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The Colorado General Assembly's work is done for the 1995-96 session. However, for judges, prosecutors and defense attorneys, the job of learning and understanding the numerous changes to the criminal law statutes is just beginning. Not surprisingly, given the political climate surrounding the issue of youthful offenders, the delinquency provisions of the juvenile code were substantially revised. This article was written to alert criminal law practitioners to these significant statutory changes.(fn1)

Sentencing

H.B. 96-1117

This act increases the maximum fine that can be levied for violation of a county ordinance from $300 to $600.(fn2)

H.B. 96-1221

This act authorizes sentencing to a day reporting center in lieu of a county jail sentence for misdemeanors. (fn3) CRS § 17-27-102(3) was amended to include day reporting programs within the definition of a "community corrections program."

H.B. 96-1198

H.B. 96-1198 amends various restitution statutes. Generally, it makes restitution easier to collect and more onerous for the defendant. The act makes a number of parties judgment creditors of the defendant, including anyone to whom restitution could ordinarily be ordered. The state becomes a judgment creditor where the party to whom restitution is owed cannot be located. Any of these statutory creditors can enforce the restitution award in the same manner as a civil judgment. Money that is collected and remains unclaimed goes into the Victim and Witness Assistance Fund.

The act also created a new statute, CRS § 16-11-101.6, which provides for a late fee of $10 if restitution payments are not made on time, and a one-time $25 payment when restitution is paid over a period of time. The state is expressly authorized to use collection agencies, private counsel or other entities to collect unpaid restitution. In addition, the court can order an attachment of wages (up to 50 percent) for payment of past-due restitution. CRS § 16-11-101.6(5) provides that if the defendant is incarcerated in a state institution, the superintendent of that facility may fix the manner and time for payment of restitution.

CRS § 16-11-204.5 is amended to require that any restitution ordered as a condition of probation be paid within twelve months from the date of the order, regardless of the amount owed. Restitution not paid within that time may be collected through the means described above. The act also amends CRS § 16-11-204.5(2) by removing the court's authority to modify the amount of restitution as a result of nonpayment.

The parole statutes were similarly amended to provide that restitution must be paid while the inmate is on parole and may be collected by the above-described methods if not paid during that time.(fn4) The juvenile statutes in Title 19 were similarly amended.

H.B. 96-1196

This act creates a three-county pilot project such that mentally ill defendants who commit class 2 and 3 misdemeanors are given deferred judgments. Which counties will participate is yet to be determined. The intent is to divert such offenders from the county jails and place them in treatment. The programs are to be in place by the first of next year.

H.B. 96-1343

This act erects a mechanism to dispose of funds left at a halfway house if the offender escapes from the program. This is accomplished by requiring the inmate to execute a limited power of attorney. The act is effective July 1, 1996, and applies to placements in community facilities occurring on or after that date.

H.B. 96-1087

CRS §§ 18-1-105 and 16-11-101 are amended to overrule *People v. Thompson*(fn5) by prohibiting the imposition of a fine in lieu of a prison sentence in a case where the prison sentence would otherwise be

mandatory. The fine may not be imposed in lieu of any period of incarceration for an offender who twice previously has been convicted of a felony.

The escape statutes(fn6) previously prohibited a suspended sentence on conviction. This act permits a suspended sentence if the court is sentencing a person to the Youth Offender System ("YOS"). This is in keeping with the YOS philosophy of a sentence to YOS coupled with a suspended adult sentence, where the suspended sentence is imposed if the offender fails to complete YOS successfully.

H.B. 96-1289

This act broadens the authority of the Department of Corrections ("DOC") to place offenders in Intensive Supervision Programs up to six months prior to their parole eligibility date. The programs may be operated by private providers as well as by community corrections providers. The act became effective May 23, 1996.

Juvenile

H.B. 96-1019

This act repeals and re-enacts the definitions scattered throughout Title 19, CRS, and places them all in CRS § 19-1-103.

H.B. 96-1005

This 123-page act made a number of changes in the juvenile system, effective primarily, but not entirely, to offenses committed on or after January 1, 1997. Because the act substantially amended and reallocated the provisions of CRS § 19-2-101 *et seq.*, the statutory references in the discussion below are to the *new* statute numbers.

The act allows trials to a jury of six only for juveniles charged as aggravated juvenile offenders or for juveniles charged with committing a crime of violence.(fn7) However, a juvenile charged as an aggravated juvenile can demand a jury of twelve.(fn8) Failure to request a jury trial waives the right. The trial must be held within sixty days of the plea unless the juvenile asks for a jury trial.(fn9) Requesting a jury trial waives the requirements, otherwise imposed, that the trial be held within sixty days and invokes the six-month speedy trial rules commonly applied in adult cases.(fn10)

CRS § 19-2-109 was amended to require the attendance of parents or guardians. A contempt citation may be levied for failure to appear. Parental cooperation also is required in the treatment process, and failure to

cooperate can lead to sanctions.

CRS § 19-2-511(5) now provides for an express written waiver of the parent/guardian's presence during questioning of a juvenile, but only the parent/guardian can execute the waiver.

Some of the special categories created by juvenile law have been amended. For example, a "violent juvenile offender" no longer need be thirteen years of age or older at the time of the act complained of.(fn11) An "aggravated juvenile offender" need no longer be twelve years of age or older.

CRS § 19-2-517 was amended to broaden direct filing to include juveniles who allegedly committed vehicular homicide, vehicular assault or felonious arson. The court can appoint guardians *ad litem* for juveniles charged by direct filing in the district court, pursuant to the same statute.

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CRS § 19-2-518 substantially amends the grounds for transfers from the juvenile court to the district court. Juveniles twelve or thirteen years of age may be transferred if they are alleged to have committed a Class 1 felony, a Class 2 felony or any crime of violence. They also may be transferred if they are fourteen years of age or older and are alleged to have committed a delinquent act that would constitute a felony and the court finds that it would be contrary to the best interests of the juvenile or the public to retain jurisdiction.

CRS § 19-2-601 provides that the sentence for a Class 1 felony can be up to seven years.

CRS § 19-2-905 presumes the need for a presentence investigation unless waived by the court. The required content of the report also is set forth in the statute.

CRS § 22-32-109.3 was added to create an obligation to maintain student records confidentially.

Anew part of CRS § 19-2-201 creates a Division of Youth Corrections within the Department of Human Services ("DHS"). This new division is to oversee juvenile corrections.

The DHS is directed to contract with the DOC to house juveniles sentenced as adults until they reach the age of fourteen, after which they will be housed in the DOC. The DOC is directed to develop a management plan for housing juveniles.

In consultation with the Joint Budget Committee, the DHS may condemn land in Denver to erect a detention facility for juveniles.

S.B. 96-137

This act allows a juvenile to be sentenced to the regimented inmate training program ("boot camp") as a condition of probation.

Sex Offenses

S.B. 96-74

This act creates the procedure for using closed-circuit television when children testify in sexual assault trials. For the cases within the act's purview, the child witness and the lawyers appear and question the witness in a room separate and apart from the judge and the defendant. It appears that the video equipment necessary to make this work would probably be expensive. The act also provides that its provisions do not apply if the defendant is *pro se*. The situation can be envisioned where a defendant fires his or her lawyer in order to force the victim to testify in the defendant's presence. Given that the defendant has a constitutional right to proceed *pro se*,(fn12) this concern needs to be addressed. This act became effective May 2, 1996.

H.B. 96-1181

This act makes numerous changes in the way sex offenders are prosecuted. CRS § 16-10-301 was repealed and re-enacted to create a strong presumption that evidence of other misconduct is admissible. The prosecution can offer the evidence for any reason other than propensity. Notice and a hearing are required, as well as a cautionary instruction to the jury.

A number of provisions apply not only to individuals who are convicted of "an unlawful sexual offense," but also to individuals who are convicted of an offense for which the factual basis involved "unlawful sexual behavior." For example, CRS § 16-11-204.3 requires genetic testing for these individuals as a condition of probation, at the offender's expense. CRS § 18-3-412.5, which provides for registration of sex offenders, now adds those persons pleading guilty where the factual basis involved "unlawful sexual behavior." Under CRS § 18-3-412.5(4), the mandatory penalties for failure to register have been broadened to include juveniles.

CRS § 18-3-412.5(6.7) requires a background check of a job applicant's criminal history if the applicant is seeking employment at a "nursing care facility."

"Unlawful sexual behavior" is defined to include virtually all sexual assaults, sexual assault on a child, incest, sexual exploitation and similar crimes. It also includes attempt, conspiracy or solicitation to commit any of these offenses, a deferred

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judgment for any such offense, and "any offense which has a factual basis . . ." of one of the enumerated offenses.

An amendment to CRS § 17-2-201(5) (a) poses a problem. This is the statute that was interpreted in *Thiret v. Kautzky,*(fn13) which allowed the parole board to refuse to parole an inmate who was convicted of a sex offense under the *Gorsuch* law.(fn14) Before *Thiret,* it was understood that these inmates would serve only 50 percent of their sentence. The effect of the *Thiret* decision was to allow the parole board to require them to serve virtually their entire sentence prior to release. H.B. 96-1181 adds to the list of offenses that fall within

this category by including those offenses involving unlawful sexual behavior and those offenses where the factual basis underlying the offense involved unlawful sexual behavior. By its terms, the amended statute is retroactive. An *ex post facto* challenge seems likely.(fn15)

A second problem with this statute is that it is ambiguous as to the length of parole for crimes committed on or after July 1, 1996. Since 1993, Colorado statutes have mandated a fixed length of parole not to exceed five years for many sex offenses.(fn16) The new subsection, CRS § 17-2-205(5)(a.5), provides that "in no event shall the term of parole exceed the maximum sentence imposed upon the inmate by the court." Whether this limits the parole to the maximum length of the sentence to incarceration or to some other "sentence" remains to be seen.

CRS § 19-1-119 was amended to permit the DOC to obtain information from the Central Registry of Child Protection for purposes of supervising the inmate in question.

The Criminal Justice Records Act, CRS § 24-72-308(3), was amended to prohibit sealing any conviction for any offense for which there is unlawful sexual behavior. This seems unnecessary because convictions cannot be sealed in any event. It also provides that sealed records are still accessible between criminal justice agencies.

Traffic

H.B. 96-1133

This act applies in the driver's license context. It clarifies that a person who has a commercial license and drives with a blood alcohol content of .04 but less than .1 grams of alcohol per 100 milliliters of blood may apply for a different type of license but may not operate a commercial

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vehicle during revocation of the commercial license. It further states that anyone possessing a commercial license who knowingly transports, possesses or uses various controlled substances will have his or her license canceled forfrom six months to one year. The act became effective for license applications and for offenses committed on or after April 8, 1996.

H.B. 96-1055

This act stiffens the penalties for chain law violations for commercial vehicles. It became effective April 11, 1996.

H.B. 96-1069

This act authorizes seventy-five-mile-per-hour speed limits on freeways and sixty-five-mile-per-hour speed limits on some other highways. This act became effective May 25, 1996.

H.B. 96-1140

This act adds probationary licenses to the list of driver's licenses that may be denied to an individual who does not have a valid privilege to drive and who has any pertinent outstanding judgments or warrants.

S.B. 96-29

Addressing a pressing concern, the General Assembly created an enhanced penalty for illegally driving in a high-occupancy vehicle ("HOV") lane---third offense.

Controlled Substances

H.B. 96-1102

This act repeals provisions that authorized licensed individuals to handle drug precursors. In the criminal context, it amends CRS § 18-18-414(1) by criminalizing transfer of drug precursors to any person and by repealing the exception for transfer of such items to licensees. It became effective April 8, 1996.

S.B. 96-133

This act repeals the controlled substance use tax embodied in CRS § 39-28.7-101 *et seq*. On the other hand, it raises the drug offender surcharges by 50 percent by amending CRS § 18-19-103. The act became effective March 25, 1996, but applies to offenses committed on or after July 1, 1996.

New/Improved Crimes

H.B. 96-1281

This act creates the crime of "use of a forged academic record," CRS § 18-5-104.5. An individual commits the crime by using a forged academic record to seek employment or admission to an institution of higher education or for securing a scholarship or other form of financial assistance. The crime is a Class 1 misdemeanor.

H.B. 96-1087

CRS § 18-8-111 was amended to create the crime of knowingly providing false identifying information to law enforcement authorities. The identifying information questions include name, address, date of birth, Social Security number and driver's license number.

This act also amends the second-degree murder statute, CRS § 18-3-103. Second-degree murder remains a Class 2 felony, but it is a Class 3 felony if the crime is committed as a result of heat of passion. This replaces the former manslaughter Class 3 felony of heat of passion. The remainder of the manslaughter offenses, such as aiding a suicide or recklessly causing a death, remain Class 4 felonies.

H.B. 96-1361

This act broadens the crime of endangering public transportation, CRS § 18-9-115, to include endangering school buses.

S.B. 96-33

The General Assembly addressed yet another pressing concern by making it a Class 2 misdemeanor for a nonemployee who is under age twenty-one to "linger in the gaming area of a casino." An adult accomplice may be prosecuted for the felony of contributing to the delinquency of a minor, CRS § 18-6-701. This act becomes effective October 1, 1996.

S.B. 96-68

The misdemeanor of obstructing a peace officer, CRS § 18-8-104, was expanded to include obstruction of emergency medical personnel and treatment.

Miscellaneous but Important

S.B. 96-205

This act creates a nine-member commission to appoint the alternate defense counsel ("ADC"). The ADC is to coordinate the representation of defendants by private counsel when the Office of the Public Defender withdraws due to a conflict of interest. Commission members are appointed by the Colorado Supreme Court. Six members must be criminal defense attorneys. The ADC then is to contract with private counsel to provide the actual representation. The ADC will begin his or her duties on January 1, 1997.

Procedural Changes

H.B. 96-1145

This act clarifies 1995's enactments regarding consolidation of sanity and guilt trials. It purports to abolish once and for all a separate trial for sanity by making various amendments to CRS § 16-8-101 *et seq*. It went into effect January 31, 1996, but by its terms, applies to offenses committed on or after July 1, 1995.

H.B. 96-1087

The penalty phase of the habitual sex offender against children prosecution, CRS § 18-3-412(5), need no longer be done before a jury. The same holds true for habitual child abusers under CRS § 18-6-401.2.

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Footnotes:

1. Unless otherwise noted, all of the changes described herein are effective for offenses committed on or after July 1, 1996.

2. Codified as amended at CRS § 30-15-402(1).

3. Codified as amended at CRS § 17-2-701(5)(c).

4. *Id*.

5. 897 P.2d 857 (Colo.App. 1994).

6. CRS § 18-8-208(9).

7. CRS § 19-2-107.

8. CRS § 19-2-601(3)(a).

9. CRS § 19-2-708.

10. CRS § 19-2-107(4).

11. Codified as amended at CRS § 19-2-516.

12. *Faretta v. California,* 422 U.S. 806 (1975).

13. 792 P.2d 801 (Colo. 1990).

14. H.B. 1589, Ch. 157, 1979 Colo. Sess. Laws 664.

15. *Compare, e.g., Furnari v. Zavaras,* 25 Colo.Law. 90 (April 1996) (App.No. 95CA0568, *annc'd* 2/1/96) (retroactive elongation of permissible parole deferral does not violate the *ex post facto* clause).

16. CRS § 18-1-105(1)(a)(V)(C).

This newsletter is prepared by the CBA Criminal Law Section. This month's article was written by Phil Cherner, Denver.
