Return to the Law Office of Phil Cherner

The Colorado Lawyer
October 1998
Vol. 27, No. 10 [Page 77]

Specialty Law Columns
Criminal Law Newsletter

Significant Legislation in the Criminal Law Field in 1998

by Phil Cherner, Jason Middleton

This article summarizes the most significant 1998 Colorado legislation in the criminal law field. The complete text of each Act can be found at the Colorado General Assembly's web site: <http://www.state.co.us/gov_dir/stateleg.html>.

Sex Offender Lifetime Supervision

Sess. Law 303, H.B. 98-1156

The Colorado Sex Offender Lifetime Supervision Act of 1998 ("Act") makes substantial revisions to sex offender sentencing for crimes committed on or after November 1, 1998. The Act's legislative declaration sets forth its philosophy: A majority of sex offenders will continue to offend for the rest of their lives, but incarcerating them for the rest of their lives is too costly; therefore, "a program under which sex offenders may receive treatment and supervision for the rest of their lives, if necessary, is necessary for the safety, health and welfare of the state."[1]

The Act establishes two categories of offenders that it governs. The first category is the more serious sex offenses, including first- and second-degree sexual assault, felony third-degree sexual assault, sexual assault on a child, and sexual assault on a child by one in a position of trust. Also

included are attempt, conspiracy, and solicitation to commit these offenses, provided such an offense would be a Class 2, 3, or 4 felony.

One sentencing option for these offenses is a Department of Corrections ("DOC") sentence of an indeterminate term. The minimum of the indeterminate sentence is at least the minimum in the presumptive range. The maximum is required to be life. The only other sentencing alternative, unless there is a mandatory sentence requirement, is a period of probation of at least ten years to life for a Class 4 felony, and twenty years to life for a Class 2 or 3 felony.

The second category of offenses includes such things as trafficking in children, felony sexual exploitation of a child, pandering, soliciting, procurement of a child, as well as attempt, conspiracy, and solicitation to commit any of these offenses. For this second category of offenders, the court can apply the same sentencing ranges as described in the preceding paragraph if the court finds, pursuant to an assessment, that the person is likely to commit one or more of the offenses under the sexually violent predator statute, CRS § 18-3-414.5, and is likely to commit them under the circumstances described under CRS § 18-3-414.5(1)(b) (stranger victimization or promoting a relationship primarily for the purpose of sexual victimization).

Even after making these findings, the statute provides only that the court "may" sentence the person pursuant to the provisions of the Act. Contrast this with the group of offenders in the more serious category, where imposition of the lifetime probation or lifetime sentence is mandatory. There is some question whether these provisions apply to deferred judgments. Obviously, it would not make sense to sentence someone who receives a deferred judgment to prison for the rest of his or her life, yet the triggering event is a conviction or a guilty plea.

The offender who is sentenced to prison for life is eligible for consideration for parole on completion of the period of incarceration specified in the sentence, less any earned time credits. The Parole Board is to consider whether (1) the person has successfully progressed in treatment, (2) whether they would pose an undue threat to the community if released under appropriate treatment and monitoring, and (3) whether there is a strong and reasonable probability that the person will not thereafter violate the law. In addition, the DOC is to make a recommendation on whether the individual should be paroled and, if so, the necessary level of treatment and monitoring.

This recommendation will be based on criteria established by the Sex Offender Management Board. Class 4 sex offenders will have a parole of at least ten years and a maximum of life. For Class 2 and 3 sex offenders, the minimum period of parole is twenty years, with a maximum of life.[2]

None of these sentences is deemed discharged until an order to that effect is entered by the Parole Board. If parole is denied at the initial application, it has to be reconsidered at least once every three years. Every paroled sex offender starts in an intensive supervision parole program.

Much like the parole process, the Judicial Department is directed to establish an intensive supervision probation program for sex offenders. Many restrictions can be placed on the probationer, including restricted daily activities, limitation of contacts with others, and monitored curfew.

Only the court can terminate probation, and then only after a hearing. Like parole, if a determination is denied, it has to be revisited at least every three years.

It is implied that the inmate, probationer, or parolee has the burden of showing eligibility to secure release. CRS § 16-13-809 requires that the Sex Offender Management Board establish criteria by which the offender may demonstrate that he or she would not pose an undue threat to the community.

CRS § 16-13-801 requires an annual report detailing the number of sex offenders in the system and the sentences and revocations that have been imposed. It will be interesting to see whether fewer offenders are sentenced to prison than under present laws. Similarly, it will be interesting to see if the percentage of cases being tried will go up or down.

The Sex Offender Act of 1968 is not available as a sentencing option for offenders who fall within the provisions of the 1998 Act.

To understand how this bill will function, it is helpful to consider a hypothetical case. The defendant is convicted of sexual assault on a child, a Class 4 felony pursuant to CRS § 18-3-405(2). This falls within the more serious group of sex offenses for purposes of the Act. Therefore, the court's sentencing options are an indeterminate sentence from the bottom of the presumptive range to life, or from an indeterminate period of probation of at least ten years to life. For this hypothetical Class 4 felony, the bottom of the presumptive range is two years, so the authorized sentence is two years to life.

A direct sentence to community corrections does not appear to be an option because the sentence must be to the DOC. However, community placement as a condition of probation is not prohibited. Thus, offenders ineligible for probation are ineligible for community placement.

"Super Parole" and Other Substantive Changes

Sess. Law 314, H.B. 98-1160 (Effective July 1, 1998)

This is the annual, substantive criminal law bill. It has several provisions, three of which are commented on in this article.

First, the bill raises the felony threshold for all theft-related offenses from $400 to $500. There are parallel provisions in H.B. 98-1225, which is discussed below.

Second, CRS § 18-3-202 is amended to provide that all first-degree assault offenses that are not committed during a sudden heat of passion are to be sentenced in the aggravated range. This is a Class 3 felony, meaning a sentence range of ten to thirty-two years.

Third, the bill creates a new period of "super parole," formally called a period of "supervision," to be served in such a fashion that the offender must serve a year on this status without violation. It applies to (1) an offender paroled for a Class 2 through 6 felony, that is (2) the offender's second or subsequent felony offense committed on or after July 1, 1998, and who has (3) had his or her most recent parole revoked. If the individual's remaining parole is less than twelve months, instead of serving the remaining parole, he or she must serve a twelve-month period of supervision.

The conditions of "supervision" appear to be the same as parole with a different name. Under some circumstances, revocation proceedings initiated during this twelve-month period can lead only to imposition of intermediate sanctions, as opposed to incarceration. However, there is no mechanism (complaint, notice, or hearing) for revocation.

The maximum amount of time a person can serve in custody as a result of a revocation of supervision is computed by the following formula:

> [The length of time] shall not exceed the length of the offender's original sentence to incarceration plus the length of the offender's original sentence to mandatory parole plus 12 months. In calculating the time spent in incarceration by an offender for purposes of this paragraph, the offender shall receive credit for time spent in incarceration as a result of the original sentence to incarceration, any time spent in incarceration as a result of revocation of mandatory parole, and any time spent in incarceration as a result of revocation of supervision.[3]

The upshot is that it will be extremely difficult to advise defendants of the maximum length of parole as part of the Rule 11 procedure. However, because the twelve months of supervision can occur only from parole revocation, the failure to advise on this point may not render the plea involuntary.[4]

Preliminary Hearings

Sess. Law 301, S.B. 98-008
(Effective July 1, 1998)

S.B. 98-008 eliminates preliminary hearings in certain classes of felonies. CRS §§ 16-5-301, 18-1-404, and 19-2-705 are amended to provide that individuals charged with a Class 1, 2, or 3 felony are entitled to a preliminary hearing.

No person accused of a Class 4, 5, or 6 felony is entitled to a preliminary hearing unless: (1) the offense requires mandatory sentencing or is a crime of violence as defined in CRS § 16-11-309; (2) the defendant is accused of a sexual offense under CRS § 18-3-401 *et seq*.; or (3) the defendant is in custody (however, if the defendant is released from custody prior to the preliminary hearing, then the preliminary hearing will be vacated). Instead of a preliminary hearing in Class 4-6 felonies, the defendant "shall participate in a dispositional hearing for the purposes of case evaluation and potential resolution." The bill "encourages" the Colorado Supreme Court to promulgate rules defining the term "dispositional hearing."

It is interesting to note that Crim.P. 5 and 7 have not been changed and still give defendants a right to a preliminary hearing in all felony cases. It also is unclear when and whether an in-custody defendant charged with a Class 4-6 felony must be advised that by making bail, he or she may waive the right to a preliminary hearing.

Persistent Drunk Driver Act of 1998

Sess. Law 295, H.B. 98-1334
(Effective July 1, 1998)

CRS § 42-4-1301 (the DUI statute) has a new paragraph which provides that if an individual is charged with Driving Under the Influence and the blood or breath analysis result is 0.20 or higher, and that individual then is convicted of the lesser offense of Driving While Ability Impaired ("DWAI"), the individual is considered an "aggravated" offender and is subject to the DUI penalties. In other words, a DUI defendant (even first time) with a .20 breath test result who pleads to, or is found guilty of, a lesser DWAI offense will still be sentenced under CRS § 42-4-1301 (9)(a)(I) as though convicted of a DUI.

The section also is amended to provide an additional penalty surcharge of $25-$500 in DUI and DWAI cases. Nothing in this law changes the point assessment pursuant to CRS § 42-2-127; consequently, a DWAI conviction in this situation should still only result in an eight-point assessment against the defendant's driver's license.

CRS § 16-4-103 has been amended to provide that, with respect to any person arrested for driving while his or her license was under restraint solely or partially because of an alcohol-related driving conviction [CRS § 42-2-138(1)(d)], the person's "bail . . . shall be set at ten-thousand dollars or such amount as is set at a bail hearing." This applies to first-time offenders whose license restraint is due, even in part, to alcohol-related driving offenses.

A condition of every bail bond where there is a charge of driving under restraint pursuant to CRS § 42-2-138(1) (d)(I) must be that the defendant not drive any motor vehicle during the period of any driving restraint. Further, any person arrested for DUI/DWAI "may not attend a bail hearing until such person is no longer intoxicated . . . such person shall be held in custody until such person may safely attend such hearing."[5]

Lastly, the law requires notification to the owner of a vehicle used in a DUI/DWAI offense that said vehicle was used in such offense, even if the owner was not driving the vehicle at the time. Further, if the vehicle is used in two or more such offenses, the owner is required to meet certain financial responsibility requirements, even if the owner was never actually involved in any offense.

Standardization of Financial Crimes

Sess. Law 221, H.B. 98-1225
(Effective July 1, 1998)

This law revises most financially related offenses, such as where the level of offense is related to pecuniary loss or damage, so that offenses involving less than $500 dollars are misdemeanors and amounts over $500 are felonies (previously the cutoff amount for many offenses was $400). The following offenses were amended:

18-4-401(4):	Theft (aggregate value)
18-4-402:	Theft of rental property
18-4-410:	Theft by receiving
18-4-501:	Criminal mischief
18-5-205:	Fraud by check
18-5-206:	Defrauding a secured creditor
18-5-502:	Failure to pay over assigned accounts
18-5-504:	Concealment or removal of secured property
18-5-505:	Failure to pay over proceeds unlawful
18-7-702:	Unauthorized use of a financial transaction device
18-5.5-102:	Computer crime
12-44-102:	Defrauding an innkeeper

26-2-306: Trafficking in food stamps
26-4-504(8)(d): Unlawful use of patient personal needs trust fund
42-5-103: Tampering with a motor vehicle
42-5-104: Theft of motor vehicle parts

Increased Penalties for Vehicular Homicide

Sess. Law 298, S.B. 98-021
(Effective July 1, 1998)

This law amends CRS § 18-1-105(9)(a) to provide for enhanced sentencing (at least midpoint of presumptive range, but not more than twice the maximum) for defendants convicted of vehicular homicide when in immediate flight from the commission of another felony.

Domestic Violence

Sess. Law 293, H.B. 98-1272
(Effective July 1, 1998)

This bill amends CRS § 18-6-803.6 ("Duties of peace officers") to provide that police are not required to make an arrest of either party allegedly involved in an act of domestic violence when the officer determines there is no probable cause to believe that a domestic violence offense occurred. Further, officers are not required to arrest both parties involved in an alleged act of domestic violence where both parties claim to be victims.

The bill also amends CRS § 18-6-803.5 and 803.7 and adds CRS § 18-6-803.8, to provide that the offense of violation of a restraining order can occur based on a violation of restraining orders or injunctions from another state ("foreign protection orders").

Crime Victim Compensation

Sess. Law 172, H.B. 98-1130
(Effective April 30, 1998)

This bill amends CRS § 16-11-102 to provide that the court may, at sentencing or later, impose an amount of restitution that is less than the full pecuniary loss caused by the defendant if the lesser amount is agreed to by the defendant, the prosecuting attorney, and the victim.

Discovery in Class 1 Felonies

Sess. Law 137, H.B. 98-1264
(Effective. April 21, 1998)

CRS § 16-11-103 has a new subsection (3.5), which specifically applies to discovery in death penalty cases.

Miscellaneous Provisions

Sexual Offenses

H.B. 98-1177 (Sess. Law 139, § 1) made some amendments relating to sex offenders and their duty to register under CRS § 18-3-412.5. The most notable change is that effective July 1, 1998, any person who was convicted in this state or any other state on or after July 1, 1991, for an offense that would constitute an unlawful sexual offense under CRS § 18-3-411(1) or enticement of a child under CRS § 18-3-305 is now required to register pursuant to this statute. Any person released from custody of the DOC on or after July 1, 1991, for such an offense also is required to register (apparently regardless of the actual date of conviction).

CRS § 18-3-407, regarding a victim's prior or subsequent sexual conduct, and hearings regarding such, has been amended by H.B. 98-1177 (Sess. Law 139, § 7) to apply to any witness, not just the victim. This bill was effective April 21, 1998.

H.B. 98-1160 (Sess. Law 314, § 33) amended CRS § 18-3-405.3 (Sexual Assault on a Child--Position of Trust) to provide that the crime is a Class 3 felony if the victim is under fifteen years old, *or* the offense is committed as part of a pattern of sexual abuse as defined in CRS § 18-3-401(2.5) (this sentence enhancement applies to victims under eighteen years old). Any defendant convicted of a Class 3 felony as part of a pattern of sexual abuse under this section shall be sentenced in accordance with CRS § 16-11-309 (Mandatory Sentences for Violent Crimes). H.B. 98-1160 was effective July 1, 1998.

Driver's Licenses and Driving Offenses

CRS § 42-4-1601 (Accidents involving death or personal injuries - duties) was amended by H.B. 98-1160 (Sess. Law 314, § 32) so that a violation is now a Class 5 felony (formerly a Class 1 misdemeanor) if the accident involved serious bodily injury. The bill was effective July 1, 1998.

CRS § 42-4-1710 provides that no bench warrants be issued for failure to appear for any hearings on traffic infractions, the sole penalty for failing to appear is entry of judgment and assessment of appropriate penalties and surcharges. *See* H.B. 98-1160 (Sess. Law 314, § 1), effective July 1, 1998.

H.B. 98-1160 (Sess. Law 314 §§ 3-8) amended CRS § 42-2-125(l) to provide for the revocation of a minor's license or permit to drive if the minor is convicted or adjudicated of the enumerated drug offenses--which include the petty offense of possession of marijuana under one ounce--

under any state or equivalent municipal statute. The first offense equals three months' suspension or twenty-four hours of public service; the second offense equals six months' suspension; and the third offense equals one year's suspension. CRS §§ 18-18-404, -405, and -406 also have had sections added, providing for revocation of any driver's permit, minor driver's license, or provisional license for any conviction or adjudication of any non-felony violations of their respective provisions. This bill was effective July 1, 1998.

Other

Central Registry of Restraining Orders: CRS § 18-6-803.7 has been amended by H.B. 98-1008 (Sess. Law 251, § 5) to provide that orders issued pursuant to CRS §§ 18-1-1001 or 19-2-707 will be entered into the registry only at the discretion of the court or on motion of the district attorney. This bill was effective May 27, 1998.

Appeals by the Prosecution: H.B. 98-1008 (Sess. Law 251, § 9) amended CRS § 16-12-102 to provide that any order of a trial court that dismisses one or more counts of a charging document prior to trial is immediately appealable. This bill was effective May 27, 1998.

NOTES

1. CRS § 16-13-801.

2. *See* H.B. 98-1177 § 6, amending CRS § 18-1-105(c)(a)(V)(C), which may conflict with this provision.

3. CRS § 17-22.5-403(9)(e).

4. *Cf. People v. Jones*, 957 P.2d 1046 (Colo. App.1997) (possibility of reincarceration for parole violation is not a direct consequence of a guilty plea).

5. CRS § 16-4-103(1)(c).

This newsletter is prepared by the CBA Criminal Law Section.