1982, June, Pg. 1478. Colorado Felony Sentencing.

The Colorado Lawyer

1982.

1982, June, Pg. 1478. Colorado Felony Sentencing

Vol. 11, No. 6, Pg. 1478

Colorado Felony Sentencing

by Philip A. Cherner

The Colorado felony sentencing scheme was extensively revised in 1979 to remove the great disparity in sentencing then permitted.(fn1) For example, the penalty for a Class 3 felony under the "old" law was from five to forty years, plus a fine.(fn2) The "new" law shrinks this to from four to eight years and only corporations can be fined.(fn3) A sentencing judge can exceed these presumptive ranges only upon a finding of "extraordinary circumstances."(fn4) To further promote uniformity, the General Assembly mandated automatic nonadversary appeals of extraordinary sentences.

This article summarizes the law of felony sentencing in Colorado, exclusive of the death penalty. Since the enactment of the new law, a number of significant developments has taken place, the foremost of which is the General Assembly's enactment of a statutory list of "extraordinary aggravating circumstances." The legislature has also repealed the automatic nonadversary appeal provision.(fn5) The overall effect of statutory changes since 1979 has been to narrow slightly the range of sentencing alternatives.

Sentencing Alternatives

The following alternatives are available to the sentencing court:(fn6)

---Probation and/or suspended sentence

---Incarceration in the Department of Corrections

---Death

---Payment of a fine if the defendant is a corporation

---A sentence to community corrections

---Payment of costs pursuant to statute

---A sentence as a sex offender

---A sentence as a habitual criminal

---Any other court order authorized by law

Prior to imposition of sentence, the court generally orders a presentence investigation (also called a probation report).(fn7) Each report must include, but is not limited to, information as to the defendant's family, background, education, history, employment record and past criminal record, as well as an evaluation of the alternative dispositions available for the defendant and the amount of restitution to be ordered.(fn8) Psychiatric examinations may also be required. The preparation of this report can be waived with the exception of the computation of restitution. The report must also include a computation of the number of days of presentence confinement to which the defendant is entitled.(fn9)

Sentences to the Department of Corrections

The following table describes sentences to the Department of Corrections for offenses committed on or after July 1, 1979.(fn10)

As can be seen, virtually all Colorado felonies are classified with Class 1 the most serious and Class 5 the least serious. All sentences to imprisonment for felonies (except as a condition of probation or to community corrections facilities) are to the Executive Director of the Department of Corrections ("Department"). The

Director then has the authority to transfer an inmate to any one of the various Department facilities. All inmates begin their stay with the Department at the Diagnostic Unit in Canon City, which prepares a summary of the inmate's program.(fn11)

The sentence in the presumptive range is the sentence that must be given by the sentencing court unless the court finds aggravating or mitigating circumstances, and these circumstances must be "extraordinary.(fn12) When such circumstances are present, the trial court may impose a sentence as low as half the presumptive minimum or as great as twice the presumptive maximum. In imposing extraordinary sentences, the trial court must make findings on the record which would justify the sentence.(fn13) Some of the factors the courts have approved in imposing extraordinary sentences are an individual's record of prior convictions, the brutality of the crime and the minimal chances of rehabilitation.(fn14)

Under a recent statute, C.R.S. 1973, § 18-1-105(9), certain characteristics of the defendant's status are *per se* extraordinary aggravating circumstances. These include:

> (I) The defendant is convicted of a crime of violence under section 16-11-309, C.R.S. 1973;
>
> (II) The defendant was on parole for another felony at the time of commission of the felony;
>
> (III) The defendant was on probation for another felony at the time of the commission of the felony;
>
> (IV) The defendant was charged with or was on bond for a previous felony at the time of the commission of the felony, for which previous felony the defendant was subsequently convicted;
>
> (V) The defendant was under confinement, in prison, or in any correctional institution within the state as a convicted felon, or an escapee from any correctional institution within the state for another felony at the time of the commission of a felony.(fn15)

It is important to note, however, that for most offenses the statute does not require that the defendant be sentenced to the Department of Corrections. Unless convicted of a crime of violence pursuant to C.R.S. 1973, § 16-11-309, the statute mandates a longer sentence only if sentence is imposed.(fn16) Probation eligibility is not affected. A "crime of violence" is:

> [A] crime in which the defendant used, or possessed and threatened the use of a deadly weapon during the commission of any crime committed against an elderly or handicapped person or the crime of murder, first or second degree assault, kidnapping, sexual assault, robbery, first degree arson, first or second degree burglary, escape, or criminal extortion, or during the immediate flight therefrom, or who caused serious bodily injury or death to any person, other than himself or another participant, during the commission of any such felony or during the immediate flight therefrom, or who caused serious bodily injury or death to any person, other than himself or another participant, during the commission of any such felony or during the immediate flight

therefrom.(fn17)

Accomplices and principals alike are subject to the statute's provisions, but it does not appear to apply to the inchoate crimes of attempt and conspiracy. However, one sentenced pursuant to the statute may still apply to the court for reconsideration and, under certain circumstances, this may be granted. Upon reconsideration, the defendant may be sentenced as if he was not convicted of a "crime of violence," but the trial court must notify the state court administrator of the reasons for the modification.(fn18)

Defendants convicted of violating the special offender provision of the new

---

Controlled Substance Act must be sentenced in the extraordinary range.(fn19)

The practitioner should also be aware of the provisions for sentencing juveniles who are before the District Court as adults. Depending on how they reach the adult court, certain special sentencing alternatives are available. Some juveniles are prosecuted as adults after their case is transferred to adult court pursuant to C.R.S. 1973, § 19-1-104(4)(a). In this situation the child, if convicted, may be sentenced as an adult or in any other manner authorized by the Children's Code and his case may be remanded to juvenile court for sentencing. However, a child convicted of a Class 1 felony or a crime of violence must be sentenced as an adult.(fn20)

On the other hand, if the child is before the adult court pursuant to a direct filing, the sentencing court is not bound by the mandatory sentencing statute.(fn21)

Unaffected by Colorado presumptive sentencing legislation are two special categories of offenders. Those adjudged to be habitual offenders are punished by a term of not less than twenty-five nor more than fifty years (two prior felonies carrying a maximum penalty of more than five years which occurred within ten years of the new offense) or life (three prior felonies; no time limit). A defendant given a twenty-five-year minimum sentence would be eligible for parole in approximately twelve years.(fn22)

Anyone convicted of a sex offense as that term is defined in § 16-13-202 may be sentenced to an indeterminate term of one day to life pursuant to the Colorado Sex Offenders Act. The Act is triggered by either the court, the defendant or the prosecutor requesting commencement of proceedings within twenty days of the conviction. The status of one committed under the Act is reviewed after six months and annually thereafter by the Parole Board to determine his eligibility for release. The court may commit the defendant under the Act if it finds he constitutes a threat of bodily harm to members of the public.(fn23)

The Sentence---How Long?

When imposing sentence, the court endeavors to punish when appropriate, to treat similarly situated defendants with consistency, to deter future crimes and to rehabilitate. Some of the factors to be considered in

fulfilling these goals are the gravity of the offense in terms of harm to person or property and in terms of the culpability requirement of the law; the defendant's history of prior criminal conduct; the degree of danger the defendant might present to the community if released; the likelihood of future criminality in the absence of corrective incarceration or treatment; the prospects for rehabilitation under some less drastic sentencing alternative, such as probation; and the likelihood of depreciating the seriousness of the offense if a less drastic sentencing alternative is chosen.(fn24)

The trial court must state its reasoning on the record, to facilitate appellate review, and a sentence of extended duration must be supported by sound reasons in the record.(fn25) The standard governing review of sentences or appeal is one of abuse of discretion, and is set forth in detail in *Triggs v. People*.(fn26)

Concurrent v. Consecutive Sentences

In most situations, the imposition of concurrent versus consecutive sentences is a matter for the trial court's discretion.(fn27) However, under certain circumstances concurrent sentences are mandatory. If two or more acts are part of a single prosecution, part of the "same criminal episode" and supported by identical evidence, then any sentences imposed must be concurrent.(fn28) On the other hand, the Supreme Court held that three sexual assaults against the same victim within two hours justify consecutive sentences. The Court of Appeals

---

recently held that consecutive life sentences infringe upon the Parole Board's discretion and are therefore unconstitutional.(fn29)

"Same criminal episode" has recently been defined broadly in *Jeffrey v. District Court* and is synonymous with that term as it is used in Crim.P. 8(a) for joinder purposes.(fn30)

Consecutive sentences are mandatory for bond jumping and certain institutional offenses, such as escape, possession of contraband and rioting.(fn31)

Sentence as Computed by the Department

A defendant who is sentenced to the Department of Corrections is entitled to credit for any time spent in custody prior to imposition of sentence. The trial court must, pursuant to statute, make a finding of the amount of presentence confinement. Such confinement is then deducted from the defendant's sentence by the Department. In addition, defendants sentenced under the present sentencing scheme (for offenses committed on or after July 1, 1979) are entitled to good time credit of fifteen days each month.(fn32) These two provisions are interpreted by the Department in the following way.

In computing an individual's sentence, the Department first subtracts any presentence confinement and then cuts the remaining sentence in half. The amount of time thus calculated is the amount of time the defendant must serve. All time is calculated from the date of the *mittimus* (which should be the date of sentencing). Thus, an individual sentenced to two years after serving three months in jail prior to sentencing would be released ten and one-half months after imposition of sentence.(fn33)

The Department's programs are all geared to an inmate's "outdate"; that is,

---

the date of his release. Eligibility for such things as work release, halfway house placement and certain institutional transfers is based on the remaining amount of time the inmate must serve until release. For this reason, all good time is awarded to every inmate when he arrives at the Diagnostic Unit. This means the sentence is halved at its inception. Rather than earn good time, an inmate must misbehave to lose it.

In addition to good time, an inmate can earn up to fifteen days per six months of incarceration as earned time. This is awarded by the Parole Board for certain criteria set out in the statute.(fn34)

With the exception of sex offenders and habitual offenders, each defendant is on parole for one year following incarceration. If parole is revoked, the Parole Board may reincarcerate the defendant for no less than six months nor more than two years, provided, however, that the aggregate length of the sentence actually served and the period of reincarceration not exceed the length of the original sentence. Good time deductions apply during the period of reincarceration; thus, when parole is revoked and a six-month sentence is imposed, the offender will serve three months unless he forfeits his good time.(fn35)

Probation and Suspended Sentences

Any defendant is eligible for probation except for those convicted of a Class 1 felony and those convicted of two prior felonies.(fn36) In considering whether to grant probation, the court is guided by statute, which provides that probation may be granted unless:

> (a) There is undue risk that during a period of probation the defendant will commit another crime; or
>
> (b) The defendant is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment as authorized by § 16-11-101; or
>
> (c) A sentence to probation will unduly depreciate the seriousness of the defendant's crime or undermine respect for law; or
>
> (d) His past criminal record indicates that probation would fail to accomplish its intended purposes; or

(e) The crime, the facts surrounding it, or the defendant's history and character when considered in relation to statewide sentencing practices relating to persons in circumstances substantially similar to those of the defendant do not justify the granting of probation.(fn37)

The following factors are to be given weight in making this determination:

(a) The defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;

(b) The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property;

(c) The defendant acted under strong provocation;

(d) There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct;

(e) The victim of the defendant's conduct induced or facilitated its commission;

(f) The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;

(g) The defendant has no history of prior criminal activity, or has led a law-abiding life for substantial period of time before the commission of the present offense;

(h) The defendant's conduct was the result of circumstances unlikely to recur;

(i) The character, history, and attitudes

of the defendant indicate that he is unlikely to commit another crime;

(j) The defendant is particularly likely to respond affirmatively to probationary treatment;

(k) The imprisonment of the defendant would entail undue hardship to himself or his dependents;

(l) The defendant is elderly or in poor health;

(m) The defendant did not abuse a public position of responsibility or trust;

(n) The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise.(fn38)

The appropriate conditions of probation include using one's best efforts to obtain and maintain employment,

refraining from the excess consumption of alcohol and the possession of a firearm, reporting to the probation officer when so ordered, advising the probation department of one's residence and allowing the probation department to visit the defendant at his residence at reasonable times.(fn39) The defendant may not leave the jurisdiction of the court without permission of the probation officer or the court. The court may also impose any condition which is reasonably related to the rehabilitation of the defendant. Finally, every grant of probation shall include as an express condition the prohibition against committing another offense and an order for restitution, if appropriate.

The defendant may be ordered to serve up to ninety days in the county jail and, if he is allowed work or education release, up to two years in the county jail.(fn40) In *People v. Knaub,* the court held that no period of probation may exceed the maximum period of time for which the defendant may be incarcerated if probation

---

is denied.(fn41) This case leaves open the question of what is the maximum period of confinement. Is it the maximum in the ordinary range or in the extraordinary range? It could be argued that the ordinary range for these purposes is the maximum since it is inconceivable that probation is a sentencing alternative when extraordinary aggravating circumstances are present.

If a suspended sentence is imposed, it is generally coupled with probation, and it is impermissible if the defendant is not eligible for probation. Since the court has authority to reconsider a suspended sentence if the suspension is revoked, there is no practical difference between probation and a suspended sentence. Upon revocation of either a suspended sentence or probation, the court's sentencing alternatives are the same.(fn42)

Restitution

For any probationary sentence imposed, the court must make a finding of the amount of restitution and order its payment. Restitution is based on the actual pecuniary damages sustained by the victim as well as the defendant's ability to pay, his obligations to support his dependents and other family obligations. If restitution would work an undue hardship on the defendant, it may be waived by the court, and it must be premised on injury to the victim which was caused by the defendant.(fn43)

While there does not appear to be a provision authorizing an order for restitution upon imposition of a sentence, the sentencing court is now required to endorse the amount of restitution upon the *mittimus*. When the defendant is paroled, the Parole Board must usually order payment of restitution.(fn44)

Revocation of Probation or Suspended Sentence

Revocation of probation or suspended sentence proceedings are governed by Crim.P. 32(f) and C.R.S. 1973, §§ 16-11-205 and 206. Revocation may be commenced either by summons or by arrest. Within five working

days after arrest or within a reasonable time after the issuance of a summons, the probation department must either dismiss the revocation or file a complaint with the court. If the probationer is in custody, the hearing must be held within fifteen days after said filing unless good cause is shown.

If probation is revoked, the court may impose any sentence which may have originally been permissible, as well as probation.(fn45) Any probation violation may trigger a revocation, but the failure to pay restitution will only mandate revocation where the prosecution has proven the defendant's present ability to pay.(fn46) All revocations must be proven at a hearing before the court by a preponderance of the evidence, unless a new crime is charged for which the defendant has not (yet) been convicted.(fn47)

Deferred Prosecution; Deferred Judgment

Though used less frequently in Colorado than in the past, C.R.S. 1973, § 16-7-401 provides fora deferred prosecution. This amounts to a waiver of speedy trial for up to two years. During that period of time, the defendant is placed under the supervision of the probation department and if he successfully complies with the terms of the stipulation, the case will be dismissed. More frequently used is a deferred judgment pursuant to C.R.S. 1973, § 16-7-403. Here the defendant enters a guilty plea but sentencing is deferred for up to two years, during which time the defendant is placed under the supervision of the probation department (whether he is actually on probation is a matter of some debate). Again, if he complies with the terms of his agreement, he is allowed to withdraw his guilty plea at the end of the supervisory period and the case is dismissed. However, if he

---

violates the agreement, proceedings to revoke his deferred judgment status may be commenced. Since he has already pled guilty to the original charge, the prosecution need only show in a hearing before the court that he has violated one or more of the conditions. Upon revocation, the court may impose any penalty authorized for the offense.(fn48)

Community Corrections

Another sentencing alternative possessed by the trial court is the imposition of community corrections. An individual who is ineligible for probation because of two prior felony convictions is still entitled to be considered for a community corrections sentence.(fn49) This makes community corrections an alternative to be considered for an individual who had at least two felony convictions years ago but has more recently been "rehabilitated" before being charged with a new case. Community corrections facilities are primarily halfway houses in which the inmates are given some freedom of movement. They are generally assisted in obtaining employment as well as education. If there is a drawback to these facilities, it is that they are also used by the Department of Corrections for placement of prison inmates who are doing the last ninety days of their sentences. Thus, more hardened criminals are mixed with individuals whose potential for rehabilitation is far greater.

The trial court's authority to sentence to community corrections is found in C.R.S. 1973, § 17-27-105. Persons convicted of a crime of violence are ineligible for community corrections placement. Once an individual is sentenced to community corrections, he must still be accepted into the facility by the community corrections board established in the locality. If he is rejected, the court may place him in the Department of Corrections, but the length of the sentence may not be increased.(fn50)

Motions to Reconsider

After the imposition of any sentence, the defendant has up to 120 days to petition the court for reconsideration. The 120 days commmences the date of imposition of the sentence, or if there has been an appeal, when appellate review is completed. If an appeal is taken from the conviction, the motion to reconsider may not be considered by the trial court while the appeal is pending, absent a remand to the trial court for that purpose.(fn51) The purpose of the 120-day limit is to create a "bright line" beyond which the judiciary has no power to alter a sentence. A Crim.P. 35(b) motion is inherently equitable and is intended to give the defendant an opportunity to show any new information

---

which would bear on the propriety of the sentence.(fn52) Upon reconsideration of a sentence, the court has the authority to impose any sentence, including probation, which it could have imposed originally, but the original sentence may not be lengthened.

Some pitfalls await the practitioner in this area. The trial court is not required to hold a hearing on the motion, so it should contain all relevant information.(fn53) If the sentence was part of a plea bargain and is then reduced, the prosecution may withdraw from the bargain, even to the point of refiling charges that have been dismissed. It is important to note that while sentences may be appealed, the appeal must be taken from the original sentencing and not from denial of the motion to reconsider.(fn54) Thus, a defendant who cannot make an appeal bond, as a practical matter, may be forced to choose between appealing his sentence and moving the sentencing judge for reconsideration.

Sentence Appeals

Any sentence in the extraordinary range may be appealed. The appellate court is to consider the nature of the offense, the character of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.(fn55)

Under the "old" sentencing scheme, the appellate courts were loath to hold that a sentence was excessive. The limited number of cases decided so far under the "new" law indicate this trend will continue.(fn56) However, the most recent cases have stressed the procedural aspects of sentencing. *People v. Watkins* requires that the trial court state on the record the basic reasons for imposition of sentence, to facilitate appellate review.(fn57)

The Court of Appeals has stressed that to justify an extraordinary sentence the trial court must make written findings of the aggravating circumstances it considers "extraordinary."(fn58)

Pardons and Commutations

After all appellate remedies are exhausted, a defendant may proceed to petition the governor for a pardon or commutation, pursuant to the Colorado Constitution, Art. 4, § 7 and § 16-17-101 *et seq*.

Conclusion

The "new" sentencing law was passed to eliminate the wide disparity in sentences authorized by its predecessor. Recent legislative enactments have seriously eroded this goal by creating an overly broad definition of "extraordinary aggravating circumstances." Coupled with recent appellate decisions, a defendant's prior record, his being on bond, parole, probation, escape status, or his use of a weapon are all reasons permitting (and in some cases mandating) an extended sentence. Thus, the available range of sentences for a Class 2 felony is not really from eight to twelve years, but from four to twenty-four. One must ask whether this is really an improvement over the from ten to fifty years previously authorized. Only time will tell.

NOTES

_____

Footnotes:

1. H.B. 1589, 1979 Session Laws; C.R.S. 1973, § 18-1-102.5.

2. *See* Multz, "Presumptive Sentencing: Colorado's New Sentencing Act," 8 *The Colorado Lawyer* (Dec. 1979), p. 2349. The previous sentencing scheme is referred to in this article as the "old" law; H.B. 1589, 1979 Session Laws, is commonly called the "new" law or the "Gorsuch Bill," after its author.

3. C.R.S. 1973, § 18-1-105(1)(a). The fines which may be levied against corporations for conviction of a felony are contained in § 18-1-105(c)(2). For a Class 3 or Class 2 felony, these range from $5,000 to $50,000. For a Class 4 or 5 felony, they must be between $1,000 and $30,000.

---

4. C.R.S. 1973, § 18-1-105(6).

5. This was originally contained in C.R.S. 1973, § 18-1-409.5 and was derived from the Gorsuch Bill. To

implement this statute, C.A.R. 4 was extensively amended by the Supreme Court in November 1979. The legislature then repealed the statute (L.81, pg. 969 § 2, effective July 1, 1981). Thus, nonadversary sentence appeals are now premised solely on court rules.

1289

6. *See generally,* C.R.S. 1973, § 16-11-101.

7. C.R.S. 1973, § 16-11-102; Crim.P. 32.

8. Crim. P. 32(a)(2).

9. *Id.:* C.R.S. 1973, § 16-11-102(4).

10. This chart is derived from C.R.S. 1973, § 18-1-105, and was originally printed in Multz, *supra*, note 2.

11. C.R.S. 1973, § 16-11-308(1), (5)and (2).

12. People v. Maldonado, ___ Colo.App. ___, 635 P.2d 240 (1981).

13. C.R.S. 1973, § 18-1-105(7); People v. Watkins, ___ Colo. ___, 613 P.2d 633 (1980).

14. People v. Gonzales, ___ Colo.App. ___, 613 P.2d 905 (1980); People v. Hamling, ___ Colo.App. ___, 634 P.2d 1023 (1981); People v. Cantwell, ___ Colo.App. ___, 636 P.2d 1331 (1981) (*cert. granted*); People v. Wylie, ___ Colo.App. ___, 605 P.2d 494 (1980).

15. This statute applies to offenses committed on or after July 1, 1981.

16. C.R.S. 1973, §§ 16-11-309, 18-1-105(9)(a)(I).

17. C.R.S. 1973, § 16-11-309(2). Robbery includes "Aggravated Robbery" as well as "Simple Robbery." *See* People v. Eggers, 196 Colo. 349, 585 P.2d 284 (1978).

18. C.R.S. 16-11-309(1)(9). *See* People v. Swanson, ___ Colo. ___, 638 P.2d 45 (1981).

19. *See* C.R.S. 1973, §§ 18-18-101 *et seq*. and 18-18-107(1).

20. C.R.S. 1973, § 19-1-104(4)(c).

21. C.R.S. 1973, § 19-1-104(4)(b) and (c). *See* People v. District Court, 196 Colo. 249, 585 P.2d 913 (1978).

22. C.R.S. 1973, § 16-13-101 *et seq*. and 17-20-107.

23. C.R.S. 1973, §§ 16-13-201 *et seq*. *See specifically*§§ 16-13-205, 216 and 211, respectively.

At present the Act is not funded; prisoners committed pursuant to its provisions are confined in the Department of Corrections and receive little if any treatment.

24. C.R.S. 1973, §§ 18-1-102.5, 18-1-105(1)(b). *See* Watkins, *supra,* note 13 at n. 14.

25. C.R.S. 1973, § 18-1-105(7). *See* Watkins, *supra,* note 13 at n. 14; People v. Home, ___ Colo. ___, 619 P.2d 53 (1980); People v. Wilson, 43 Colo.App. 68,599 P.2d 970 (1979).

26. 197 Colo. 229, 591 P.2d 1024 (1979).

> [F]irst, sentencing is by nature a discretionary decision, second, the interests of both society and the defendant must be considered; third, rehabilitation is preferred but, if it is not feasible under the facts of the case, the deterrence of others and the protection of society are legitimate goals to pursue in sentencing; fourth, long sentences are justified on any of three bases---the depravity of the offense, the gravity of the offense committed by a hardened criminal, or the assurance of public safety given the recidivism of the defendant; fifth, sentencing requires an ad hoc analysis of the factual backgrounds of both the defendant and the particular offense for which he has been convicted; sixth, the trial court is a better arbiter of the facts than the appellate court because of its greater familiarity with the defendant and with the details of the offense; finally, the trial court's decision will not be modified absent a clear abuse of discretion.

27. *Compare* People v. Edwards, 198 Colo. 52, 598 P.2d 126 (1979) and People v. Soper, ___ Colo. ___, 628 P.2d 604 (1981).

28. C.R.S 1973, § 18-1-408(2) and (3). *See, for example,* Maynes v. People, 169 Colo. 198, 454 P.2d 797 (1969) (larceny and burglary).

29. People v. Saars, 196 Colo. 294,584 P.2d 622 (1978); People v. Montgomery, ___ Colo. App. ___, 11 Colo.Law. 493 (Feb. 1982) (*cert. granted*).

30. ___ Colo. ___, 626 P.2d 63(1981). "For purposes of joinder under Crim.P. 8(a), 'a series of acts arising from the same criminal episode' would include physical acts that are committed simultaneously or in close sequence, that occur in the same place or closely related places, and that form part of a schematic whole."

31. C.R.S. 1973, §§ 18-8-212(3) and 18-8-209.

32. C.R.S. 1973, §§ 16-11-306 and 17-22.5-101. *See* People v. Dempsey, ___ Colo.App. ___, 624 P.2d 374 (1981).

33. Less any earned time. C.R.S. 1973, § 17-22.5-102.

34. C.R.S. 1973, § 17-22.5-102.

35. C.R.S. 1973, §§ 18-1-105(1)(a) and 17-22.5-102.

36. C.R.S. 1973, § 16-11-201(1) and (2).

37. C.R.S. 1973, § 16-11-203(1). *See also,* Crim.P. 32(e).

38. C.R.S. 1973, § 16-11-203(2). In the author's experience, the factors most considered by the sentencing court are, in roughly declining order of importance: the severity of the offense, including whether a weapon was used; the nature of the victim's injuries, both financial, physical, and psychological; the defendant's prior record; the defendant's social stabilty (employment, education, age, etc.); the probation department's recommendation; the defendant's regret, if any; and what the defendant presents at sentencing.

39. C.R.S. 1973, § 16-11-204.

40. C.R.S. 1973, §§ 16-11-202 and 16-11-212. This time may not be served with the Department of Corrections. *See* People ex rel. Gallagher v. District Court, 197 Colo. 481, 593 P.2d 1372 (1979).

41. ___ Colo.App. ___, 624 P.2d 922 (1980).

42. *See* People v. Patrick, 38 Colo.App. 103, 555 P.2d 182 (1976); People v. Henderson, 196 Colo. 44, 586 P.2d 229 (1978); People v. Jenkins, 40 Colo.App. 140, 575 P.2d 13 (1977).

43. C.R.S. 1973, §§ 16-11-204.5. "Victim," as used in the statute, does not include the injured parties' insuror. *See* People v. King, ___ Colo.App. ___, 11 Colo.Law. 1283 (May 1982); Cumhuriyet v. People, ___ Colo. ___, 615 P.2d 724 (1980).

44. C.R.S. 1973, § 17-2-201(5)(c)(I).

45. C.R.S. 1973, §§ 16-11-205, 205(4), 206(4) and 206(5).

46. Strickland v. People, 197 Colo. 488, 594 P.2d 578 (1979).

47. There is no right to a jury. C.R.S. 1973, §§ 16-11-206(1) and (3).

48. C.R.S. 1973, § 16-7-403(2). People v. Adair, ___ Colo.App. ___, 620 P.2d 46 (1980) (*cert. granted*), requires the trial court to impose sentence upon revocation of a deferred

---

judgment. However, the more recent case of People v. Widhalm, ___ Colo. ___, 11 Colo.Law. 1399 (May 1982), appears to hold to the contrary.

49. C.R.S. 1973, § 17-27-101 *et seq*. *See* People ex rel. Van Meveren v. District Court, 195 Colo. 34, 575 P.2d 4 (1978); People v. Scott, ___ Colo. ___, 615 P.2d 680 (1980).

50. C.R.S. 1973, §§ 17-27-102, 16-11-309(2)(a), and 17-27-103(3). *See* People v. Johnson, 42 Colo.App. 350, 594 P.2d 601 (1979).

51. Crim.P. 35(b); People v. District Court, ___ Colo. ___, 638 P.2d 65 (1981).

52. People v. Smith, 189 Colo. 50, 536 P.2d 820 (1975); Spann v. People, 193 Colo. 53, 561 P.2d 1268 (1977). The diagnostic report prepared pursuant to C.R.S. 1973, §§ 16-11-308(2) and 16-11-309(1) is particularly useful for this purpose.

53. Crim.P. 35(b).

54. Van Meveren, *supra,* note 49; People v. Malacara, ___ Colo. ___, 606 P.2d 1300 (1980). *See* C.A.R. 4(c) and (d).

55. C.A.R. 4(c); C.R.S. 1973, § 18-1-409(1).

56. *See, for example,* People v. Duran, 188 Colo. 207, 533 P.2d 1116 (1975) (34 1/2-39 1/2 years for aggravated robbery upheld); People v. Alvarez, 187 Colo. 290, 530 P.2d 506(1975) (17-25 years for aggravated robbery upheld); People v. Goetz, 41 Colo.App. 60, 582 P.2d 698 (1978) (30-40 years for consipiracy to commit first degree murder upheld); People v. Naranjo, ___ Colo. ___, 612 P.2d 1099 (1980) (45 1/2-50 years for first degree sexual assault upheld); People v. Trujillo, ___ Colo. ___, 627 P.2d 737 (1981) (7-10 years for theft upheld).

This is not to say that all "old" law sentences were upheld. Some were not: People v. Strong, 190 Colo. 189, 544 P.2d 966 (1976) (18-20 years for first degree burglary excessive); Wilson, *supra,* note 25 (35-39 years for second degree sexual assault excessive); Spann, *Spann,* note 52 (3-5 years for killing a calf excessive); People v. Cohen, ___ Colo. ___, 617 P.2d 1205 (1980) (20-25 years for second degree burglary of a dwelling excessive on this record); Home, *supra,* note 25 (lengthy consecutive sentences for aggravated robbery and criminal trespass excessive on this record).

No extraordinary sentence under the "new" law has been reversed on the merits.

57. ___ Colo. ___, 613 P.2d 633 (1980). *See also,* C.R.S. 1973, § 18-1-105(7).

58. People v. Abila, ___ Colo.App. ___, 606 P.2d 81 (1980). *But see* Hamling, *supra,* note 14; *supra,* note 12; and People v. Sanchez, ___ Colo.App. ___, 11 Colo.Law. 1332 (May 1982).