement if, while being held in confinement after arrest for any crime, or while serving a sentence after conviction for any crime, he escapes from confinement.

2. Escape from confinement is a class A misdemeanor except that it is:
   (1) A class A felony if it is effected by means of a deadly weapon or dangerous instrument or by holding any person as hostage;
   (2) A class D felony if:
      (a) The person escapes while being held on a felony charge or while serving a sentence after conviction of a felony; or
      (b) The escape is facilitated by striking or beating any person.

Elements

A person commits the crime of escape from confinement if:
1. while being held
2. in confinement
3. after
   a) an arrest for any crime, or
   b) a conviction and while serving a sentence for any crime
4. he escapes from confinement.

Comments

This section applies only when the prisoner is in confinement as distinguished from those situations when the prisoner is in custody. The Code defines confinement as:

> **a person is in confinement** when he is held in a place of confinement pursuant to arrest or order of a court, and remains in confinement until
> (a) A court orders his release; or
> (b) He is released on bail, bond, or recognizance, personal or otherwise; or
> (c) A public servant having the legal power and duty to confine him authorizes his release without guard and without condition that he return to confinement;
> (d) **A person is not in confinement if**
> a. He is on probation or parole, temporary or otherwise; or
> b. He is under sentence to serve a term of confinement which is not continuous, or is serving a sentence under a work-release program, and in either such case is not being held in a place of confinement or is not being held under guard by a person having the legal power and duty to transport him to or from a place of confinement.

Place of confinement means any building or facility and the grounds thereof wherein a court is legally authorized to order that a person charged with or convicted of an offense be held.

Under the Code definition, confinement *does not* include persons on bond, recognizance, probation, or parole. It will not apply when a prisoner is mistakenly released by jail authorities. However, the term confinement *does* apply to all actual confinement in a place of confinement, and as previously mentioned, once an individual is in confinement, he remains in confinement while in transit from one location to another, while outside the place of confinement for court appearances, work details, etc., or while on an emergency "leave for humanitarian purposes because of death or illness in the family." However, where a prisoner is serving a sentence which is not continuous (such as when he is confined on weekends only), or is participating in a work-release program (the "Huber Plan") whereby he is free without guard to work during the day and returns to his cell at night, he is "in confinement" only during the periods of actual confinement. See paragraph 20.22, failure to return to confinement.

As is true with custody, if a person is placed in confinement that is not lawful, he will *not* have a complete defense if he escapes. This is due to the Code's general policy of encouraging individuals to follow legal methods of testing the legality of confinement, and not to take the law into their own hands. However, if the conditions of confinement are such as to subject the defendant to a risk of death or serious physical harm, the defendant might avail himself of the general principles of justification. See chapter 8. See also **State v. Green,** 470 S.W.2d 565 (Mo. 1971).

Penalty

Normally, escape from confinement is a Class A misdemeanor. However, it will become
1. a Class A felony if:
   a) the escape is effected
   b) by means of
      1) a deadly weapon, or
      2) a dangerous instrument, or
      3) holding any person hostage.

2. a Class D felony if:
   a) the person escapes while
      1) being held on a felony charge, or
      2) serving a sentence after conviction of a felony
      or
   b) the escape is facilitated by
      1) striking any person, or
      2) beating any person.

Notice that there is one main difference between the penalties provided for escape from custody and those provided for escape from confinement. That is, when a person is confined for a misdemeanor and effectuates his escape by use of striking or beating on any person, the escape is aggravated from a Class A misdemeanor to a Class D felony. There is no similar provision in the escape from custody section.

20.22 Failure to Return to Confinement (§575.220) Penalty varies (see below)

Code

1. A person commits the crime of failure to return to confinement if, while serving a sentence for any crime under a work-release program, or while under sentence of any crime to serve a term of confinement which is not continuous, or while serving any other type of sentence for any crime wherein he is temporarily permitted to go at large without guard, he purposely fails to return to confinement when he is required to do so.

2. This section does not apply to persons who are free on bond, bail or recognizance, personal or otherwise, nor to persons who are on probation or parole, temporary or otherwise.

3. Failure to return to confinement is a class C misdemeanor unless:
   (1) The sentence being served is to the Missouri division of corrections, in which case failure to return to confinement is a class D felony; or
   (2) The sentence being served is one of confinement in a county jail on conviction of a felony, in which case failure to return to confinement is a class A misdemeanor.

Elements

A person commits the crime of failure to return to confinement if he:
1. purposely fails
2. to return
3. to confinement
4. when required to do so
5. while serving
   a) a sentence for any crime under a work-release program; or
   b) under sentence of any crime to serve a term for confinement which is not continuous; or
   c) any other type sentence for any crime wherein he is temporarily permitted to go at large without guard.

Note: This section *does not* apply to those persons who are free on bond, bail, recognizance (personal or otherwise), or probation or parole.

Major Changes

This section replaces pre-Code §557.351 RSMo. The pre-Code law combined escapes and attempts to escape with failing to return, whereas the Code deals with these offenses in individual sections which make them conceptually easier to deal with. Also, the Code deals with failing to return to any place of confinement for any sentence.

Penalty

Failure to return to confinement is usually a **Class C misdemeanor.** However, it is
1. a **Class D felony** if
   a) the sentence being served
   b) is to the Missouri division of corrections; or
2. a **Class A misdemeanor** if
   a) the sentence is being served
   b) by confinement in the county jail
   c) on conviction of a felony.

Comments

One problem area is the different treatment for failing to return to serve a felony sentence. Under the Code, the penalty varies depending on whether a person was confined in the county jail or to the department of corrections. If a felon was confined in the department of corrections and failed to return, this offense is punished as a Class D felony. The felon who fails to return to the county jail receives Class A misdemeanor punishment for the same offense. The reason for this difference is that by making failure to return to the penitentiary a felony, the sentences, whether consecutive or concurrent, will be served in the same place.

20.23 Aiding Escape of a Prisoner (§575.230) Penalty varies (see below)

1. A person commits the crime of aiding escape of a prisoner if he:
   (1) Introduces into any place of confinement any deadly weapon or dangerous instrument, or other thing adapted or designed for use in making an escape, with the purpose of facilitating the escape of any prisoner confined therein, or of facilitating the commission of any other crime; or
   (2) Assists or attempts to assist any prisoner who is being held in custody or confinement for the purpose of effecting the prisoner's escape from custody or confinement.
2. Aiding escape of a prisoner by introducing a deadly weapon or dangerous instrument into a place of confinement is a class B felony. Aiding escape of a prisoner being held in custody or confinement on the basis of a felony charge or conviction is a class D felony. Otherwise, aiding escape of a prisoner is a class A misdemeanor.

Elements

A person commits the crime of aiding the escape of a prisoner if he:

A. 1. introduces into any place of confinement
      a) a deadly weapon, or
      b) a dangerous instrument, or
      c) another thing adapted or designed for use in making an escape
   2. with the purpose
      a) of facilitating the escape of any prisoner confined therein; or
      b) of facilitating the commission of any other crime

OR

B. 1. assists or attempts to assist
   2. any prisoner being held in custody or confinement
   3. for the purpose
   4. of effecting the prisoner's escape from custody or confinement.

Major Changes

This Code section combines the pre-Code Missouri laws that were found in §§557.290, 557.300, 557.310, 557.320, 557.330 and 557.340 RSMo. It also replaces §§557.230, 557.240, 557.250, 557.260,

557.270 and 557.280 RSMo. These latter sections dealt with rescuing prisoners. Section 557.310 covered aiding persons charged with felonies; §557.320 applied to aiding prisoners charge with misdemeanors; and §557.340 applied to fellow prisoners aiding escape. Pre-Code §§557.310 and 557.320 applied only to persons lawfully detained. As with prior sections, this section does not include that element and thus is a change in the law.

It should be noted that there is no requirement that an escape occur in order for there to be a conviction for aiding escape. This is consistent with pre-Code law.

Under pre-Code law, introducing a weapon to aid the escape of a prisoner was a felony if the prisoner aided was a felon, or a misdemeanor if the prisoner aided was confined for a misdemeanor. Under the Code, this distinction is eliminated and introducing a weapon into a place of confinement to aid an escape makes the crime a **Class B felony.**

Source

The provision on introduction of weapons or instruments of escape is based on pre-Code §§557.290 and 557.300 RSMo.

Penalty

Normally, aiding escape of a prisoner is a **Class A misdemeanor.** However, it is

1. a **Class B felony** if
   a) escape is aided
   b) by introducing into a *place of confinement*
      1) a deadly weapon, or
      2) a dangerous instrument

OR

2. a **Class D felony** if a person
   a) aids the escape of a prisoner
   b) being held in custody or confinement
   c) on the basis of a felony charge or conviction.

Comments

The Code section applies to aiding the escape of a prisoner in custody or confinement on a **charge of any crime** or serving a sentence after **conviction of any crime.**

Note that there is no requirement that an escape actually occur in order for there to be a conviction for aiding escape.

20.24 Permitting Escape (§575.240) Class B felony—if dangerous instrument or deadly weapon is introduced, otherwise Class D felony

Code

1. A public servant who is authorized and required by law to have charge of any person charged with or convicted of any crime commits the crime of permitting escape if he knowingly:
   (1) Suffers, allows or permits any deadly weapon or dangerous instrument, or anything adapted or designed for use in making an escape, to be introduced into or allowed to remain in any place of confinement, in violation of law, regulations or rules governing the operation of the place of confinement; or
   (2) Suffers, allows or permits a person in custody or confinement to escape.

2. Permitting escape by suffering, allowing or permitting any deadly weapon or dangerous instrument to be introduced into a place of confinement is a class B felony; otherwise, permitting escape is a class D felony.

Elements

A **public servant** who is authorized and required by law to have charge of any person charged or convicted of any crime, commits the crime of permitting escape if:

A. he
   1. knowing suffers, allows, or permits
   2. any
      a) deadly weapon, or
      b) dangerous instrument, or
      c) thing adapted or designed for use in making an escape
   3. to be introduced into or allowed to remain in
   4. any place of confinement
   5. in violation of law, regulations, or rules governing operation of the place of confinement

OR

B. he
   1. knowingly suffers, allows, or permits
   2. a person in custody or confinement
   3. to escape.

Major Changes

This section combines and amends pre-Code §§557.420 and 557.430 RSMo. The adjective "disguised" has been removed from "arms" or "instruments," and the Code now uses the phrase "in violation of law, regulations, or rules governing the operation of the place of confinement" to distinguish between lawful and unlawful introductions. Pre-Code §557.430 RSMo. required that the custody be lawful. Again, this has been changed.

The Code makes some substantial changes in the penalties provided by pre-Code law. Under the Code, allowing the introduction of a weapon is a Class B Felony. Under the pre-Code law it is a felony only if the proposed recipient of the weapon is a felon, otherwise it was a misdemeanor.

Any other violation of this section under the Code is a Class D Felony. Again this changes tbe pre-Code law which stated that allowing the introduction of an instrument for escape to benefit a misdemeanant was only a misdemeanor. It should be noted that even though aiding the escape of a misdemeanant has been reduced to a misdemeanor under Code §§575.200, 575.210, and 575.230, it is retained as a felony for a public servant to aid such an escape.

Source

Pre-Code §§557.420 and 557.430.

Comments

See discussion in **Major Changes.**

20.25 Disturbing a Judicial Proceeding (§575.250) Class A misdemeanor

Code

1. A person commits the crime of disturbing a judicial proceeding if, with purpose to intimidate a judge, attorney, juror, party or witness, and thereby to influence a judicial proceeding, he disrupts or disturbs a judicial proceeding by participating in an assembly and calling aloud, shouting, or holding or displaying a placard or sign containing written or printed matter, concerning the conduct of the judicial proceeding, or the character of a judge, attorney, juror, party or witness engaged in such proceeding, or calling for or demanding any specified action or determination by such judge, attorney, juror, party or witness in connection with such proceeding.

2. Disturbing a judicial proceeding is a class A misdemeanor.

Elements

A person commits the crime of disturbing a judicial proceeding if he:

1. disrupts or disturbs a judicial proceeding by:
   a) participating in an assembly and
   b) calling aloud or
   c) shouting, or
   d) holding or displaying a placard or sign containing written or printed matter concerning the conduct of the judicial proceeding, or the character of a judge, juror, attorney, party or witness engaged in such proceeding, or calling for any specified action or determination by such judge, attorney, juror, party or witness in connection with such proceeding.

2. with purpose to intimidate a judge, attorney, juror, party, or witness and thereby influence a judicial proceeding.

Source

This section is based on New York Penal Code §215.50(7).

Comments

New York Penal Code §215.50(7) on which this section is based provides:

> "A person is guilty of criminal conduct when he engages in any of the following conduct:
> "...
> "(7) On or along a public street or sidewalk within a radius of two hundred feet of any building established as a courthouse, he calls aloud, shouts, holds or displays placards or signs containing written or printed matter, concerning the conduct of a trial being held in such courthouse or the character of the court or jury engaged in such trial or calling for or demanding any specified action or determination by such court or jury in connection with such trial."

In **Cox v. Louisiana,** 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), the United States Supreme Court considered a statute which prohibited the above conduct "near" a courthouse. The Court declined to rule that such a statute was a violation of the right of free speech, but did hold that the term "near" was unconstitutionally vague. New York has attempted to remedy this by placing the specific limitation of two hundred feet in the statute. However, this arbitrary limit is not necessarily related to the potential problems which the section seeks to avert. The Code provision avoids the problems of both these statutes by eliminating the element of nearness or a specific distance and focusing upon the effect of the conduct of the participants on the judicial proceeding.

The Code section differs from the New York provision in two other material respects. First, it adds the element of a "purpose to intimidate" and second, the actor must both "participate in an assembly" *and* shout or carry a sign, etc. Thus, a single person cannot violate the statute. Nor is it violated by a member of a group who does nothing more than be present. The committee considered specifying that mere presence at the scene where a disturbance takes place is insufficient for arrest, prosecution or conviction. However, since this is merely a restatement of existing case law, it was rejected as superfluous.

20.26 Tampering with a Judicial Proceeding (§575.260) Class C felony

Code

1. A person commits the crime of tampering with a judicial proceeding if, with purpose to influence the official action of a judge, juror, special master, referee or arbitrator in a judicial proceeding, he:
   (1) Threatens or causes harm to any person or property; or
   (2) Engages in conduct reasonably calculated to harass or alarm such official or juror; or

(3) Offers, confers or agrees to confer any benefit, direct or indirect, upon such official or juror.

2. Tampering with a judicial proceeding is a class C felony.

Elements

A person commits the crime of tampering with a judicial proceeding if he:

1. acting with a purpose to influence the official action of a judge, juror, special master, referee, or arbitrator in a judicial proceeding
2. threatens or causes harm to any person or property, or
3. engages in conduct reasonably calculated to harass or alarm such official or juror, or
4. offers, confers, or agrees to confer any benefit, direct or indirect, upon such official or juror.

Under the Code, "juror" includes persons who have been summoned as prospective jurors in a grand or petit jury.

Major Changes

This is a revision of pre-Code §557.110 RSMo. with the addition of judges and masters to the potential subjects of improper influence.

Comments

The phrase "benefit, direct, or indirect" is broad enough to include offers of things other than money, and benefits to the official's family or friends.

20.27 Tampering with a Witness (§575.270)

Class D felony—if the witness is involved in a felony prosecution or if the purpose of tampering is to induce the witness to testify falsely

Class A misdemeanor—otherwise

Code

1. A person commits the crime of tampering with a witness if, with purpose to induce a witness or a prospective witness in an official proceeding to disobey a subpoena or other legal process, or to absent himself or avoid subpoena or other legal process, or to withhold evidence, information or documents, or to testify falsely, he:
   (1) Threatens or causes harm to any person or property; or
   (2) Uses force, threats or deception; or
   (3) Offers, confers or agrees to confer any benefit, direct or indirect, upon such witness.
2. Tampering with a witness in a felony prosecution, or tampering with a witness with purpose to induce the witness to testify falsely is a class D felony. Otherwise, tampering with a witness is a class A misdemeanor.

Elements

A person commits the crime of tampering with a witness if:

1. for the purpose of inducing a witness or a prospective witness in an official proceeding
   a) to disobey a subpoena or other legal process; or
   b) to absent himself; or
   c) avoid subpoena or other legal process; or
   d) to withhold evidence, information or documents; or
   e) to testify falsely; he:
2. threatens or causes harm to any person or property; or
3. uses force, threats, or deception; or
4. offers, confers, or agrees to confer any benefit, direct or indirect, upon such witness.

Major Changes

This section is a revision of part of pre-Code §557.090 RSMo.

Comments

Note that this section covers witnesses in an official proceeding which is defined as: "any cause, matter, or proceeding where the laws of this state require that evidence considered therein be under oath or affirmation;" (§575.010(6)).

20.28 Acceding to Corruption (§575.280) Penalty varies (see below)

Code

1. A person commits the crime of acceding to corruption if:
(1) He is a judge, juror, special master, referee or arbitrator and knowingly solicits, accepts, or agrees to accept any benefit, direct or indirect, on the representation or understanding that it will influence his official action in a judicial proceeding pending in any court or before such official or juror;
(2) He is a witness or prospective witness in any official proceeding and knowingly solicits, accepts, or agrees to accept any benefit, direct or indirect, on the representation or understanding that he will disobey a subpoena or other legal process, or absent himself or avoid subpoena or other legal process, or withhold evidence, information or documents, or testify falsely.

2. Acceding to corruption under subdivision (1) of subsection 1 of this section is a class C felony.

3. Acceding to corruption under subdivision (2) of subsection 1 of this section in a felony prosecution, or on the representation or understanding of testifying falsely is a class D felony. Otherwise, acceding to corruption is a class A misdemeanor.

Elements

A person commits the crime of acceding to corruption if:

A. 1. he is a judge, juror, special master, referee or arbitrator and
2. knowingly solicits, accepts, or agrees to accept
3. any direct or indirect benefit
4. on the representation or understanding that it will influence his official action in a judicial proceeding pending before such official or juror.

OR

B. 1. he is a witness or prospective witness in any official proceeding and
2. knowingly solicits, accepts, or agrees to accept
3. any direct or indirect benefit
4. on the representation or understanding that he will disobey a subpoena or other legal process, withhold evidence, information, or documents, or testify falsely.

Penalty: A violation of part "A" is a **class C felony.** A violation of part "B" is a **class D felony** if it is a felony trial or the witness agrees to testify falsely. Otherwise, it is a **class A misdemeanor.**

Major Changes

Section 1(1) is an expansion of pre-Code §557.100 RSMo. in that "judges" and "special masters" are added to the class of offenders and the crime has been broadened to include solicitation of bribes and agreement to accept bribes.

Section 1(2) is a revision of the last half of pre-Code §557.090 RSMo. with no substantial change.

20.29 Improper Communication (§575.290) Class B misdemeanor

Code

1. A person commits the crime of improper communication if he communicates, directly or indirectly, with any juror, special master, referee, or arbitrator in a judicial proceeding, other than as part of the proceedings in a case, for the purpose of influencing the official action of such person.
2. Improper communication is a class B misdemeanor.

Elements

A person commits the crime of improper communication if he:
1. communicates directly or indirectly
2. with any juror, special master, referee, or arbitrator in a judicial proceeding
3. in a manner not part of the proceedings in the case
4. for the purpose of influencing the official action of such person.

Major Changes

This is a revision of pre-Code §557.130 RSMo. Special Masters have been added to the class of persons covered.

20.30 Misconduct by a Juror (§575.300) Class A misdemeanor

Code

1. A person commits the crime of misconduct by a juror if, being a juror, he knowingly:
(1) Promises or agrees, prior to the submission of a cause to the jury for deliberation, to vote for or agree to a verdict for or against any party in a judicial proceeding; or
(2) Receives any paper, evidence or information from anyone in relation to any judicial proceeding for the trial of which he has been or may be sworn, without the authority of the court or officer before whom such proceeding is pending, and does not immediately disclose the same to such court or officer.
2. Misconduct by a juror is a class A misdemeanor.

Elements

A person commits the crime of misconduct by a juror if:
A. 1. he is a juror and he
2. knowingly promises or agrees,
3. prior to the submission of the cause to the jury for deliberation,
4. to vote for or agree to a verdict for or against any party in a judicial proceeding.

OR

B. 1. he is a juror and he
2. knowingly receives from anyone
3. any paper, evidence or information
4. in relation to any judicial proceeding for the trial of which he has been or may be sworn
5. without the authority of the court or officer before whom the proceeding is pending
6. and does not immediately disclose the same to such court or officer.

Major Changes

This is a revision of pre-Code §557.120 RSMo.

Comments

This section prohibits jurors and prospective jurors from knowingly receiving information about the case without the authority and knowledge of the court. It also prohibits them from knowingly promising or agreeing to vote for a certain result before the case is submitted to the jury. The term "juror" includes persons summoned as prospective jurors.

12.31 Misconduct in Selecting or Summoning a Juror (§575.310) Class B misdemeanor

Code

1. A public servant authorized by law to select or summon any juror commits the crime of misconduct in selecting or summoning a juror if he knowingly acts unfairly, improperly or not impartially in selecting or summoning any person or persons to be a member or members of a jury.
2. Misconduct in selecting or summoning a juror is a class B misdemeanor.

Elements

A person commits the crime of misconduct in selecting or summoning a juror if he:
1. is a **public servant** authorized by law to summon or select jurors and he
2. knowingly acts unfairly, improperly or not impartially
3. in selecting or summoning any person or persons to be a member or members of a jury.

20.32 Misconduct in Administration of Justice (§575.320) Class A misdemeanor

Code

1. A public servant, in his public capacity or under color of his office or employment, commits the crime of misconduct in administration of justice if:
   (1) He is charged with the custody of any person accused or convicted of any crime or municipal ordinance violation and he coerces, threatens, abuses or strikes such person for the purpose of securing a confession from him;
   (2) He knowingly seizes or levies upon any property or dispossesses anyone of any lands or tenements without due and legal process, or other lawful authority;
   (3) He is a judge and knowingly accepts a plea of guilty from any person charged with a violation of a statute or ordinance at any place other than at the place provided by law for holding court by such judge;
   (4) He is a jailer or keeper of a county jail and knowingly refuses to receive, in the jail under his charge, any person lawfully committed to such jail on any criminal charge or criminal conviction by any court of this state, or on any warrant and commitment or capias on any criminal charge issued by any court of this state;
   (5) He is a law enforcement officer and violates the provisions of section 544.170, RSMo., by knowingly
      (a) Refusing to release any person in custody who is entitled to such release; or
      (b) Refusing to permit a person in custody to see and consult with counsel or other persons; or
      (c) Transferring any person in custody to the custody or control of another, or to another place, for the purpose of avoiding the provisions of that section; or
      (d) Preferring against any person in custody a false charge for the purpose of avoiding the provisions of that section.
2. Misconduct in the administration of justice is a class A misdemeanor.

Elements

A **public servant,** acting in his public capacity or under color of his office or employment, commits the crime of misconduct in administration of justice if:

A. 1. he is charged with the custody of
   2. any person accused or convicted of
   3. any crime or municipal ordinance violation and
   4. he coerces, threatens, abuses, or strikes such person
   5. for the purpose of securing a confession from him

   OR

B. 1. he knowingly seizes or levies upon any property or
   2. knowingly dispossesses anyone of any lands or tenements
   3. without due and legal process
   4. or other lawful authority

   OR

C. 1. he is a judge and
   2. knowingly accepts
   3. a plea of guilty
   4. from any person charged with a violation of a statute or ordinance
   5. at any place other than at the place provided by law for holding court by such judge

   OR

D. 1. he is a jailer or keeper of a county jail and
   2. knowingly refuses to receive in the jail under his charge
   3. any person lawfully committed to such jail
   4. on any criminal charge or any criminal conviction by any court of this state or
   5. on any warrant and commitment or capias on any criminal charge issued by any court of this state

   OR

E. 1. he is a law enforcement officer and violates the provisions of section 544.170 RSMo.
   2. by knowingly
      a) refusing to release any person in custody who is entitled to such release, or
      b) refusing to permit a person in custody to see and consult with counsel or other persons, or
      c) transferring any person in custody to the custody or control of another, or to another place, for the purpose of avoiding the provisions of 544.170 RSMo., or
      d) preferring against any person in custody a false charge for the purpose of avoiding the provisions of section 544.170 RSMo.

Major Changes

This section and Code §576.040 cover most of the present sections of Chapter 558 RSMo. relating to specific types of official misconduct.

Subsection 1(1) is basically pre-Code §558.360 without substantive change.

Subsection 1(2) is based on part of pre-Code §558.190 RSMo. It has been expanded to cover all public servants.

Subsection 1(3) is pre-Code §558.380 RSMo.

Subsection 1(4) is pre-Code §557.450 RSMo. The phrase "on any lawful process whatever" has been replaced by "on any warrant and commitment or capias on any criminal charge issued by any court of this State." This would allow the person in charge of a county jail to refuse to receive persons charged with or convicted of ordinance violations, but does not, of course, require him to do so.

Subsection 1(5) is a redrafting of the pre-Code penalty provisions of §544.170 RSMo. without substantive change.

Some existing statutes dealing with misconduct have not been included either here or in Code §576.040, official misconduct.

Comments

Only a public servant, acting in his official capacity or under color of his office, can violate this section. "Color of his office" means that the official acts in such a way that he thinks he is carrying out his duties, or he leads other persons to believe that he is acting under authority of his office.

CHAPTER 21

Offenses Affecting Government (§§576.010—576.070)

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21.1 Introduction

The offenses covered in this chapter of the Code deal primarily with offenses committed by public servants. A "**public servant**" means any person employed in any way by a government of this state who is compensated by the government by reason of his employment. It includes, but is not limited to, legislators, jurors, members of the judiciary and law enforcement officers. It does not include witnesses.

21.2 Bribery of a Public Servant (§576.010) Class D felony

Code

1. A person commits the crime of bribery of a public servant if he knowingly offers, confers or agrees to confer upon any public servant any benefit, direct or indirect, in return for:
   (1) The recipient's official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant; or
   (2) The recipient's violation of a known legal duty as a public servant.
2. It is no defense that the recipient was not qualified to act in the desired way because he had not yet assumed office, or lacked jurisdiction, or for any other reason.
3. Bribery of a public servant is a class D felony.

Elements

A person commits the crime of bribery of a public servant if he:
1. knowingly offers, confers or agrees to confer
2. any direct or indirect benefit
3. upon any public servant
4. in return for
   a) the recipient's official vote, opinion, recommendation, judgment, decision, or exercise of discretion as a public servant; or
   b) the recipient's violation of a known legal duty as a public servant.

Changes

This Code section replaces the pre-Code statutes on bribery of public officials (558.010 RSMo); bribing an officer to appoint to office (558.030 RSMo); bribery to procure office (558.050 RSMo); accepting an office procured by bribery (558.070 RSMo); attempting to bribe (558.080 RSMo); solicitation of bribe by public officer or employee (558.090 RSMo); and sale of public office (558.100 RSMo). The code section also replaces the miscellaneous bribery statutes pertaining to public servants outside Chapter 558. However, the bribery sections connected with the election laws are unaffected by the Code.

Source

Subsection 1 is based on pre-Code Missouri law. Subsection 2 is based on Model Penal Code §240.1, Colo. Rev. Stat. §40-8-302(2) and Michigan Revised Criminal Code §4705 (3) (Final Draft 1967).

Comments

Subsection 1 is basically a codification of pre-Code Missouri law. The pre-Code statute defines bribery in terms of "influencing" official action. **State v. Farris,** 229 S.W. 1100 (1900). The courts, however, have required allegation and proof of specific action sought or promised. The Code follows this interpretation. The benefit must be offered or given in the expectation that specific action or inaction will ensue, not in the hope that the official will be influenced in some vague way.

Subsection 2 changes pre-Code Missouri law in that it is no longer a defense to assert that the person bribed was for same reason unqualified to act in the desired way. See **State v. Adcox,** 312 Mo. 55, 278 S.W. 990 (1925) The reason an official is unqualified is not relevant. The statute precludes the defense regardless of the reason the official is unable to act. Thus, the fact the public servant bribed had not assumed office at the time of the bribe is not relevant.

Other Related Offenses

See Code §§575.260 and 575.280. In an appropriate set of circumstances this section could be a lesser included offense of §§575.260. (Tampering with a judicial proceeding).

21.3 Public Servant Acceding to Corruption (§576.020) Class D felony

Code

1. A public servant commits the crime of acceding to corruption if he knowingly solicits, acepts or agrees to accept any benefit, direct or indirect, in return for:
   (1) His official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant; or
   (2) His violation of a known legal duty as a public servant.
2. Acceding to corruption by a public servant is a class D felony.

Elements

A **public servant** commits the crime of acceding to corruption if he:

1. knowingly solicits, accepts, or agrees to accept
2. any direct or indirect benefit
3. in return for
   a) his official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant, or
   b) his violation of a known legal duty as a public servant.

Comments

The comments under paragraph 21.2 are applicable here.

21.4 Obstructing Government Operations (§576.030) Class B misdemeanor

Code

1. A person commits the crime of obstructing government operations if he purposely obstructs, impairs, hinders or perverts the performance of a governmental function by the use or threat of violence, force, or other physical interference or obstacle.
2. Obstructing government operations is a class B misdemeanor.

Elements

A person commits the crime of obstructing governmental operations if he:
1. purposely obstructs, impairs, hinders, or perverts the performance
2. of a governmental function
3. by using or threatening violence, force or other physical interference or obstacle.

Changes

This section is new to Missouri law.

Source

This Code section is based on Model Penal Code §242.1; Colo. Rev. Stat. §40-8-102 and New York Penal Code §195.05.

Comments

This section is designed to cover the impedance of governmental functions.

Included and Related Offenses

Given the appropriate circumstances, this offense may be a lesser included offense to a number of more serious crimes such as false bomb threat to obstruct a governmental function (575.090), resisting or interfering with arrest (575.150), interfering with legal process (575.160), disturbing judicial proceedings (575.250) or tampering with a witness (575.270). Note that the defendant's purpose in these more serious crimes would have to be to obstruct a governmental function for this offense to be a lesser included one.

21.5 Official Misconduct (§576.040) Class A misdemeanor

Code

1. A public servant, in his public capacity or under color of his office or employment, commits the crime of official misconduct if:
   (1) He knowingly discriminates against any employee or any applicant for employment on account of race, creed, color, sex or national origin, provided such employee or applicant possesses adequate training and educational qualifications;
   (2) He knowingly demands or receives any fee or reward for the execution of any official act or the performance of a duty imposed by law or by the terms of his employment, that is not due, or that is more than is due, or before it is due;
   (3) He knowingly collects taxes when none are due, or exacts or demands more than is due;

(4) He is a city or county treasurer, city or county clerk, or other municipal or county officer, or judge of a municipal or county court, and knowingly orders the payment of any money, or draws any warrant, or pays over any money for any purpose other than the specific purpose for which the same was assessed, levied and collected, unless it is or shall have become impossible to use such money for that specific purpose;
(5) He is an officer or employee of any court and knowingly charges, collects or receives less fee for his services than is provided by law;
(6) He is an officer or employee of any court and knowingly directly or indirectly buys, purchases or trades for any fee taxed or to be taxed as costs in any court of this state, or any county warrant, at less than par value which may be by law due or to become due to any person by or through any such court;
(7) He is a county officer, deputy or employee and knowing traffics for or purchases at less than the par value or speculates in any court warrant issued by order of the county court of his county, or in any claim or demand held against such county.

2. Official misconduct is a class A misdemeanor.

Elements

A public servant, while acting in his public capacity or under color of his office or employment, commits the crime of official misconduct if:

1. a) he knowingly discriminates on the basis of race, creed, color, sex or national origin
   b) against any employee or applicant for employment
   c) where the employee or applicant possesses adequate training and educational qualifications for the position in question; or
2. a) he knowingly demands or receives
   b) any fee or reward that is not due, or that is more than due, or before it is due
   c) for the execution of any official act or performance of a duty imposed by law or the terms of his employment; or
3. he knowingly collects taxes when none are due or exacts or demands more than is due; or
4. a) he is a city or county treasurer, clerk or other officer of a city or county, or judge of a municipal or county court and
   b) he knowingly orders the payment of, pays over, or draws a warrant to pay any money
   c) for any purpose other than the specific purpose for which the same was assessed, levied and collected
   d) unless it has become impossible to use the money for that purpose; or
5. a) he is an officer or employee of any court and
   b) knowingly charges, collects or receives less fee for his services than is provided by law; or
6. a) he is an officer or employee of any court and
   b) knowingly purchases, buys or trades for any
   c) fee taxed or taxable as costs in any court in this state, or county warrant, at less than par value which may be by law due or become due to any person by or through any such court; or
7. a) he is a county officer, deputy or employee and
   b) knowingly traffics for or purchases at less than par value or speculates in
      1) any court warrant issued by order of the county court of his county, or
      2) any claim or demand held against his county.

Changes

This Code section replaces the following pre-Code sections:
§558.110—Oppression in office.
§558.140—Exacting illegal fees.
§558.150—Collecting illegal taxes.
§558.155—Discrimination based on race or creed.
§558.160—Misconduct or neglect of duty.
§558.180—Usurping public office.

§558.200—Clerks and deputies not to buy fees.
§558.210—Penalty for buying fees.
§558.260—Fraudulent disbursement of money.
§558.280—Diversion of money.
§558.300—Officers speculating in county warrants.

Please note that subsection 1(1) is pre-Code §558.155 with the addition of a ban on discrimination on account of sex to comport with present federal law. Subsection 1(2) is pre-Code §558.140 without substantive change. Subsection 1(3) is pre-Code §558.150 with a slight change in wording. Subsection 1(4) is a combination of pre-Code §§558.260 and .280. Subsections 1(5) and 1(6) are based on pre-Code §558.200 without substantive change. Subsection 1(7) is basically pre-Code §558.300.

One major change is that the offense has been changed from a felony to a misdemeanor.

Source

Present Missouri law. See the "Changes" section for specific citations.

21.6 Misuse of Official Information (§576.050) Class A misdemeanor

Code

1. A public servant commits the crime of misuse of official information if, in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he knowingly:
   (1) Acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action; or
   (2) Speculates or wagers on the basis of such information or official action; or
   (3) Aids, advises or encourages another to do any of the fore-going with purpose of conferring a pecuniary benefit on any person.
2. Misuse of official information is a class A misdemeanor.

Elements

A public servant commits the crime of misuse of official information if:
1. in contemplation of official action by himself or by a governmental unit he is associated with, or
2. in reliance on information not available to the public, that he has access to in his official capacity,
3. he knowingly
   a) acquires a pecuniary interest in any property, transaction, or enterprise affected by the information or official action, or
   b) speculates or wagers on the basis of the information or official action, or
   c) aids, advises or encourages someone else to do any of the foregoing with the purpose of conferring a pecuniary benefit on any person.

Changes

This section is new to Missouri law.

Source

This section is based on Colo. Rev. Stat. §40-8-402. See similar provisions in the Model Penal Code §243.2; Michigan Revised Criminal Code §4810 (Final Draft 1967) and Texas Penal Code §39.03.

Comments

This section is new to Missouri law. Its purpose is to preserve the financial integrity of governmental units. Also, the law encourages government workers to work for the government and not themselves. Note that this section **does not** apply to the use of information that is **publicly available** but not generally known.

21.7 Failure to Give a Tax List (§576.060) Infraction

Code

1. A person commits the crime of failure to give a tax list if, when requested by a government assessor, he knowingly fails to give a true list of all his taxable property, or to take and subscribe an oath or affirmation to such list as required by law.
2. Failure to give a tax list is an infraction.

Elements

A person commits the crime of failure to give a tax list if:
1. when requested to do so by a government assessor,
2. he knowingly fails to give a true list of all his taxable property, or
3. he knowingly fails to take and subscribe an oath or affirmation to his tax list as required by law.

Comments

This section replaces the pre-Code law on refusing to give a tax list (557.510 RSMo) without substantive change.

21.8 Treason (§576.070) Class A felony

Code

1. A person owing allegiance to the state commits treason if he purposely levies war against the state, or adheres to its enemies by giving them aid and comfort.
2. No person shall be convicted of treason unless one or more overt acts are alleged in the indictment or information.
3. In a trial on a charge of treason, no evidence shall be given of any overt act that is not specifically alleged in the indictment or information.
4. No person shall be convicted of treason except upon the direct evidence of two or more witnesses to the same overt act, or upon his confession under oath in open court.
5. Treason is a class A felony.

Elements

A person commits the crime of treason if he:
1. owes allegiance to the state and
2. he purposely levies war against the state, or
3. adheres to its enemies by giving them aid and comfort.

Comments

This section replaces the pre-Code law on treason (562.010 and 546.350 RSMo). This statute also requires that one or more overt acts must be alleged in the information or indictment and that at least two witnesses to the same overt act or a confession in open court is required for conviction. There are no reported cases under the pre-Code statute.

CHAPTER 22

Drug Offenses (Chapter 195 RSMo)

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22.1 Introduction

Chapter 195 RSMo defines and regulates the use of controlled substances. Misuse of these substances is defined in 195.020, 195.240 and 195.250. Penalties for misuse are delineated in 195.200 (Schedule I and II drugs) and 195.270 (Schedule III, IV, and V drugs).

Major Changes

The Code **does not change the drug laws except that it will have an effect on attempts to possess, use, sell and manufacture controlled substances.** Since Sections 195.170 and 195.250 specifically criminalize fraudulent **attempts** to obtain controlled substances, these attempts are punished as defined in 195.200 and 195.270 rather than under the attempt statute in the Code. None of the other criminal statutes within the controlled substances chapter specifically make attempted violations crimes. Such attempts are therefore punished according to the attempt statute in the Code (564.011) rather than under 195.200 and 195.270 of the existing law.

Each of the controlled substances comes under one of five schedules:

Schedule I drugs—high potential for abuse and no accepted medical use.

Schedule II drugs—high potential for abuse but has a currently accepted medical use. Opium is an example.

Schedule III drugs—a lesser potential for abuse but has a currently accepted medical use and abuse may lend to moderate or low physical dependence, or high psychological dependence (amphetamines).

Schedule IV drugs—low potential for abuse—may lead to limited physical or psychological dependence.

Schedule V drugs—similar to Schedule 4, but specifically includes preparations containing limited quantities of certain narcotic drugs.

22.2 Prohibited Acts (195.020)
Penalty varies; see below.

Elements

A person violates Section 195.020 RSMo if he:

A. 1) Manufactures, possesses, has under his control, sells, prescribes, administers, dispenses, distributes, or compounds,

2) a controlled or counterfeit substance except as authorized in 195.010—195.320; or

B. 1) Possesses any apparatus, devices, or instruments for unauthorized use of a controlled substance. This subsection has been declared unconstitutional since no penalty is provided. (See comments below.)

Penalty

Penalties are set out in 195.200 and 195.270 which are discussed in paragraphs 22.6 and 22.9 of this book. All violations are felonies except:

1) First offenses of possession of 35 grams or less of marijuana or 5 grams or less of hashish is a misdemeanor,

2) First offenses of delivery of less than 25 grams of marijuana or less than 5 grams of hashish for no remuneration is a misdemeanor.

Comment

The provisions of subsection "B" criminalizing possession of narcotics paraphernalia was declared unconstitutional in **State v. Harper**, 510 S.W.2d 749, because no penalty is specified for the violation.

22.3 Certain use of vessels, vehicles (§195.025)
Penalty varies; see below.

Elements

A person commits a violation of Section 195.025 RSMo if he:

1) transports, carries, and conveys any controlled substance by means of any vessel, vehicle, or aircraft, except as authorized in Sections 195.010 to 195.320; or

2) conceals or possesses any controlled substance in or upon any vessel, vehicle or aircraft; or

3) uses any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, reception, purchase, sale, barter, exchange or giving away of any controlled substance.

Penalty

Penalties are set out in Section 195.200 and 195.270. They are discussed in paragraphs 22.6 and 22.9 of this book. All violations are felonies except:

1) First offenses of possession of 35 grams or less of marijuana or 5 grams or less of hashish is a misdemeanor,

2) First offenses of delivery of less than 25 grams of marijuana or 5 grams of hashish for no remuneration is a misdemeanor.

22.4 User of controlled substances to keep substance in container in which obtained (§195.110)
Felony—see paragraph 22.6.

Elements

A person to whom or for whose use any controlled substance in Schedule II has been prescribed, sold, or dispensed by a physician, dentist, podiatrist, or apothecary, or other person authorized under the provisions of section 195.050 and the owner of any animal for which any such drug has been prescribed, sold, or dispensed by a veterinarian, may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same.

Penalty

Penalties are set out in §195.200. The penalties are discussed in paragraph 22.6.

22.5 Fraudulent attempts to obtain controlled substances (§195.170)

Elements

1. No person shall obtain or attempt to obtain a controlled substance or procure or attempt to procure the administration of the controlled substance by fraud, deceit, misrepresentation, or subterfuge; or by the forgery or alteration of a prescription or of any written order; or by the concealment of a material fact; or by the use of a false name or the giving of a false address.

2. Information communicated to a physician in an effort unlawfully to procure a controlled substance or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication; provided, however, that no physician or surgeon shall be competent to testify concerning any information which he may have acquired from any patient while attending him in a professional character and which information was necessary to enable him to prescribe for such patient as a physician, or to perform any act for him as a surgeon.

3. No person shall willfully make a false statement in any prescription, order, report, or record, required by sections 195.010 to 195.320.

4. No person shall, for the purpose of obtaining a controlled substance falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, podiatrist, veterinarian, or other authorized person.

5. No person shall make or utter any false or forged prescription or false or forged written order.

6. No person shall affix any false or forged label to a package or receptacle containing controlled substances.

7. The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of section 195.080, in the same way as they apply to transactions under all other sections.

Comment

Penalties are set out in Sections 195.200 and 195.270. All violations are felonies except as noted in paragraphs 22.6 and 22.9. It is not an element of this crime that the pharmacist rely on the misrepresentation used to acquire drugs.

22.6 Penalties for violations relating to Schedule I and II drugs (§195.200)

Section 195.200 provides:

1. Any person violating any provision of this chapter relating to Schedules I or II is punishable as follows:

(1) For the first offense, other than selling, giving or delivering any controlled substance listed in Schedule I or II, by imprisonment in a state correctional institution for a term of not more than twenty years, or by imprisonment in a county jail for a term of not less than six months nor more than one year, provided that:

(a) For the first offense of possession of thirty-five grams or less of marijuana or five grams or less of hashish, such person shall be confined in the county jail for a term of not more than one year, or be fined no more than one thousand dollars, or be punished by both such confinement and fine.

(b) For the second and subsequent offenses for the possession of marijuana or for the first offense of possession of more than thirty-five grams of marijuana or more than five grams of hashish, any person, upon conviction, shall be imprisoned in a state correctional institution for a term of not more than five years, or be confined in the county jail for not more than one year, or be fined not more than one thousand dollars or be both confined and fined.

(c) Any person, who delivers less than twenty-five grams of marijuana or less than five grams of hashish for no remuneration to any other person shall, on conviction, be punished by confinement in the county jail for not more than one year, or be fined not more than one thousand dollars, or by both such confinement and fine, provided that this penalty shall be applicable only upon the first offense and this paragraph shall not apply if such person has been previously convicted of any felony related to controlled substances.

(2) For the second offense under this chapter, relating to Schedules I or II except as provided in paragraph (b) of subdivision (1) of subsection 1 of this section, and other than selling, giving or delivering of any drug, listed in Schedule I or II, or in the case of a first conviction under this chapter for an offense other than selling, giving or delivering of any drug, listed in Schedule I or II, if the person has previously been convicted of any felony violation of the laws of this state, or of the United States, or of any other state, territory or district relating to controlled substances, by imprisonment in a state correctional institution for a term of not less than five years nor more than life imprisonment.

(3) Except as provided in paragraph (b) of subdivision (1) of subsection 1 of this section, for the third or subsequent offense under this chapter, relating to Schedule I or II other than selling, giving or delivering of any drug listed in Schedule I or II, or if the person has previously been convicted two or more times in aggregate of any felony violation of the laws of this state, or of the United States, or of any other state, territory or district relating to controlled substances, by imprisonment in a state correctional institution for a term of not less than ten years nor more than life imprisonment.

(4) Except as provided in paragraph (c) of subdivision (1) of subsection 1 of this section, for the offense of selling, giving or delivering any controlled substance listed in Schedule I or II, to a person, by imprisonment in a state correctional institution for a term of not less than five years nor more than life imprisonment.

(5) For the offense of selling, giving or delivering any controlled substance listed in Schedule I or II to a person if the offender has previously been convicted of any felony violation of the laws of this state, or of the United States, or any other state, territory or district relating to controlled substances, by imprisonment in a state correctional institution for a term of not less than ten years nor more than life imprisonment.

2. If any person is to be punished under the provisions of subdivision (2), (3), or (5) of subsection 1 the duty develops upon the court to affix the term of imprisonment; in all other cases punishment shall be affixed as otherwise provided by the law.

3. Prior convictions under this chapter shall be pleaded, heard and determined in the same manner as in all other cases.

4. No parole, probation, suspended sentences or any other form of judicial clemency may be exercised in behalf of any person punished under subdivision (3) or (5) of subsection 1.

22.7 Possession, sale, distribution, or transfer of certain substances prohibited (§195.240)

Felony; see paragraph 22.9.

Elements

The possession, sale, distribution, or transfer of any controlled substance listed in Schedules III, IV, or V, or any apparatus, device or instrument for the unauthorized use of such substances is unlawful, except in the usual course of business or practice, or in the performance of their official duties by the following persons:

(1) Persons licensed under the provisions of chapters 330, 332, 334, 335, 338, and 340, RSMo;

(2) Persons who procure controlled substances

(a) for handling by or under the supervision of persons employed by them who are licensed under the provisions of chapters 330, 332, 334, 338, and 340, RSMo, or

(b) for the purpose of lawful research, teaching, or testing and not for resale;

(3) Hospitals and other institutions which procure controlled substances for lawful administration by persons described in subdivision (1);

(4) Officers or employees of appropriate enforcement agencies of federal, state, or local governments, pursuant to their duties in enforcing the provisions of this chapter;

(5) Manufacturers and wholesalers of controlled substauces;

(6) Carriers and warehousemen handling or distributing controlled substances or drugs;

(7) Persons using controlled substances for medical purposes upon the written prescription or personal dispensation by a person licensed under the provision of chapters 330, 332, 334, 338, and 340, RSMo.

Penalty

Two to ten years imprisonment or up to one year in the county jail and/or up to $1,000 fine (195.270).

22.8 Obtaining controlled substances by fraud or deception (§195.250)

Elements

A person commits the crime of obtaining controlled substances by fraud or deception if he:

1) obtains or attempts to obtain, or
2) procures or attempts to procure the administration of
3) any controlled substance listed in Schedule III, IV or V
4) by means of
   a) fraud, deceit, misrepresentation, or subterfuge; or
   b) forgery or alteration of a prescription or of any written order; or
   c) concealment of a material fact; or
   d) the use of a false name or the giving of a false address.

Penalty

Two to ten years imprisonment, or confinement in the county jail for not more than one year or a fine of not more than $1,000; or both a fine and imprisonment.

22.9 Penalties (§195.270)

Possession, sale, distribution or transfer and acquisition by fraud or deception of a Class III, IV, or V drug shall be punished by imprisonment from two to ten years or by confinement in the county jail for up to one year and/or a fine up to $1,000.

CHAPTER 23

Miscellaneous Offenses Affecting Public Safety (§§577.010-577.100)

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23.1 Introduction

All of the offenses contained in this chapter are covered by the Code. The chapter also contains a discussion of breath test procedures and the rights of the suspect.

23.2 Driving While Intoxicated (§577.010) First Offense - Class B misdemeanor Second Offense - Class A misdemeanor Third Offense - Class D felony

Code

1. A person commits the crime of driving while intoxicated if he operates a motor vehicle while in an intoxicated or drugged condition.
2. Driving while intoxicated is:
   (1) For the first offense, a class B misdemeanor;
   (2) For the second offense, a class A misdemeanor;
   (3) For the third and subsequent offenses, a class D felony.
3. Evidence of prior convictions shall be heard and determined by the trial court, out of the hearing of the jury, prior to the submission of the case to the jury, and the court shall enter its findings thereon.

Elements

A person commits the crime of driving while intoxicated if he:
1. operates a motor vehicle
2. while in an intoxicated or drugged condition

Major Changes

This is essentially the same as pre-Code §564.440 RSMo. The language has been changed to conform to the rest of the Code. The only significant change is the addition of "drugged condition" which in effect combines pre-Code §564.445 RSMo with driving while intoxicated.

Comments

Section 577.030 sets out the effect of chemical analysis as evidence. That statute provides that ten-hundredths of one-percent or more by weight of alcohol in the person's blood shall be prima facie evidence that the person was intoxicated at the time the specimen was taken. However, this is not conclusive evidence of intoxication. Other evidence can always be considered on the question of whether the defendant was intoxicated. Keep in mind that the question is whether the defendant was intoxicated at the time he was operating the vehicle.

The term "drugged condition" is not defined by statute, however it appears to apply to a person under the influence of drugs to the extent that it affects his driving.

The term "operate" means to be in control of the motor vehicle.

23.3 Breath Test for Determining Alcoholic Content of Blood (§577.020)

Code

1. Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 577.020, 577.030 and 577.050, a chemical test of his breath for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while intoxicated. The test shall be administered by or at the direction of a law enforcement officer whenever the person has been arrested for the offense.

2. Chemical analysis of the person's breath, to be considered valid under the provisions of sections 577.020, 577.030 and 577.050, shall be performed according to methods approved by the state division of health by a person possessing a valid permit issued by the state division of health for this purpose. The state division of health is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct analyses and to issue permits which shall be subject to termination or revocation by the state division of health.

3. The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a test in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer.

4. Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test shall be made available to him.

Major Changes

This section is identical to pre-Code §564.441.

Comments

There is a substantial body of case law which is applicable to this statute since it is essentially the same as the pre-Code "breath test" statute. These cases basically cover the following four areas.

A. Right to counsel:

When a person is arrested for drunken driving, he has the right to counsel as any person who is arrested. A person arrested and held in custody has the right to consult with an attorney. He can call his lawyer, or, if his lawyer is at the station, he may consult with him there. However, recent case law in Missouri provides that a person arrested for drunken driving does not have a constitutional right to have his attorney present before he takes the breath test. In **Spradling v. Deimeke,** 528 SW 2d 759 (1975),

the appellant was picked up for drunken driving and brought into the police station. He told the police officer that he was not going to take the breathalyzer test without his attorney present. His attorney was out of town at the time. The trooper wrote this up as a refusal, and the appellant's driver's license was revoked for one year. On appeal, the Missouri Supreme Court stated that the appellant "was not entitled to delay the test until his attorney arrived nor to condition his taking the test on the presence of an attorney."

B. Unequivocal Refusal

A person who refuses to take a breathalyzer test after being arrested for drunken driving may have his license revoked. However, there has been some question about how definite the refusal must be to warrant a license revocation. Recent cases indicate that a refusal to take the breathalyzer test must be "express and unequivocal" before a driver's license can be revoked. **Thomas v. Schaffner**, 448 SW 2d 319 (Mo. App. 1969). In **Thomas**, the arrested licensee had initially refused to take the breathalyzer test. But after talking with his lawyer he agreed to take it. The court said that this was not an effective refusal, and the driver's license could not be revoked. In **Hester v. Spradling,** 508 SW 2d 194 (Mo. App. 1974), the arrestee called his lawyer, who advised him to take the test. The arrestee consented to the test, but the police would not administer it because they believed he had refused to take it by smoking a cigarette. About 40 or 50 minutes had elapsed since his arrest and the time he gave his consent. The court said this was not an unequivocal refusal, and his license could not be revoked. In **Gooch v. Spradling,** 523 SW 2d 861 (Mo. App. 1975), the licensee was arrested for drunken driving, brought into the police station, and was asked to take the test. The police told him of the consequences of refusing to take the test, and the licensee then made repeated demands to consult with his attorney, which were refused. The policy of that police department was that no phone calls to attorneys were allowed until the party was "booked" and they did not "book" until the breathalyzer test is given. The licensee refused to take the test. The court found that this was not a refusal that could warrant a license revocation because the police department had violated Rule 37.89 by refusing to allow the licensee to consult with his attorney at any time after he was arrested.

C. Self-Incrimination

It is clear from recent Missouri case law that the administration of the breathalyzer test presents no self-incrimination problems. In **Jones v. Schaffner,** 509 SW 2d 72 (Mo. App. 1972), the court explained that the privilege against self-incrimination protects an accused only from being compelled to testify against himself in a testimonial or communicative manner. The use of the breathalyzer test is not testimonial or communicative.

D. Testing

Police are under no obligation to administer every intoxication test that the motorist requests. In **State v. Snipes,** 478 SW 2d 299 (1972), the defendant refused to take a breathalyzer test but did request that a blood sample be taken to determine the alcoholic content in his blood. The police drove him to a hospital where this was done. The defendant also requested that he be allowed to see a physician so that he could be given tests to test his agility and awareness, also for the purpose of determining his level of intoxication. The court found that the administration of the blood test was sufficient to determine his level of intoxication and that the defendant was not denied due process when police refused to let him see a physician to administer other tests.

In **McGuire v. Jackson County Prosecuting Attorney,** 548 SW 2d 272, the court stated that a person has no right to insist on an officer administering any test other than the breathalyzer test. The motorist refused to take the breathalyzer test, and demanded a blood test instead. This was not given. The court stated if a motorist refuses the breathalyzer test, that qualifies as an unequivocal refusal and his license may be revoked. The police are under no obligation to administer any other type of test.

E. In summary, the following points should be remembered:

1. Right to counsel:
   1) The arrestee may call his lawyer from the station, or, if his lawyer is there, he may consult with him before taking the breath test.

2) The arrestee does not have a constitutional right to have his counsel **present** when he takes the breath test.

2. Unequivocal refusal:
A refusal to take the breath test must be express and unequivocal for it to warrant a license revocation.

3. Self-incrimination:
The use of the breath test does not violate a person's privilege against self-incrimination.

4. Testing:
1) A person has no right to have any intoxication test administered other than the breathalyzer test.
2) A refusal to take the breathalyzer test is sufficient to warrant the revocation of a driver's license, even though the arrestee requests that another type of test be administered.

23.4 Effect of Chemical Analysis as Evidence (§577.030)

1. Whenever a person is on trial for any criminal action or violation of county or municipal ordinance arising out of acts alleged to have been committed by him while driving a motor vehicle while intoxicated, the amount of alcohol in his blood as shown by chemical analysis is admissible in evidence. This includes chemical analysis of the person's blood, breath, saliva, or urine.

Such evidence will be given the following effect:

A. If there was five-hundredths of one percent or less by weight of alcohol in his blood, it is presumed that he was *not* intoxicated at the time the specimen was taken.

B. If there was more than five-hundredths of one percent but less than ten-hundredths of one percent by weight of alcohol in his blood, there is no presumption of intoxication or non-intoxication. Other competent evidence may be considered in conjunction with the results of the chemical test.

C. If there was ten-hundredths of one percent or more by weight of alcohol in the person's blood, this shall be prima facie evidence that the person was intoxicated at the time the specimen was taken.

2. Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred milliliters of blood.

3. No provision in this statute limits the introduction of any other competent evidence on the question of whether the person was intoxicated.

Major Changes

This section is identical in language to the pre-Code provisions of 564.442 RSMo as amended in 1972.

23.5 Arrest Without Warrant, When (§577.040)

Code

> An arrest without a warrant by a law enforcement officer, including a uniformed member of the state highway patrol, for a violation of section 577.010 is lawful whenever the arresting officer has reasonable grounds to believe that the person to be arrested has violated the section, whether or not the violation occurred in the presence of the arresting officer; provided, however, that any such arrest without warrant must be made within one and one-half hours after such claimed violation occurred.

Elements

An arrest without a warrant by a law enforcement officer including a uniformed member of the state highway patrol for a violation of 577.010 (Driving while intoxicated) is lawful whenever:

1. the arresting officer has reasonable grounds to believe that the person to be arrested has violated the section (whether or not the violation occurred in the presence of the arresting officer), *and*

2. the arrest is made within one and one-half hours after the claimed violation occurred.

Major Changes

This section is identical in language with pre-Code §564.443 except that "law enforcement officer" is used instead of "peace officer."

Comments

This section ties in closely with 577.020, the breath test statute. When an officer arrests a person for driving while intoxicated he may then administer or direct the administration of the breathalyzer test in accordance with the provisions of 577.020. See the comments in paragraphs 23.2, 23.3, 23.4, and 23.6 for a discussion of the breath test procedures.

23.6 Refusal to Submit to Chemical Test—Revocation of License—Hearing (§577.050)

Code

1. If a person under arrest refuses upon the request of the arresting officer to submit to a chemical test, which request shall include the reasons of the officer for requesting the person to submit to a test and which also shall inform the person that his license may be revoked upon his refusal to take the test, then none shall be given. In this event, the arresting officer, if he so believes, shall make a sworn report to the director of revenue that he has reasonable grounds to believe that the arrested person was driving a motor vehicle upon the public highways of this state while in an intoxicated condition and that, on his request, refused to submit to the test. Upon receipt of the officer's report, the director shall revoke the license of the person refusing to take the test for a period of not more than one year; or if the person arrested be a nonresident, his operating permit or privilege shall be revoked for not more than one year; or if the person is a resident without a license or permit to operate a motor vehicle in this state, an order shall be issued denying the person the issuance of a license or permit for a period of not more than one year.

2. If a person's license has been revoked because of his refusal to submit to a chemical test, he may request a hearing before a court of record in the county in which he resides or in the county in which the arrest occurred. Upon his request the clerk of the court shall notify the prosecuting attorney of the county and the prosecutor shall appear at the hearing on behalf of the arresting officer. At the hearing the judge shall determine only:

(1) Whether or not the person was arrested;

(2) Whether or not the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition; and

(3) Whether or not the person refused to submit to the test.

3. If the judge determines any issue not to be in the affirmative, he shall order the director to reinstate the license or permit to drive.

4. Requests for review as herein provided shall go to the head of the docket of the court wherein field.

Elements

1. If an arresting officer requests a person under arrest to submit to a chemical test, stating his reasons for the request and informing the person that his license may be revoked if he refuses to take the test, and the person under arrest refuses, no test shall be given.

If the person does refuse to submit to the test, the arresting officer, if he so believes, shall make a sworn report to the director of revenue that he has reasonable grounds to believe that the arrested person was driving a motor vehicle upon the public highways of this state while in an intoxicated condition and that, on his request, the motorist refused to submit to the test.

After receiving the officer's report, the director shall revoke the license of the person refusing to take the test for a period of not more than one year;

or if the person arrested be a non-resident, his operating permit or privilege shall be revoked for no more than one year;

or if the person is a resident without a license or permit to operate a motor vehicle in the state, an order shall be issued denying the person the issuance of a license or permit for a period of no more than one year.

2. If a person's license has been revoked because of his refusal to submit to a chemical test, he may request a hearing before a court of record in the county in which he resides or in the county in which the arrest occurred. Upon his request the clerk of the court shall notify the prosecuting attorney of the county and the prosecutor shall appear at the hearing on behalf of the arresting officer. At the hearing, the judge shall determine only:

a) whether or not the person was arrested;
b) whether or not the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle in an intoxicated condition; and,
c) whether or not the person refused to submit to the test.

3. If the judge determines any issue not to be in the affirmative, he shall order the director to reinstate the license or permit to drive.

4. Requests for review shall go to the head of the docket of the court wherein field.

Major Changes

This section is identical in language to pre-Code §564.444 RSMo.

23.7 Leaving the Scene of a Motor Vehicle Accident (§577.060) Class D felony

Code

1. A person commits the crime of leaving the scene of a motor vehicle accident when being the operator or driver of a vehicle on the highway and knowing that an injury has been caused to a person or damage has been caused to property, due to his culpability or to accident, he leaves the place of the injury, damage or accident without stopping and giving his name, residence, including city and street number, motor vehicle number and chauffeur's or registered operator's number, if any, to the injured party or to a police officer, or if no police officer is in the vicinity, then to the nearest police officer, or if no police officer is in the vicinity, then to the nearest police station or judicial officer.

2. Leaving the scene of a motor vehicle accident is a class D felony.

Elements

A person commits the crime of leaving the scene of a motor vehicle accident when:

1. being the operator or driver of a vehicle on a highway and
2. knowing that injury has been caused to a person or damage has been caused to property and
3. knowing such damage or injury was caused by his culpability or accident
4. he leaves the place of injury, damage, or accident
5. without stopping and giving his name, residence, motor vehicle number and chauffeur's or registered operator's number, if any, to the injured party, police officer, or nearest police station or judicial officer.

Major Changes

This section is essentially the same as pre-Code §564.450 RSMo. A slight change has been made in the wording to conform to the rest of the Code.

23.8 Littering (§577.070) Class A misdemeanor

Code

1. A person commits the crime of littering if he throws or places, or causes to be thrown or placed, any glass, glass bottles, wire, nails, tacks, hedge, cans, garbage, trash, refuse, or rubbish of any kind, nature or description on the right-of-way of any public road or state highway or on or in any of the waters in this state or on the banks of any stream, or on any land or water owned, operated or leased by the state, any board, department, agency or commission thereof or on any land or water owned, operated or leased by the federal government or on any private real property owned by another without his consent.
2. Littering is a class A misdemeanor.

Elements

A person commits the crime of littering if he:

1. throws or places, or causes to be thrown or placed,
2. any glass, glass bottles, wire, nails, tacks, hedge, cans, garbage, trash, refuse, or rubbish of any kind, nature or description
3. on the right of way of any public road or state highway or on or in any of the waters in this state or on the banks of any stream, or on any land or water owned, operated or leased by the state, any board, department, agency or commission thereof or on any land or water owned, operated or leased by the federal government or on any private real property owned by another without his consent.

Major Changes

This section is essentially the same as the pre-Code section 564.480, except that the portion dealing with abandoned automobiles has been deleted, and is now contained in 577.080.

23.9 Abandoning Motor Vehicle (§577.080) Class A misdemeanor

Code

1. A person commits the crime of abandoning a motor vehicle if he abandons any motor vehicle on the right-of-way of any public road or state highway or on or in any of the waters in this state or on the banks of any stream, or on any land or water owned, operated or leased by the state, any board, department, agency or commission thereof, or any political subdivision thereof or on any land or water owned, operated or leased by the federal government or on any private real property owned by another without his consent.
2. Abandoning a motor vehicle is a class A misdemeanor.

Elements

A person commits the crime of abandoning a motor vehicle if he:

1. abandons any motor vehicle
2. on the right-of-way of any public road or state highway or on or in any of the waters in this state or on the banks of any stream, or on any land or water owned, operated or leased by the state, any board, department, agency or commission thereof, or any political subdivision thereof or on any land or water owned, operated or leased by the federal government or on any private real property owned by another without his consent.

Major Changes

This crime was included in pre-Code section 564.480 and is essentially unchanged.

23.10 Powers of Law Enforcement Officers—Limited Powers of Conservation Agents and Water Patrolmen (§577.090)

Any law enforcement officer shall and any agent of the conservation commission or deputy or employee of the boat commission may enforce the "littering" section (577.070) and the "abandoning motor vehicle" section (577.080), but conservation agents and water patrolmen many enforce these laws only:

1. upon the water or
2. the banks of the water or
3. upon public land.

Major Changes

This is essentially the same provision as contained in pre-Code section 564.480.

23.11 Abandonment of Airtight or Semi-Airtight Containers (§577.100) Class B misdemeanor

Elements

A person commits the crime of abandonment of airtight ice box if:

1. he abandons, discards, or knowingly permits to remain on premises under his control
2. in a place accessible to children
3. any abandoned or discarded icebox, refrigerator, or other airtight or semi-airtight container which has a capacity of one and one-half cubic feet or more and and opening of fifty square inches or more and which has a door or lid equipped with hinge, latch or other fastening device capable of securing such door or lid,
4. without rendering such equipment harmless to human life by removing such hinges, latches, or other hardware which may cause a person to be confined therein.

This section does not apply to an icebox, refrigerator or other airtight or semi-airtight container located in the part of a building which is occupied by a dealer, warehouseman or repairman. However, the defendant has the burden of injecting this issue in his defense.

Major Changes

This section is essentially the same as pre-Code section 564.6659

Definitions

The following definitions are arranged alphabetically. The designation, "Code definition," means that the definition of that term may be used in conjunction with any section of the Code. The designation "as used in Chapter _____", means that the definition is peculiar to the particular chapter of the Criminal Code and may not necessarily mean the same throughout the Code.

1. **"Adulterated"** means varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulations of this state lawfully filed, or if none, as set by commercial usage; (as used in chapter 570)

2. **"Advance gambling activity"**, a person "advances gambling activity" if, acting other than as a player, he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, lottery, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement or communication of any of its financial or recording phases, or toward any other phase of its operation. A person advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue or makes no effort to prevent its occurrence or continuation; (as used in chapter 572)

3. **"Affidavit"** means any written statement which is authorized or required by law to be made under oath, and which is sworn to before a person authorized to administer oaths; (as used in chapter 575)

4. **Affirmative defense**

When the phrase **"affirmative defense"** is used in the Code, it means

(1) The defense referred to is not submitted to the trier of fact unless supported by evidence; and

(2) If the defense is submitted to the trier of fact the defendant has the burden of persuasion that the defense is more probably true than not. (Code definition)

5. **"Appropriate"** means to take, obtain, use, transfer, conceal or retain possession of; (As used in chapter 570)

6. **"Bookmaking"** means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events; (As used in chapter 572)

7. **Burden of injecting the issue**
When the phrase **"The defendant shall have the burden of injecting the issue"** is used in the Code, it means

(1) The issue referred to is not submitted to the trier of fact unless supported by evidence; and
(2) If the issue is submitted to the trier of fact any reasonable doubt on the issue requires a finding for the defendant on that issue. (Code definition)

8. **"Coercion"** means a threat, however communicated:

(a) To commit any crime; or
(b) To inflict physical injury in the future on the person threatened or another; or
(c) To accuse any person of any crime; or
(d) To expose any person to hatred, contempt or ridicule; or
(e) To harm the credit or business repute of any person; or
(f) To take or withhold action as a public servant, or to cause a public servant to take or withhold action; or
(g) To inflict any other harm which would not benefit the actor.

A threat of accusation, lawsuit or other invocation of official action is not coercion if the property sought to be obtained by virtue of such threat was honestly claimed as restitution or indemnification for harm done in the circumstances to which the accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful service. The defendant shall have the burden of injecting the issue of justification as to any threat; (As used in chapter 570)

9. **"Conditional release"** means the conditional discharge of a prisoner by the division of corrections subject to conditions of release that the state board of probation and parole deems reasonable to assist the offender to lead a law-abiding life, and subject to the supervision under the state board of probation and parole. The conditions of release shall include avoidance by the offender of any other crime, federal or state, and shall prohibit technical violation of his probation and parole. (As used in chapter 558)

10. **"Confinement"**, a person is in confinement when he is held in a place of confinement pursuant to arrest or order of a court, and remains in confinement until

(a) A court orders his release; or
(b) He is released on bail, bond, or recognizance, personal or otherwise; or
(c) A public servant having the legal power and duty to confine him

authorizes his release without guard and without condition that he return to confinement;

(d) A person is not in confinement if
   a. He is on probation or parole, temporary or otherwise; or
   b. He is under sentence to serve a term of confinement which is not continuous, or is serving a sentence under a work-release program, and in either such case is not being held in a place of confinement or not being held under guard by a person having the legal power and duty to transport him to or from a place of confinement. (Code definition)

11. **"Consent"**, consent or lack of consent may be expressed or implied. Assent does not constitute consent if
   (a) It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifest or known to the actor; or
   (b) It is given by a person who by reason of youth, mental disease or defect, or intoxication, is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or
   (c) It is induced by force, duress or deception. (Code definition)

12. **"Contest of chance"** means any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor therein; (as used in chapter 572)

13. **"Credit device"** means a writing, number or other device purporting to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer; (as used in chapter 570)

14. **"Crime"**, an offense defined by this Code or by any other statute of this state, for which a sentence of death or imprisonment is authorized, constitutes a **"crime"**. Crimes are classified as felonies and misdemeanors. (Code definition)

15. **"Criminal Negligence"**, a person **"acts with criminal negligence"** or is criminally negligent when he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. (Code definition)

16. **"Custody"**, a person is in custody when he has been arrested but has not been delivered to a place of confinement. (Code definition)

17. **"Dangerous felony"** means the felonies of murder, forcible rape, assault, burglary, robbery, kidnapping or the attempt to commit any of these felonies (Code definition)

18. **"Dangerous instrument"** means any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury. (Code definition)

19. A **"dangerous offender"** is one who:
Is being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person; and
Has been previously convicted of a class A or B felony or a dangerous felony. (Code definition)

20. **"Deadly force"** means physical force which the actor used with purpose of causing or which he knows to create a substantial risk of causing death or serious physical injury (as used in chapter 563)

21. **"Deadly weapon"** means any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of producing death or serious physical injury may be discharged, or a switchblade knife, dagger, billy, blackjack or metal knuckles. (Code definition)

22. **"Dealer"** means a person in the business of buying and selling goods; (As used in chapter 570)

23. **"Deceit"** means purposely making a representation which is false and which the actor does not believe to be true and upon which the victim relies, as to a matter of fact, law, value, intention or other state of mind. The term "deceit" does not, however, include falsity as to matters having no pecuniary significance, or puffing statements unlikely to deceive ordinary persons in the group addressed. Deception as to the actor's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise; (As used in chapter 570)

24. **"Deprive"** means
   (a) To withhold property from the owner permanently; or
   (b) To restore property only upon payment of reward or other compensation; or
   (c) To use or dispose of property in a manner that makes recovery of the property by the owner unlikely; (As used in chapter 570)

25. **"Deviate sexual intercourse"** means any sexual act involving the genitals of one and the mouth, tongue, hand or anus of another person; (As used in chapter 566)

26. **"Displays publicly"** means exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character

distinguished by normal unaided vision viewing it from a street, highway or public sidewalk, or from the property of others. (As used in chapter 573)

27. **"Dwelling"** means any building or inhabitable structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging. (As used in chapter 563)

28. **"Enter unlawfully or remain unlawfully"**, a person "enters unlawfully or remains unlawfully" in or upon premises when is not licensed or privileged to do so. A person who, regardless of his purpose, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or by other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. (As used in chapter 569)

29. **"Explicit sexual material"** means any pictorial or three dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation or unclothed genitals, sadomasochistic abuse, or emphasizing the depiction of post-pubertal human genitals, provided, however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition; (As used in chapter 573)

30. **"Felony"**, a crime is a **"felony"** if it is so designated or if persons convicted thereof may be sentenced to death or imprisonment for a term which is in excess of one year. (Code definition)

31. **"Forcible compulsion"** means either
   (a) Physical force that overcomes reasonable resistance, or
   (b) A threat, express or implied, that places a person in reasonable fear of death, serious physical injury, or kidnapping of himself or another person. (Code definition)

32. **"Forcibly steals"**, a person "forcibly steals", and thereby commits robbery, when, in the course of stealing, as defined in section 570.030, RSMo, he uses or threatens the immediate use of physical force upon another person for the purpose of:
   (a) preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
   (b) Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft; (As used in chapter 569)

33. **"Furnish"** means to issue, sell, give, provide, lend, mail, deliver, transfer, circulate, disseminate, present, exhibit or otherwise provide. (As used in chapter 573)

34. **"Gambling"**, a person engages in "gambling" when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health or accident insurance; nor does gambling include playing an amusement device that confers only an immediate right of replay not exchangeable for something of value; (As used in chapter 572)

35. **"Gambling device"** means any device, machine, paraphernalia or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person with a machine. However, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices with this definition; (As used in chapter 572)

36. **"Gambling record"** means any article, instrument, record, receipt, ticket, certificate, token, slip or notation used or intended to be used in connection with unlawful gambling activity; (As used in chapter 572)

37. **"Government"** means any branch or agency of the government of this state or any political subdivision thereof; (As used in chapter 575)

38. **"Incapacitated"** means that physical or mental condition, temporary or permanent, in which a person is unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act. A person is not "incapacitated" with respect to an act committed upon him if he became unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to act, after consenting to the act. (Code definition)

39. **Infractions**

1. An offense defined by this code or by any other statute of this state constitutes an **"infraction"** if it is so designated or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction.
2. An infraction does not constitute a crime and conviction of an infraction shall not give rise to any disability or legal disadvantage based on conviction of a crime. (Code definition)

40. **"Inhabitable structure"** includes a ship, trailer, sleeping car, airplane, or other vehicle or structure:

(a) Where any person lives or carries on business or other calling; or
(b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or

(c) Which is used for overnight accommodation of persons. Any such vehicle or structure is "inhabitable" regardless of whether a person is actually present: (Code definition)

41. **"Judicial proceeding"** means any official proceeding in court, or any proceeding authorized by or held under the supervision of a court; (As used in chapter 575)

42. **"Juror"** means a grand or petit juror, including a person who has been drawn or summoned to attend as a prospective juror; (As used in chapter 575) H12)

43. **"Jury"** means a grand or petit jury, including any panel which has been drawn or summoned to attend as prospective jurors; (As used in chapter 575) H12)

44. **"Knowingly"**, a person **"acts knowingly"**, or with knowledge,
(1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
(2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result. (Code definition)

45. **"Law enforcement officer"** means any public servant having both the power and duty to make arrests for violations of the laws of this state. (Code definition)

46. **"Lottery" or "policy"** means an unlawful gambling scheme in which for a consideration the participants are given an opportunity to win something of value, the award of which is determined by chance; (As used in chapter 572)

47. **"Material"** means anything printed or written, or any picture, drawing, photograph, motion picture film, or pictorial representation, or any statue or other figure, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or may be used as a means of communication. "Material" includes undeveloped photographs, molds, printing plates and other latent representational objects; (As used in chapter 573)

48. **"Minor"** means any person under the age of eighteen; (As used in chapter 573)

49. **"Misdemeanor"**, a crime is a **"misdemeanor"** if it is so designated or if persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is one year or less. (Code definition)

50. **"Mislabeled"** means varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regula-

tions of this state lawfully filed, or if none, as set by commercial usage; or represented as being another person's product, though otherwise accurately labeled as to quality and quantity; (as used in chapter 570)

51. **"Nudity"** means the showing of post-pubertal human genitals or pubic area, with less than a fully opaque covering; (As used in chapter 573)

52. **"Of another"**, property is that "of another" if any natural person, corporation, partnership, association, governmental subdivision or instrumentality, other than the actor, has a possessory or proprietary interest therein; if a building or structure is divided into separately occupied units, any unit not occupied by the actor is an "inhabitable structure of another"; (As used in chapter 569)

53. **"Of another"** property or services is that "of another" if any natural person, corporation, partnership, association, governmental subdivision or instrumentality, other than the actor, has a possessory or proprietary interest therein, except that property shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security arrangement; (As used in chapter 570)

54. **"Offense"** means any felony, misdemeanor or infraction. (Code definition)

55. **"Official proceeding"** means any cause, matter, or proceeding where the laws of this state require that evidence considered therein be under oath or affirmation; (As used in chapter 575)

56. **"Patronizing prostitution"**, a person "patronizes prostitution" if
   (a) Pursuant to a prior understanding, he gives something of value to another person as compensation for that person or a third person having engaged in sexual conduct with him or with another; or
   (b) He gives or agrees to give something of value to another person on an understanding that in return therefor that person or a third person will engage in sexual conduct with him or with another; or
   (c) He solicits or requests another person to engage in sexual conduct with him or with another, or to secure a third person to engage in sexual conduct with him or with another, in return for something of value; (As used in Chapter 567)

57. **"Performance"** means any play, motion picture film, dance or exhibition performed before an audience; (As used in Chapter 573)

58. A **"persistent offender"** is one who has been previously convicted of two felonies committed at different times and not related to the instant crime as a single criminal episode. (Code definition)

59. **"Physical injury"** means physical pain, illness, or any impairment of physical condition. (Code definition)

60. **"Place of confinement"** means any building or facility and the grounds thereof wherein a court is legally authorized to order that a person charged with or convicted of a crime be held. (Code definition)

61. **"Player"** means a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein does not otherwise render material assistance to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefor and supplying cards or other equipment used therein. A person who engages in "bookmaking" as defined in subdivision (2) of this section is not a "player"; (as used in Chapter 572)

62. **"Pornographic"**, any material or performance is "pornographic" if, considered as a whole, applying contemporary community standards:

(a) Its predominant appeal is to prurient interest in sex; and
(b) It depicts or describes sexual conduct in a patently offensive way; and
(c) It lacks serious literary, artistic, political or scientific value.

In determining whether any material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults; (As used in Chapter 573)

63. **"Pornographic for minors"**, any material or performance is "pornographic for minors" if it is primarily devoted to description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and:

(a) Its predominant appeal is to prurient interest in sex; and
(b) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
(c) It lacks serious literary, artistic, political, or scientific value for minors; (As used in Chapter 573)

64. **"Premises"** includes any building, inhabitable structure and any real property. (As used in Chapter 563)

65. **"Private person"** means any person other than a law enforcement officer. (As used in Chapter 563)

66. **"Private property"** means any place which at the time is not open to the public. It includes property which is owned publicly or privately; if a building

or structure is divided into separately occupied units, such units are separate premises. (As used in Chapter 574)

67. **"Professional player"** means a player who engages in gambling for a livelihood or who has derived at least twenty percent of his income in any one year within the past five years from acting solely as a player; (As used in Chapter 572)

68. **"Profit from gambling activity"**, a person "profits from gambling activity" if, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity; (As used in Chapter 572)

69. **"Promote"** means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same; (As used in Chapter 573)

70. **"Promoting prostitution"**, a person "promotes prostitution" if, acting other than as a prostitute or a patron of a prostitute, he knowingly

(a) Causes or aids a person to commit or engage in prostitution; or
(b) Procures or solicits patrons for prostitution; or
(c) Provides persons or premises for prostitution purposes; or
(d) Operates or assists in the operation of a house of prostitution or a prostitution enterprise; or
(e) Accepts or receives or agrees to accept or receive something of value pursuant to an agreement or understanding with any person whereby he participates or is to participate in proceeds of prostitution activity; or
(f) Engages in any conduct designed to institute, aid or facilitate an act or enterprise of prostitution; (As used in Chapter 567)

71. **"Property"** means anything of value whether real or personal, tangible or intangible, in possession or in action, and shall include but not be limited to the evidence of a debt actually executed but not delivered or issued as a valid instrument; (As used in Chapter 570)

72. **"Property of another"** means any property in which the actor does not have a possessory interest; (As used in Chapter 574)

73. **"Prostitution"**, a person commits "prostitution" if he engages or offers or agrees to engage in sexual conduct with another person in return for something of value to be received by the person or by a third person; (As used in Chapter 567)

74. **"Public place"** means any place which at the time is open to the public. It

includes property which is owned publicly or privately. If a building or structure is divided into separately occupied units, such units are separate premises; (As used in Chapter 574)

75. **"Public record"** means any document which a public servant is required by law to keep; (As used in Chapter 575)

76. **"Public servant"** means any person employed in any way by a government of this state who is compensated by the government by reason of his employment. It includes, but is not limited to, legislators, jurors, members of the judiciary and law enforcement officers. It does not include witnesses.(Code definition.)

77. **"Purposely"**- A person **"acts purposely"**, or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result. (Code definition)

78. **"Receiving"** means acquiring possession, control or title or lending on the security of the property; (As used in Chapter 570)

79. **"Recklessly"**- A person **"acts recklessly"** or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation (Code definition)

80. **"Sadomasochistic abuse"** means flagellation or torture by or upon a person as an act of sexual stimulation or gratification; (As used in Chapter 573)

81. **"Serious physical injury"** means physical injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ. (Code definition)

82. **"Services"** includes transportation, telephone, electricity, gas, water, or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions and use of vehicles; (As used in Chapter 570)

83. **"Sexual conduct"** occurs when there is
   (a) **"Sexual intercourse"** which means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results; or
   (b) **"Deviate sexual intercourse"** which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person; or
   (c) **"Sexual contact"** which means any touching, manual or otherwise, of

the anus or genitals of one person by another, done for the purpose of arousing or gratifying sexual desire of either party; (As used in Chapter 567)

84. **"Sexual conduct"** means acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification; (As used in Chapter 573)

85. **"Sexual contact"** means any touching of the genitals or anus of any person, or the breast of any female person, or any such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person; (As used in Chapter 566)

86. **"Sexual excitement"** means the condition of human male or female genitals when in a state of sexual stimulation or arousal; (As used in Chapter 573)

87. **"Sexual intercourse"** means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results; (As used in Chapter 566)

88. **"Slot machine"** means a gambling device that as a result of the insertion of a coin or other object operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value. A device so constructed or readily adaptable or convertible to such use is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because apart from its use or adaptability as such it may also sell or deliver something of value on a basis other than chance; (As used in Chapter 572)

89. **"Something of value"** means any money or property, or any token, object or article exchangeable for money or property. (As used in Chapter 567)

90. **"Something of value"** means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge; (As used in Chapter 572)

91. **"To tamper"**, to interfere with something improperly, to meddle with it, displace it, make unwarranted alterations in its existing condition, or to deprive temporarily, the owner or possessor of that thing; (As used in Chapter 569)

92. **"Testimony"** means any oral statement under oath or affirmation. (As used in Chapter 575)

93. **"Unlawful"** means not specifically authorized by law. (As used in Chapter 572)

94. **"Utility"**, an enterprise which provides gas, electric, steam, water, sewerage disposal or communication services and any common carrier. It may be either publicly or privately owned or operated; (As used in Chapter 569)

95. **"Vital public facility"** includes a facility maintained for use as a bridge, whether over land or water, dam, reservoir, tunnel, communication installation or power station; (As used in Chapter 569)

96. **"Voluntary act"**

1. A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act.
2. A **"voluntary act"** is
   (1) A bodily movement performed while conscious as a result of effort or determination; or
   (2) An omission to perform an act of which the actor is physically capable.
3. Possession is a voluntary act if the possessor knowingly procures or receives the thing possessed, or having acquired control of it was aware of his control for a sufficient time to have enabled him to dispose of it or terminate his control.
4. A person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law. (Code definition)

97. **"Wholesale promote"** means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purposes of resale; (As used in Chapter 573)

98. **"Writing"** includes printing, any other method of recording information, money, coins, negotiable instruments, tokens, stamps, seals, credit cards, badges, trademarks and any other symbols of value, right, privilege or identification. (As used in Chapter 570)