Specialty Law Columns
Criminal Law Newsletter
Significant Legislation in the Criminal Law Field in 1999
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This article summarizes the work of the Colorado General Assembly in the criminal law arena for 1999.

Sentencing

House Bill ("H.B.") ***99-1068*** amends CRS §§ 17-27-105 and -106 to deny earned time to offenders who escape from community corrections and are later sentenced to the Department of Corrections. The act applies to escapes occurring on or after July 1, 1999.

H.B. 99-1162 provides that the sentencing court ordinarily retains jurisdiction to adjudicate probation revocation complaints while an appeal of the underlying conviction proceeds. This act was effective March 15, 1999.

CRS § 18-1-409 provides for appellate review of felony sentences. ***H.B. 99-1168*** amends the statute to delete the right to appeal if the defendant received a sentence within any range agreed on in a plea bargain. This act is effective for crimes committed on or after July 1, 1999.

H.B. 99-1235 requires DNA testing for violent offenders, at the offender's expense. It applies to crimes committed on or after July 1, 1999. The testing is made a condition of probation and parole. Testing is also required if a prison inmate has been found guilty of a sex offense under the Department of Correction's ("DOC") Code of Penal Discipline. It is fair to ask whether this new consequence of such a conviction comports with the minimal due process protections afforded at Code of Penal Discipline hearings.

H.B. 99-1353 addresses concerns over placement of out-of-state felons in Colorado halfway houses. The statute requires notification of local officials and provides authority for the administrator of the Uniform Act for Out of State Parolee Supervision, CRS § 24-60-301 *et seq.*, to reject the placement. The act applies to any person convicted of or accused of a crime in another state and transferred into this state on or after June 2, 1999.

New/Improved Crimes

H.B. 99-1070 creates a new form of second-degree sexual assault. CRS § 18-3- 403(1)(e.5) provides that the crime is committed if an actor inflicts penetration or intrusion on a fifteen- or sixteen-year-old victim and the actor is at least ten years older than the victim. The offense is an extraordinary risk Class 1 misdemeanor. The act applies to offenses committed on or after July 1, 1999.

H.B. 99-1168 changes the crime of "harassment by stalking," CRS § 18-9-111, to "stalking" and enhances the penalties by one felony class. The definition of stalking now includes making a "credible threat" to another person, coupled with contact or communication. The act also increases the penalty for ethnic intimidation under CRS § 19-9-121 to a Class 4 felony if the actor causes bodily injury and is aided by others.

H.B. 99-1168 also deletes the right to a jury trial for the crime of illegal possession or consumption of alcohol by an underage person, CRS § 18-13-122, by making the crime an unclassified, rather than a petty, offense.

This act also allows aggregation of the value of stolen items for the crime of theft by receiving, CRS § 18-4-410(7), when the value of the items is at least $500 but less than $15,000. The offense is a Class 4 felony. The act also created CRS § 18-8-210.2, which assures that Colorado's escape statutes apply to persons confined under the authority of another state or the United States.

In addition, H.B. 99-1168 adds CRS § 18- 18-406.5, which makes it a felony to possess or use marijuana in a "detention facility." H.B. 99-1168 was effective July 1, 1999.

The offense of hazing was created by ***S.B. 99-106***. "Hazing" is defined in CRS § 18-9-124(2)(a) as:

> [A]ny activity by which a person recklessly endangers the health or safety of or causes a risk of bodily injury to an individual for purposes of initiation or admission into or affiliation with any student organization; except that "hazing" does not include customary athletic events or other similar contests or competitions, or authorized training activities conducted by members of the armed forces of the state of Colorado or the United States.

Hazing is a Class 3 misdemeanor. The act applies to offenses committed on or after July 1, 1999.

S.B. 99-096 addresses female genital mutilation. It adds a provision to the child abuse statute, CRS § 18-6-401(1), which makes it a crime to excise or "infibulate" the genitalia of a female child. Any belief that the conduct is required as a custom or ritual, or is performed with the consent of the child or child's parent/guardian, is not an affirmative defense to the crime. However, there are exceptions to the offense if the procedure is performed for the child's health or performed for medical purposes during labor or birth. The district attorney has an obligation to report persons accused of this offense to the Immigration and Naturalization Service if there is a reasonable belief that the person is not a U.S. citizen or national. This act was effective May 24, 1999.

S.B. 99-048 amends CRS § 18-4-409(4) so that second-degree aggravated motor vehicle theft is a:

- Class 5 felony if the vehicle value is greater than $15,000;
- Class 6 felony if the vehicle value is more than $500 but less than $15,000;
- Class 2 misdemeanor if the values is less than $500.

The act also clarifies venue in such cases by providing that the offense can be prosecuted in the jurisdiction where the theft occurred, where the recovery of the vehicle occurred, or any jurisdiction where the vehicle was operated or transported. This act is effective July 1, 2000.

H.B. 99-1304 amends the burglary statutes (CRS §§ 18-4-201, 202, and -204) to clarify "enters unlawfully" and "remains unlawfully." A person may be guilty of burglary whether the initial entry was lawful or unlawful. This act was effective July 1, 1999.

Drugs

H.B. 99-1095 criminalizes the possession, manufacture, distribution, etc. of a drug known as "GHB" (CRS § 18-13-123). It also makes it a crime to knowingly cause others to use it, except for *bona fide* medical purposes. A first offense for possession is a Class 1 misdemeanor. The act was effective July 1, 1999.

H.B. 99-1168 expands the mandatory sentencing penalties, which previously applied to cocaine, to all Schedule I and II controlled substances. These penalties apply when the substance weighs 25 grams or more and include multiple offenses over a six-month period. This act was effective July 1, 1999.

While not criminal legislation, the Drug Dealer Liability Act, ***S.B. 99-150***, CRS § 13-25- 801 *et seq.*, merits discussion. The act allows a large class of persons to sue an illicit drug distributor for damages, including attorney fees. There is a procedure for prejudgment attachment of the drug dealer's assets, and the dealer is stripped of all exemptions. A criminal conviction based on the same circumstances as the civil action estops the dealer from denying participation in the illegal activity, but the conviction must be for more than "mere possession." Judgments and orders in the criminal proceeding take priority over any award under the act. The act is effective for causes of action accruing on or after June 2, 1999.

Grand Juries

H.B. 99-1162 allows a court to order that grand juror identifying information be kept confidential at the request of the prosecution. The court "shall enter" the confidentiality order "when reasonably necessary to protect the grand jury process or the security of the grand jurors." CRS §§ 13-72-103 and 13-74-103. No procedure is specified, nor does an adversary hearing appear to be contemplated. Compare, for example, the detailed procedure governing expanded media access to trials contained in Canon 3 of the Code of Judicial Conduct. This act was effective March 15, 1999.

Bail

H.B. 99-1162 codifies Art. II, § 19 of the Colorado Constitution denying bail after conviction to a number of serious felony offenders. It applies to crimes committed on or after January 1, 1995.

Motor Vehicle Offenses And Licenses

H.B. 99-1279 concerns penalties for alcohol-related traffic offenses. The act changes the mandatory minimum jail sentence for persons convicted of driving under the influence or DUI *per se* for a second or additional time within a five-year time period to ten days. It further requires that such person's license be revoked for at least one year and that during the one-year revocation, the person is ineligible for any type of probationary license. After the one-year revocation, the person is eligible to have a restricted driver's license, which requires the person to install an ignition interlock device on his or her vehicle(s) for a period of one year. Note that these restrictions apply only when an individual has multiple DUI or DUI *per se* convictions; it does not apply to DWAI convictions. Thus, if an individual receives a DUI conviction within five years of previous DWAI conviction, these provisions do not appear to be applicable.

Any driver's license revocations for multiple alcohol-related offenses must run consecutively, rather than concurrently. Lastly, the new CRS § 42-2-132.5 has a subsection (2), which provides that any person convicted of a DUI offense that did not occur within five years of a previous offense will, subsequent to any period of revocation, be required to have a restricted license and maintain an ignition interlock device on his or her vehicle(s) for a period of six months. This subsection is somewhat ambiguous because it is not clear whether it was meant to apply to a first offense, or simply to a second offense that occurred outside the five-year period.

H.B. 99-1026 applies to hearings regarding revocation of driver's licenses conducted on or after July 1, 1999. It amends CRS § 42-2-126 to provide that when a law enforcement officer requests a chemical test pursuant to CRS § 42-4-1301(7)(a)(II), the person must cooperate so that the sample can be obtained within two hours of the person's driving. This act also provides that any subpoena served on a law enforcement officer for a hearing shall be served at least five calendar days before the day of the hearing. It allows the officer to reschedule a hearing date, if done at least forty-eight hours prior to the hearing, for any "reasonable conflict," including training, vacation, and personal leave time.

S.B. 99-079 provides new procedures regarding parking provisions involving drivers with disabilities. Any person without a disability who violates these parking provisions by unauthorized parking, or using a license plate or placard issued to a disabled person, commits a Class B traffic infraction. Any person who fraudulently obtains, possesses, or uses a placard under this section is guilty of a misdemeanor and subject to the penalties in CRS §§ 42-6-139(3) and (4). This act was effective July 1, 1999.

H.B. 99-1027 provides that conviction or adjudication as a juvenile for defacing of property, as defined in CRS § 18-4-509 (2), or a conviction of criminal mischief, CRS § 18-4-501(f), if it involves defacing of property, results in mandatory revocation of the defendant's driver's license under CRS § 42-2-125. This act took effect on July 1, 1999.

H.B. 99-1364 addresses issues regarding "Photo Radar." The act requires personal service or a waiver of personal service. Service must be effected within ninety days of the violation. Convictions based on photo radar cannot be reported to the DMV and carry no points. Signs must be posted notifying drivers that photo radar is being used. An owner of a vehicle cannot be required to disclose the identity of a driver. If a violation is a first offense and less than ten miles per hour over the speed limit, only a warning may be sent. This act was effective May 17, 1999.

H.B. 99-1158 creates a Class A traffic infraction for any person under the age of seventeen who drives between midnight and 5 a.m., unless accompanied by parent, guardian, or other responsible adult, or with a statement from an employer indicating that the person is going to/from employment, or in the case of medical emergency. This offense results in two points being assessed against a driver's license. This act was effective July 1, 1999.

The crime of driving after revocation prohibited, CRS § 42-2-206, is reduced from a felony to a Class 1 misdemeanor by ***H.B. 99-1168***, effective July 1, 1999. However, the crime of aggravated driving with a revoked license is a Class 6 felony. It is committed when a habitual traffic offender commits any of a number of serious traffic offenses, such as DUI, DWAI, reckless driving, and eluding.

Mental Condition Evidence

H.B. 99-1172 applies to trials where sanity is at issue, to competency hearings, and to death penalty sentencings. When the defendant gives notice of the intent to offer "mental condition" evidence, the court must require an examination. A defendant who seeks to introduce evidence of his or her mental condition waives confidentiality as to communications with the examining physician or psychologist.[1] The act requires the defendant to "cooperate" with court-ordered mental health professionals, or be barred from introducing expert testimony about his or her "mental condition." "Cooperation" and "mental condition" are not defined. The act governs offenses committed on or after July 1, 1999.

Juvenile

S.B. 99-130 regards substantive juvenile law. This act amends CRS §§ 19-2-517 and -518 to provide new definitions regarding the types of juvenile offenders who may be sentenced to the Youthful Offender System in the Department of Corrections after either direct filing or transfer to district court. Juveniles convicted of Class 2 felonies may be sentenced up to seven years in the Youthful Offender System.

The act requires the court to sentence a repeat juvenile offender under CRS § 19-2-908 to at least a one-year commitment out-of-home, unless the court finds that an alternative sentence or lesser commitment out-of-home would be more appropriate. If the repeat offender is eighteen or older at time of sentencing, the court may sentence the offender to a county jail or community corrections program for up to two years.

The act provides that, as a condition of probation for a juvenile eighteen years old or older at the time of sentencing, the court may order up to ninety days in the county jail, unless school/work release is authorized, in which case the sentence may require up to 180 days in the county jail.

The act allows a parent, guardian, or other adult responsible on any bond for a juvenile to ask the court to revoke the bond and remand the juvenile to custody, if the adult determines that he or she is unable to control the juvenile.

The court may transfer venue to the court of the county in which the juvenile resides (if different than the court where the case is pending) only after sentencing. This act was effective July 1, 1999.

S.B. 99-050 is entitled "Sentencing Considerations for Certain Serious Offenders." This act applies to juvenile defendants convicted of any unlawful sexual behavior as defined in CRS § 18-3-412.5(6). "Conviction" includes deferred judgments and deferred adjudications. The act amends CRS §§ 19-2-905(1) and -906. In the case of the specified juvenile sex offenders, the act requires the juvenile presentence investigation to include the juvenile's prior criminal and delinquency record and mandates that the court must consider such record in sentencing the juvenile. This act was effective July 1, 1999.

H.B. 99-1253 is part of a legislative response to the Colorado Supreme Court's ruling in *Nicholas v. People*.[2] This act amends CRS § 19-2-511(6), regarding juvenile custodial statements, so that if the juvenile makes a deliberate misrepresentation regarding the applicability or requirements of this section (namely, regarding age) and the law enforcement officer, acting in good faith and reasonable reliance on the misrepresentations, conducts an interrogation without the presence of a parent or guardian, such statements resulting from the interrogation will not be rendered inadmissible by this statute. This act is effective August 4, 1999.

Statements made by a juvenile also were addressed in ***S.B. 99-130***, which amended CRS § 19-2-511(2)(a) and was effective July 1, 1999. Under this provision, juvenile statements to law enforcement will not be inadmissible because of a parent's or guardian's absence if the juvenile misrepresents (without regard to whether the misrepresentation is deliberate) his or her age and law enforcement officials act in good faith (but not necessarily reasonable) reliance on the misrepresentation, or the juvenile is emancipated, or the juvenile is a runaway from another state. The apparent conflict between the amended versions of CRS § 19-2-511 (2) and (6) will have to be resolved by the courts

H.B. 99-1173 amends numerous statutes to provide that attendance at school, or attendance in an educational program working toward a high school diploma or GED, may be required of a juvenile by the juvenile parole board or ordered by the court as a condition of probation. It requires the parole board to notify the school district in which the juvenile is enrolled that school attendance is part of the juvenile's parole, and requires the school to report any absences. A juvenile cannot be required to attend a school from which he or she has been expelled without prior approval of the school's board. This act took effect on July 1, 1999.

H.B. 99-1156 provides that "Restorative Justice" is now an authorized goal of the juvenile justice system and authorizes the executive director of the Department of Public Safety to accept funds, gifts, grants, etc. to effectuate that goal. This act is effective August 4, 1999.

H.B. 99-1094 applies to the sentencing of aggravated juvenile offenders. The act amends CRS §§ 19-2-601(5)(a)(I) and -921 to provide that a juvenile who is adjudicated an aggravated offender for an offense that would constitute a Class 2 felony must be committed for at least three, but not more than five, years. If the offense would constitute a Class 1 felony, the juvenile must be committed for at least three, but not more than seven, years. This act was effective July 1, 1999.

H.B. 99-1037 amends CRS § 22-33-106 (4)(a) to provide that if a student is expelled from public school pursuant to CRS § 22-33-106(1)(c) or (d) for commission of an offense, the school district must prohibit the student from enrolling or re-enrolling in the same school in which the victim of the offense or a member of the victim's family is enrolled or employed. This does not apply to property crimes. Further, it only applies if a conviction, adjudication, deferred judgment, or diversion results from the offense for which the student was expelled. This act is effective July 1, 1999.

Sex Offenses

H.B. 99-1260 makes a number of relatively small changes in the wake of 1998's Lifetime Supervision Act. Last year's enactment did not provide for sentencing sex offenders to community corrections. This year's legislation, at CRS §§ 16-13-804 (2)(b) and -808(1.5), authorizes community placement, but only as a condition of probation.

The Lifetime Supervision Act purported to provide for indeterminate sentences. It arguably conflicted with CRS § 16-11-304, which required determinate sentences for felonies. H.B. 99-1260 amends the latter statute by resolving the ambiguity in favor of indeterminate sentences.

There are several changes to the duty to register. Individuals required to register in another state are likewise required to register if they become temporary or permanent Colorado residents. CRS § 18-3-412.5(2)(a)(II) tightens registration requirements by requiring verification of residence for potential parolees. Knowingly providing false information about the residence is now a form of the crime of failure to register as a sex offender, a misdemeanor for the first offense under CRS § 18-3-412.5(4)(b).

DNA testing is required under CRS § 16-11-104 for offenders sentenced to the county jail or to community corrections if the offense involves unlawful sexual behavior or has a factual basis that involves unlawful sexual behavior. DNA testing also is required under CRS § 16-11-203(1) for individuals placed on deferred judgments.

Under CRS § 16-13-901 *et seq.*, a sexually violent predator risk assessment is to be done as part of the presentence report for offenders who potentially qualify for that designation (*see* CRS § 18-3-414.5 for the definition of "sexually violent predator"). For parole applicants, DOC prepares the assessment. For some sexually violent offenders, community notification can be accomplished pursuant to standards to be promulgated by the Sex Offender Management Board (formerly the Sex Offender Treatment Board). The act was effective June 2, 1999.

S.B. 99-119 broadens the category of persons who must undergo HIV testing. Now included are persons who are convicted of prostitution or patronizing a prostitute in municipal courts, as well as state courts. In certain circumstances, the test results can be made available to the prosecution for consideration of seeking sentence enhancement. CRS § 18-3-415.5 requires a massive sentence for offenders having unlawful sex with knowledge that the offender has tested positive for HIV, even if the disease is not transmitted. The penalty is at least three times the presumptive maximum, and up to life, CRS §§ 18-3-415.5(5)(b) and 16-13-804(1)(d). S.B. 99-119 was effective May 29, 1999.

Miscellaneous

H.B. 99-1235 requires DNA testing of many violent/sex offenders while on probation or parole. The cost of the testing is borne by the offender. The act applies to crimes committed on or after July 1, 1999.

H.B. 99-1350 attempts to resolve some conflict of interest issues that have arisen between the State Public Defender and the Office of Alternate Defense Counsel. Previously, the Public Defender made the initial determination if there was a conflict of interest that would require appointment of counsel other than the Public Defender. CRS § 21-2-103 was amended by this act to provide that the court should determine whether there is a conflict. The Public Defender triggers the inquiry by filing a motion to withdraw, which may contain sealed material.

Two issues are raised by this act. First, it appears to mandate a procedure for withdrawal and, thereby, to invade the Supreme Court's rule-making authority under Art. VI, § 21 of the Colorado Constitution. Second, by requiring disclosure of confidential material, even if only to the court in support of the motion to withdraw, it may run afoul of *People v. Schultheis*,[3] in which the Colorado Supreme Court stated, "Defense counsel should not, in any way, be required to divulge a privileged communication to the trial court during trial."

NOTES

1. *Cf. People v. Ullery*, 28 Colo.Law. 191 (Aug. 1999) (S.Ct. No. 98SC92, *annc'd* 6/21/99).

2. 28 Colo.Law. 180 (Jan. 1999) (S.Ct. No. 97SC705, *annc'd* 1/11/99).

3. 638 P.2d 8 (Colo. 1981).

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