MMACJA

MISSOURI MUNICIPAL AND ASSOCIATE CIRCUIT JUDGES ASSOCIATION

Regional Seminar Notebook

November 5, 2021

MMACJA Regional Seminars
November 5, 2021, Noon to 4:00 PM

Lake of the Ozarks - Lodge of Four Seasons
and Virtual Via Zoom Video Conferencing

AGENDA

11:30 light lunch for those attending in person

12:00 - 4:00 - Sessions

Caselaw Update - St. Louis County Associate Circuit Judge John Newsham

Panel Discussion - Muncipal Judges from across the state will discuss warrants, Webex, hybrid courts and other changes in our courts

What happened to Rule 37? Branson Municipal Judge Tom Motley

Ethics Quiz - What would you do? Municipal Judge in Battlefield, Branson West, Crane, Kimberling City and Reeds Springs, Mark Rundel

Who Should Attend

All municipal court judges[1] and associate circuit judges hearing municipal and/or traffic violations and municipal appeals. Prosecutors are also encouraged to attend.

This seminar qualifies for 4.0 hours judicial CLE including 1.0 hour of ethics. MMACJA is an accredited sponsor under both Supreme Court Rules 15 and 18.

[1]All attorney municipal judges are required to complete 5 hours and non-attorney judges 15 hours of judicially related CLE each reporting year ending July 31, 2022. All municipal judges must complete 2 hours of ethics annually.

2021 REGIONAL CASE SUMMARIES

State v. MIGUEL TORRES, WD83487 (June 15, 2021)

Defendant appealed convictions of three counts of possession of an unlawful item in a county jail and one count of damage to jail property, for which he was sentenced as a persistent offender to concurrent terms of twenty years' imprisonment for each possession count and five years' imprisonment for the damage to jail property. First, he argues that the court erred in admitting evidence of his prior convictions because the State violated Rule 25.03 by failing to timely disclose the evidence. Second, he argues that his right to be free from double jeopardy was violated by his convictions on Counts II and III because § 221.111, RSMo, is ambiguous.

The Court held that when the State does not intend to introduce something at a hearing or trial, that item is not subject to disclosure under Rule 25.03(b)(7). Moreover, the State is not required to disclose evidence of which the defense is already aware and which the defense can acquire. Here, the State's obligation to disclose Torres's prior convictions did not arise until it intended to introduce the exhibits into evidence at a hearing or trial, and that time arose when the State filed the amended information containing the persistent offender allegations. Additionally, Defendant was aware of both his own prior convictions and the fact that the State intended to use them to establish his persistent offender status.

State v. LEIGHTON MICHAEL QUAPAW, SD36693 (June 22, 2021)

Defendant appealed his conviction of stealing where he alleges the victim "gave" him the money. Defendant approached the victim with a knife, and said, "Give me all your money." Defendant tried to stab the victim in the stomach, but she grabbed his arm and told him, "Kid, this is something you don't want to do." Defendant replied, "Give me 20 bucks and I'll go away." As Defendant was backing victim toward the cash register, victim grabbed $20 from the drawer and handed it to Defendant. Cash in hand, Defendant ran out of the store and drove away.

On appeal, Defendant argues that the plain language of physically "taking" in the statute means "forceful" and "rough." As a result, Defendant concludes that the victim's simple handing over the money from the cash register does not constitute a physical taking by the Defendant.

The Court noted that a person commits the offense of stealing if he or she:
(1) Appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion…The offense of stealing is a class D felony if: . . . . (2) The offender physically takes the property appropriated from the person of the victim. The Court then cites State v. Branyon, 939 S.W.2d 921 (Mo. App. E.D. 1996), wherein the Eastern District concluded that "there was no basis to acquit defendant of felony stealing because victim and defendant both testified [that] defendant took the money from victim's hand, i.e. 'from the person of the victim.'" Id. at 924.1 Similarly, in the Western District, the court concluded that a physical taking occurred when the victim took the billfold from his pocket, removed money, and either handed it to the defendant or laid it down and the defendant picked it up. State v. Cascone, 648 S.W.2d 190, 193 (Mo. App. W.D. 1983).

DUSTIN HEFLEY v. State, SC98876 (June 29, 2021)

Defendant plead guilty to the charge of driving while intoxicated. Defendant filed an ineffective assistance of counsel claim, alleging that his attorney erroneously advised him that he was eligible for long term treatment. As a habitual offender, Defendant was not eligible for a long-term drug program under section 217.362. At the hearing on the motion, defense attorney testified that he counseled Hefley about long-term drug programs and that Defendant plead guilty on counsel's representation that he would argue for placement in such programs. Defendant testified he would not have pleaded guilty had he known he was ineligible for a long-term drug program. The trial court denied Defendant's claim, concluding that the Defendant had no reasonable basis to expect he would receive placement in a long-term drug program when he entered a "blind plea."

The Supreme Court rejected the Circuit court's finding because his plea was "open" and there were no promises made as to the sentence he would receive. The Supreme Court ruled that the man's guilty plea was not made voluntarily, knowingly, and intelligently and that counsel erred by advising the Defendant that he was eligible for a long-term drug program, and the Defendant would not have entered a guilty plea but for this erroneous information.

MATTHEW ROSCHE v. DOR, WD84073 (July 6, 2021)

The Department of Revenue appealed the trial court's setting aside Defendant's license suspension based on the trial courts finding that the breath analyzer test result was inadmissible.

At trial, Rosche objected to the breath analyzer test result, arguing that 19 CSR 25-30.051(6), the regulation that prescribed breath analyzer calibration and accuracy verification standards, listed "Intoximeters, Inc. St Louis, MO 63114," as an approved supplier of standard compressed ethanol-gas mixtures. Because the certificate of analysis for this machine listed Intoximeters, Inc.'s zip code as 63146 and not 63114, Rosche argued the test result was inadmissible. The trial court ruled in Defendant's favor, finding that there was an insufficient foundation for the admission of Rosche's BAC test result due to the "use of the wrong testing supplies for the instrument" and "radio interference."

Evidence at trial revealed that on December 9, 2017, Corporal Dudeck arrested Rosche on probable cause to believe he had been driving while intoxicated. At the time of the arrest, Dudeck was a Type III permit holder, which allowed him to operate a breath alcohol test instrument. Dudeck used an Intox DMT breath analyzer to collect a breath sample from Rosche. Dudeck certified in his Alcohol Influence Report that he did not deviate from approved procedures, that the instrument was functioning properly, and that no radio transmission occurred inside the room during the test. The sample of Rosche's breath yielded a blood alcohol concentration ("BAC") of .086%.

Four days before Rosche's arrest, another State trooper performed a maintenance test on the breath analyzer. He was a Type II permit holder, which allowed him to run maintenance tests on the breath analyzer instrument. He used a compressed ethanol-gas mixture, which his maintenance report stated was supplied by "Intoximeters," to conduct the calibration check. The ethanol-gas mixture came with a certificate of analysis. This certificate stated that it was from "Airgas USA LLC" to "Exclusive Supplier, Intoximeters, Inc., 2081 Craig Road, St. Louis, MO 63146." He also conducted a radio frequency interference ("RFI") test during his maintenance check. He noted that the RFI detector on the breath analyzer was functioning properly.

The Western District appellate court held that the circuit court erred in finding there was an insufficient foundation for the admission of Rosche's breath analyzer test result due to the "use of the wrong testing supplies for the instrument." The Director's evidence identifying "Intoximeters, Inc." as the supplier of the standard compressed ethanol-gas standard mixture used to maintain the breath analyzer instrument was sufficient to establish the mixture came from an approved supplier. The court explained that it was not necessary to prove that Intoximeters, Inc. had a particular zip code in order to show that the company was an approved supplier.

The appellate court also held that the circuit court erred in finding there was an insufficient foundation for the admission of Rosche's breath analyzer test result due to "radio interference." The Director laid a proper foundation for admission of the result, as he established that the officer who administered Rosche's breath analyzer test was a valid permit holder who administered the test on aDepartment-approved device and followed the Department's approved techniques and methods in doing so. The court noted that even if the court inferred that the officer's body microphone created some radio frequency interference during Rosche's test, that inference alone was not a sufficient basis upon which to exclude the test result in light of the clear evidence that any such radio frequency interference did not compromise the accuracy of the breath analyzer test.

The Eastern District Court of appeals has also reached the same conclusion regarding the zip code discrepancy.

In re C.A.R.A. WD83967 (July 6, 2021) and **In re J.A.T., v. JACKSON COUNTY JUVENILE OFFICE** WD83968 (July 20, 2021)

In both of these cases, due to the pandemic, the circuit courts refused to transport juveniles from the detention facility where they were in custody to the court for their adjudication hearings, and the juveniles participated in the hearing by videoconference (although all other trial participants were physically present in the courtroom).

The Court of appeals concluded that the juveniles' right to confront adverse witnesses was violated when the court refused to permit the juveniles to appear at their adjudication hearing in person, without any specific finding that this exclusion from the hearing was necessary or justified by exceptional circumstances. The Court noted that it would normally reverse the circuit court's judgment and remand for further proceedings. However, the court instead ordered that case to be transferred to the Missouri Supreme Court for final disposition pursuant to Rule 83.02, given the general interest and importance of the Confrontation Clause issues.

DORIS JEAN STALNACKER v. JUDGE DAVID DOLAN, SD36954 (July 29, 2021)

Appellant filed an appeal following the trial court's dismissal of her civil suit seeking damages against Judge David Dolan for false imprisonment. Her petition alleged that Judge Dolan was a circuit court judge and presided over a case in which Stalnacker was charged with a criminal offense and was placed on probation. In that case, Judge Dolan erroneously ordered that "[n]o earned compliance credit in this case will be allowed," revoked her probation, and ordered her sentence to be executed after the probation period had expired. As a result, Stalnacker served 26 months in the Missouri Department of Corrections before a habeas court

ordered that Stalnacker be released from confinement. Stalnacker sued Judge Dolan for false imprisonment, seeking $2,000,000 in damages, and alleged that Judge Dolan "lacked authority and jurisdiction" when he disallowed ECCs, revoked her probation, and ordered her sentence to be executed after her term of probation had expired.

The appellate court affirmed the dismissal. First, the appellate court ruled that assuming all facts in favor of Stalnacker, she cannot recover because her petition demonstrates that Judge Dolan had subject matter jurisdiction to decide probation revocation cases, and thus, the doctrine of judicial immunity applies to shield him from liability. The court noted that judicial immunity "is absolute and protects conduct which is intimately associated with the judicial phase of the judicial process." The court also noted that Missouri courts have held that a "judge with subject matter jurisdiction has judicial immunity from all actions taken, even when acting in excess of his authority."

The court also noted that because Stalnacker alleged Judge Dolan was a Missouri circuit court judge, it was not an error for the trial court to make the legal conclusion that Judge Dolan had subject matter jurisdiction pursuant to Article V, Section 14 of the Missouri Constitution to decide probation matters.

State v. ANTONIO EDJUAN MULDREW, ED108938 (August 17, 2021)

Defendant was convicted after a jury trial of one count of first-degree murder, one count of assault in the first degree, one count of first degree robbery, and three counts of armed criminal action. Defendant raises two points on appeal, first his right against double jeopardy was violated by entering separate convictions for murder and assault because defendant's multiple shooting of the victim was part of the same course of conduct and supports only a murder conviction. Second, defendant argues trial court erred in admitting statements he made after he had invoked his right to silence. The court affirmed the judgment of the trial court. Defendant entered a convenience store with a gun. Once defendant and the cashier (victim) were alone, defendant shot victim three times. Defendant then stole money and lottery tickets from the store. While behind the counter, defendant sold a cigarillo to a woman who had entered the store after the initial shooting. Once the women left the store, defendant went back to victim and shot victim in the head using a gun from under the cash register. Defendant was arrested when he reappeared outside the store when a crowd had gathered around the crime scene. Defendant was taken into custody and questioned. Defendant signed a Miranda waiver and admitted to shooting and killing victim.

In denying the first point of double jeopardy the Court cites, State v. Garnett, 298 S.W.2d 919, 923 (Mo. App. ED 2009) wherein the Eastern District states "Thus when a defendant has time to reconsider his actions, each assault separated by time constitutes a separate offense." "Factors such as time, place of commission, and the defendant's intent, as evidenced by his conduct and utterances determine whether separate offenses should result from a single incidence." Id. In this case the defendant had sufficient time to reconsider his actions. Defendant first shot the victim three times with his gun, injuring the victim. The defendant then sold products in the store to a customer, before shooting the victim two more times with a gun found in the store resulting in the death of the victim.

As to the second point of defendant invoking his right to silence the court states that once the Miranda rights are given, to invoke his right to silence the defendant "must give a clear, consistent expression of a desire to remain silent." State v. Rice, 573 S.W.3d, 53, 67 (Mo. banc

2019). "If the invocation is ambiguous or equivocal, the police are not required to end the interrogation and are not required to ask questions to clarify whether the accused is invoking his right to silence." Id. The courts review of the evidence supports the finding that the defendant did not clearly and unambiguously invoke his right to silence, by stating "It is what is it, I ain't going to say no more." Point denied. Judgment affirmed.

State v. ERIC G. HOLLOWELL, ED108941 (August 17, 2021)

Defendant was convicted of fifteen counts of unlawful possession of a firearm and sentenced to concurrent seven-year sentences on fourteen counts, and a four-year sentence for the fifteenth count, to be served consecutively, resulting in an eleven-year sentence. Defendant appealed.

Four points are raised on appeal; 1) trial court erred by overruling defendant's motion for acquittal because the State failed to prove defendant possessed and controlled the firearms, 2) trial court abused its discretion by admitting inadmissible hearsay testimony to establish defendant's control over the firearms, 3) trial court erred and violated defendant's sixth amendment confrontation right, and 4) defendant argues his right to be free of double jeopardy was violated. The court reversed saying points 1 and 2 are dispositive so they need not consider points 3 and 4.

Appellant was arrested after his wife, Beckey, reported him to police for domestic violence against her. Beckey reported to police that appellant was a convicted felon and kept numerous firearms in their home. Beckey gave authorities in Washington County permission to search the lower level of their home where appellant, Beckey, and three grandchildren lived. Beckey unlocked a safe in the home with a key in her possession containing fifteen firarms with ammunition. The officers seized the firearms. Appellant was not present during the search because he was already in custody.

Beckey later informed authorities that there were two antique black powder firearms in the home that were not found because they were in a closet. The two antique firearms were later seized by the authorities, but appellant was not charged for the antique firearms. At trial the State planned to call Beckey, a detective, and a corrections officer, however, Beckey never testified due to a medical condition.

At trial the detective testified Beckey told him appellant "had several firearms at their home, and so that's what prompted [Detective Haworth] to go [to Appellant's home]." Appellant counsel objected saying this was inadmissible hearsay which involved an element of the offense, the possession and control of the firearms. Counsel for appellant on cross-exam asked the detective if he went to Beckey's house because Beckey had provided the information that the firearms were located there. The State then argued that appellant waived the objection by raising the issue on cross-exam. There was evidence presented that some of the firearms in the safe belonged to Beckey and other family members, and at least one of the firearms was given to Beckey by a friend. The corrections officer testified that he heard appellant state that he was being charged for the antique guns but not the guns in the safe.

The court addressed the second point first, that the trial court abused its discretion by allowing inadmissible hearsay. This point requires reversal and is dispositive of the first point, the lack of evidence to show the appellant possessed and controlled the firearms. First the court addressed the issue of whether appellant waived his objection by raising the issue on cross-exam. The Missouri Supreme Court explained cross-examination about objected-to testimony stating it

"would neither waive nor cure the error in the admission of that evidence." Chester v. Shockley, 304 S.W.2d 831, 835 (Mo. 1957). Appellant's cross-examination of the detective did not waive his objection. Next the court addressed the hearsay testimony by the detective. Appellant argues the detective's recitation of Beckey's statement was inadmissible hearsay and prejudicial because it went beyond the level of detail necessary to explain subsequent police conduct and reached the ultimate fact issue of Appellant's control over the guns. Appellant relies on *State v. Douglas* for the proposition "when out-of-court statements go beyond what is necessary to explain subsequent police conduct, they are hearsay." 131 S.W.3d 818, 824 (Mo. App. W.D. 2004). The State argues the testimony the detective offered was cumulative of other evidence indicating Appellant possessed the guns. The court disagreed with the State saying the detective's testimony was not cumulative because it was the only evidence presented establishing that appellant possessed the guns. In addition, the detective's testimony went beyond what was necessary to explain his subsequent conduct and improperly reached the fact issue to be decided by the jury: whether the guns in the house were under Appellant's control. The trial court therefore abused its discretion by permitting the testimony and Appellant was prejudiced because there is a reasonable probability the jury relied on Beckey's hearsay statement to conclude Appellant possessed the guns.

In addressing the first point the sufficiency of the evidence, the court stated the only evidence presented that appellant controlled the guns in the safe was the inadmissible hearsay presented by the detective. Appellant's proximity to the guns were outweighed by the facts he did not commingle his other property – including his antique guns – with the guns in the safe, made no admissions of ownership or possession, and engaged in no behavior indicating consciousness of guilt. State v. Morgan, 366 S.W.3d 565, 576-77 (Mo. App. E.D. 2012).

The judgment is reversed. We need not address Points 3 or 4. As reversal is premised on the insufficiency of the evidence, we do not remand for a new trial. The double-jeopardy clause of the United States Constitution precludes a second trial after a reversal based solely on insufficiency of the evidence. State v. Drabek, 551 S.W.3d 550, 561 (Mo. App. E.D. 2018). We therefore remand and direct the trial court to enter a judgment of acquittal.

CALEB Z. ECCHER v. State, SD36821 (August 25, 2021)

Caleb Eccher shot at three people with a shotgun, seriously injuring two. He pleaded guilty to seven felonies and sought minimum sentences to be served concurrently. Instead, he essentially received 75 years. He raises two issues on appeal. First that his plea was not entering knowingly, voluntarily, and intelligently, because he relied on trial counsel's opinion that he would receive no more than 25 years. Second, he claims that his sentence is grossly disproportionate to his crimes.

Eccher was driving to work when he noticed a vehicle driven by Donald Hembree, a former co-worker against whom Eccher bore a grudge. Eccher pursued Hembree's vehicle until it stopped. Eccher got out of his vehicle, took his already-loaded shotgun and shot at Hembree's vehicle six times. Hembree drove away, eventually stopping at his workplace. Eccher pursued Hembree, reloaded, and fired two more shots at Hembree as he fled into the workplace. The shots missed Hembree but struck a bystander, Krista Gerster. Eccher then went around to the other side of the building, where he saw Michael Galer kneeling on the ground. Eccher shot Galer in the neck. Both Gerster and Galer had serious injuries, and Galer was left a quadripalegic.

On the day of trial, Eccher entered a guilty plea on all seven felony counts. At sentencing the court considered testimony of the victims, their families, Eccher, his family and others and expressly stated it had considered the "very comprehensive," 17-page sentencing assessment report, Eccher's personal and family history, and Eccher's mental issues.

In denying the first issue on appeal, the court said the record refutes Eccher's argument, because Eccher had no difficulty understanding the charges, no difficulty communicating with counsel, and could assist the defense if trial were necessary. Eccher's mental limitations were discussed and testimony was presented on that issue at the sentencing hearing. The same doctor who diagnosed Eccher with autism found Eccher was competent to stand trial because he understood the nature of the proceedings, did not have a psychotic disorder, knew what was real and what was not, and had the ability to cooperate in his defense.

As to the second issue of disproportionate punishment, Eccher's sentence was within the range prescribed by statute and it appears that the sentencing court considered the mitigating factors he highlights on appeal. Although the aggregate total of Eccher's sentences is lengthy, "punishment is not cruel simply because it is severe." State v. Mubarak, 163 S.W.3d 624, 631 (Mo. App. 2005). Judgment was affirmed.

State v. JORDAN BUSH, SD36727 (August 27, 2021)

Appellant Jordan Bush appeals his convictions, following a jury trial, of one count of second-degree domestic assault; eight counts of third-degree domestic assault; three counts of fourth-degree domestic assault; and one count each of second-degree burglary, attempted tampering with a victim, first-degree property damage, and first-degree harassment. Appellant raises two points on appeal: (1) the trial court's decision to overrule his motion for a mistrial was an abuse of discretion; and (2) the trial court's admission of certain propensity evidence was plain error.

In late 2018 and early 2019, appellant would visit and stay with his girlfriend (victim) for days at a time. Appellant was arrested in 2019 for a series of domestic disputes with victim. Appellant was alleged to have assaulted victim on several occasions and caused significant damage to victim's apartment and belongings. Appellant admitted to some of these acts. With respect to the first point on appeal, at trial appellant's counsel requested a mistrial arguing that requiring the appellant to appear in restraints made him appear to be dangerous and destroyed the presumption of innocence. The trial court disagreed. On the second point on appeal, at trial victim testified that appellant had assaulted her while she was at college in 2017 and sent numerous texts to her threatening to hurt or kill her. Copies of the texts were produced into evidence.

As to the first point the court stated that potential jurors might have seen appellant's restraints; however, his clothing, the placement of counsel, and the layout of the courtroom made that unlikely. Without some evidence to indicate that jurors or potential jurors saw the restraints, we cannot find that the trial court abused its discretion in denying appellant's motion for a mistrial. State v. Snowden, 285 S.W.3d 810, 815 (Mo. App. S.D. 2009); State v. Taylor, 298 S.W.3d 482, 512 (Mo. Banc 2009).

On the second point, since there was no objection to the evidence presented at trial the review is for plain error. State v. Blair, 443 S.W.3d 677, 682 (Mo.App. W.D. 2014). Appellant argues that, even though he did not object, testimony about his prior acts was propensity

evidence that was substantially more prejudicial than probative. The court stated that evidence of uncharged crimes that are part of the sequence of events or circumstances surrounding the charged offense may be admissible to present a complete, coherent picture of the overall events. State v. Miller, 372 S.W.3d 455, 474 (Mo. banc 2012). Here the victim's testimony demonstrated a history of violent conduct and tended to show appellant's intent, motive, and animosity towards her, all of which were at issue in this case. The court did not see an evident, obvious, and clear error regarding the admission of the prior act evidence. Judgment affirmed.

State v. ANTHONY JAMAL SHEPHARD, SD36741 (August 26, 2021)

Shepherd was convicted, following a jury trial, of one count of kidnapping in the second degree, and one count of unlawful use of a weapon. Shepherd raises one point on appeal that the trial court erred in ordering him to register as a sex offender.

On December 7, 2017, Shepherd and Victim were involved in a physical altercation in an extended-stay motel room in Springfield. Shepherd was arrested and charged with five counts; 1) attempted rape in the first degree, 2) the class D felony of kidnapping in the second degree, 3) the class D felony of assault in the second degree, 4) the class E felony of unlawful use of a weapon, and 5) the class D felony of stealing a firearm (this count was later dismissed).
At trial the victim testified that she lived in the same building as Shepherd and went to his room in search of marijuana. She stated she smoked marijuana with Shepherd in his room and he asked her to stay. When she tried to leave he threw her on the bed and started rubbing her buttocks and genitals through her clothes. She protested and Shepherd told her to shut the fuck up. Shepherd pulled down the back of her pants and victim started screaming. Shepherd grabbed a gun from under the pillow and struck victim with the gun. Victim stated she got up from the bed and started to leave but Shepherd grabbed her and pushed her down and stuck the gun barrel in her mouth and told her to shut the fuck up. Victim begged him to stop and started screaming very loudly. Shepherd then got off her, took her to the door and at gunpoint told her to get the fuck out and if she told anyone he would kill her. Shepherd testified that he never pulled the gun on victim, he did rub her buttocks and genitals but only after she laid on the bed next to him. He stated the victim said she did not want to do this, so Shepherd went to the bathroom. Upon his return he observed victim trying to steal his drugs and alcohol by stuffing them in her pants. He grabbed his drugs from her and grabbed victim and escorted her out of the room because she started yelling. Shepherd admitted to having the gun in his room. Evidence was presented of marks on the victim's neck and bruising on her arm.

Shepherd was convicted of kidnapping in the second degree and unlawful use of a weapon. At sentencing the State asked that Shepherd be required to register as a sex offender for the kidnapping charge because the primary motivation was a sexual offense. Shepherd objected saying he was acquitted on the assault and attempted rape charges and there was no sexual motivation in the kidnapping charge so he should not have to register as a sexual offender.
The court stated that there was not a sexual motivation element included in the kidnapping charge, and because of this there should be no requirement for Shepherd to register as a sexual offender. The trial court erred during the sentencing hearing when it ordered Shepherd to register as a sex offender. Because that order was not incorporated into the written judgment, however, the judgment itself is correct and is affirmed.

State v. JAMES CHRISTOPHER BALES, SC98376 (August 31, 2021)

Bales moved to suppress evidence found on a cell phone and data stored on the phone obtained under a search warrant. The Circuit Court stated that the warrant failed to describe with sufficient particularity the thing to be seized and was so facially deficient the executing officers could not reasonably have presumed it to be valid and granted the motion to suppress. The State appeals. The court ruled in a 4-3 decision in favor of upholding the decision of the Circuit Court and suppressing the evidence found on the phone.

On March 17, 2019, Detective Thomas Fenton of the Pulaski County Sheriff's Department, a social worker, and another law enforcement officer went to Mr. Bales's home to investigate potential abuse or neglect of his 22-month-old son, L.B., who had been admitted to the hospital for a head injury and diagnosed with shaken baby syndrome. When questioned, Mr. Bales claimed L.B. hit his head on the foot of a bed while playing. He said, although L.B. seemed fine after hitting his head, Mr. Bales was awakened in the middle of the night by L.B. banging his head against the wall in the hallway of the home. After Mr. Bales picked L.B. up, he said he immediately put L.B. back down because L.B. threw his body backwards and was "throwing a fit." Mr. Bales said he then grabbed his cell phone to record L.B.'s behavior.
To support his explanation of L.B.'s injury, Mr. Bales showed Detective Fenton and the social worker the video he recorded the night L.B. was injured. It showed L.B. sitting on the floor, rocking back and forth and crying, until he "face-planted," hitting his head on the wooden floor. After that, L.B. went limp and was breathing heavily. When Detective Fenton interviewed Mr. Bales a couple of days later at the sheriff's office, Mr. Bales again showed him the video on his cell phone.

Detective Fenton executed an affidavit for a warrant for Mr. Bales phone. An application was made for a search warrant describing electronic data and a SIM card as evidence of the crimes of endangering the welfare of a child and abuse or neglect of a child and alleged the evidence was kept in a cell phone located at 13251 Highway O, Dixon, in Pulaski County, Missouri. The circuit court issued a search warrant on March 28, 2019.

Before the March search warrant was executed, Mr. Bales returned to the sheriff's office for an interview, accompanied by his attorney. He once again attempted to show Detective Fenton the video on his cell phone. While Mr. Bales was searching his cell phone for the video, Detective Fenton informed Mr. Bales and his attorney that he had a search warrant for the cell phone and seized it.

Detective Fenton filed a return of the search warrant that incorrectly stated he had gone to the premises described in the warrant and seized the cell phone after discovering it there. When a police investigator searched the electronic data stored on the cell phone, he found possible evidence of other crimes and applied for a second search warrant. The investigator's affidavit filed to support issuance of a second search warrant stated the cell phone was obtained when Detective Fenton executed the March search warrant. The circuit court issued a second search warrant on May 28, 2019.

Mr. Bales filed a motion to quash, which the court agreed was a motion to suppress the evidence obtained from the search of the phone. Bales argued the March search warrant was fatally defective because it lacked particularity in its description of the cell phone and did not authorize retention of the phone.

Detective Fenton admitted he seized the phone from Mr. Bales at the sheriff's office and not from the location and premises identified in the warrant, which was contrary to his statement in the return and inventory.

The circuit court found the March search warrant authorized seizure of a cell phone but failed to describe the phone with sufficient particularity because black Samsung cell phones in black cases are ubiquitous. The court also found, while the cell phone was seized "allegedly pursuant to the . . . search warrant," its contents were examined before a warrant to search the phone was issued. The court held the March search warrant "failed to adequately describe the thing to be seized and was so facially deficient the executing officers could not reasonably presume it to be valid." It found the search of the cell phone for electronic data occurred prior to issuance of a search warrant authorizing such search, so the court suppressed all evidence obtained during the search of the cell phone as "fruit of the poisonous tree."

The state appealed. After an opinion by the court of appeals, this Court granted transfer. The question before the Court is whether the circuit court erred in sustaining Mr. Bales's motion to suppress evidence seized pursuant to the March search warrant. The March search warrant includes four paragraphs in total. As it relates to the place to be searched and the things to be seized, the search warrant states:

Phone messages, text messages, social media networks, Instagram photos, Facebook messages, passwords to the device, global positioning system coordinates, emails, phone logs, SIM cards, photo galleries, voicemails, or any other evidence pertaining to the crime *kept in the following described places* in the County aforesaid, to wit: A cell phone located at, 13251 Highway O Dixon, in Pulaski County Missouri. This cell phone is described as Black Samsung with black case.

NOW THEREFORE, these are to command you that you *search the said premises above described to including* [sic] *text messages, passwords, global positioning system, emails, phone records, or all other digital folders* and, *if* said *above described articles* or any part thereof *be found on said premises* by you, that you *seize the same and take same into your possession*[.] (Emphasis added).

The decision of the court turned on the definition of the word "premises" in the March warrant. The majority believes that the warrant allows a search of the property located at 13251 Highway O Dixon, in Pulaski County Missouri, for the phone and since the phone that was searched was not found at this property the search was outside the scope of the warrant. Therefore, the search of the phone was invalid and the evidence should be suppressed. Executing the March search warrant at the sheriff's office, or any location other than 13251 Highway O, Dixon, was beyond the scope of the search authorized by the warrant. The phone's seizure at the sheriff's office was outside the scope of the search warrant; therefore, the March search warrant, even assuming it was sufficiently particular, is not a valid legal basis for such seizure.

Accordingly, the evidence must be suppressed unless an exception to the warrant requirement applies. Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971). The only exception the state raised in the circuit court was the good faith exception to the exclusionary rule. The state argued the good faith exception should apply because Detective Fenton did everything that reasonably could have been done under the circumstances in obtaining the warrant. The good faith exception allows evidence seized pursuant to an invalid warrant to be admitted if it was objectively reasonable for the officer to rely on the warrant. State v. Sweeney, 701 S.W.2d 420, 426 (Mo. banc 1985). The majority states it was not objectively reasonable for Detective Fenton

to rely on the search warrant to seize Mr. Bales's phone at the sheriff's office because the warrant did not authorize a search outside the described address. *Coolidge*, 403 U.S. at 481.

The minority believes that the premises described in the warrant are actually the phone itself and since the phone searched was the one that Detective Fenton believed was the phone described in the warrant the evidence should not be suppressed. The minority believes the warrant offers more than adequate particularity. The reference to Mr. Bales's residence was not included for the purpose of limiting the location where the search was to occur. Instead, it was included to further specify the cell phone in question. The central characteristic of a cell phone is that it is mobile, i.e., that it is more likely to be found with its owner/user than in any particular location. To say that a cell phone is to be found at a place or can only be searched if found at that place, is precisely the opposite of the commonsense reading this Court is supposed to give a warrant. *See State v. Neher*, 213 S.W.3d 44, 49 (Mo. banc 2007) (explaining a warrant is to be examined in a commonsense, rather than hypertechnical manner). In the end, the principal opinion's analysis exalts form over substance. And even if the phone search falls outside the actual scope of the warrant the good faith exception should apply, because because Detective Fenton had specifically requested ***and obtained*** a warrant to search that particular phone, he was objectively reasonable in believing he was authorized to seize it for the purpose of searching it for the items specified and seizing them if they were found.

The decision is affirmed.

State v. CHESTER WILLIAM FEWINS, SD36923 (August 31, 2021)

Defendant was convicted of three counts of first-degree statutory rape, one count of attempted first-degree statutory rape, three counts of first-degree child molestation, one count of first-degree statutory sodomy, one count of felony abuse of a child, and one count of tampering with a victim. Defendant raises two point on appeal, 1) the trial court abused its discretion in denying his request for a continuance, and 2) the ninety-nine-year sentences imposed in the judgment on the five various convictions are inconsistent with the trial court's oral pronouncement at sentencing.

All of Defendant's crimes were committed against his step-daughter, who was under 14 years of age at the time they took place. Defendant does not challenge the sufficiency of the evidence supporting his convictions. Defendant's trial began in November 2019. On the second day of trial after an off the record discussion the court granted a continuance to allow Defendant to have evidence reviewed by an expert. The trial continued in July 2020, nearly eight months later. Since a continuance was granted, even though it was not for the same reason as requested by Defendant, the court stated that Defendant had sufficient time to secure any expert he might want to call and denied Defendant's claim that the trial court abused its discretion under count 1.

As to the second point, the trial court's pronouncement during the sentencing hearing was for life imprisonment for each of the five counts. All counts were ordered to run consecutively. However, the trial court's written judgment substituted ninety-nine-year sentences for life sentences. Those sentences are materially different because, among other things, they have a different effect in determining parole eligibility dates. State v. Clark, 494 S.W.3d 8, 14 (Mo. App. E.D. 2016) (citing State v. Hardin, 429 S.W.3d 417, 419 (Mo. banc 2014), for the proposition that, under section 558.019.4, RSMo 2000, a "life" sentence is calculated to be 30 years)). Because the written judgment does not conform to the trial court's oral pronouncement of sentence, it contains a clerical error that may be corrected *nunc pro tunc*. McArthur v. State,

428 S.W.3d 774, 782 (Mo. App. E.D. 2014). Defendant's convictions are affirmed, and the case is remanded to the trial court to enter a corrected written judgment that conforms to the trial court's oral pronouncement of Defendant's sentences on the five counts.

State v. BRIAN SHAWN JONES, SD36915 (September 1, 2021)

Jones had filed a Rule 29.15 motion to set aside convictions for Murder in the 2nd degree and Armed Criminal Action based on alleged ineffectiveness of counsel. The Court discussed the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) which is set out below:

1. Did the Defendant's trial counsel's representation "show that counsel's representation fell below an objective standard of reasonableness" and

2. Did the counsel's representation prejudice the Defendant at trial.

The Court found that "(i)t is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy." Further, the Court found that "no amount of testimony on behalf of [Jones] at sentencing would have changed the outcome given [his] extensive criminal history." In other words, the defendant was not prejudiced by his trial counsel in part because of the extensive criminal record of the defendant.

STATE EX REL., ERIC SCHMITT V. THE HONORABLE KEVIN HARRELL, CIRCUIT JUDGE OF JACKSON COUNTY, WD84772 (SEPTEMBER 7, 2021)

The defendant at issue in this case had been sentenced in 1979 to 50 years without parole for capital murder. On August 28, 2021, a new statute, Section 547.031, RSMo became effective. That section states (in part):

> 547.031. Information of innocence of convicted person — prosecuting or circuit attorney may file to vacate or set aside judgment — procedure. — 1. A prosecuting or circuit attorney, in the jurisdiction in which a person was convicted of an offense, may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted. The circuit court in which the person was convicted shall have jurisdiction and authority to consider, hear, and decide the motion.

On August 28, 2021, the prosecutor for Jackson County filed a Motion to Set Aside Strickland's murder convictions under the statute because the convictions were based upon on person's eyewitness identification and that witness had subsequently recanted their testimony.

The Attorney General's office filed several motions including a motion for a continuance to investigate the case. On August 31, the Jackson County Prosecutor filed a Motion to Strike the Attorney General's filings stating the Attorney General was not a party to the proceeding and thus had no right to file motions.

The trial court found that while Section 547.031.2, RSMo does allow the Attorney General to (1) appear, (2) question witnesses and (3) make arguments in this motion, the

Attorney General does not have the right to file any motions. As a result, the Attorney General filed an emergency Petition for Writ of Prohibition.

The Court granted relief and ordered the trial court to vacate the September 2, 2021 hearing. The Court found that Section 547.031.2, RSMo requires the Circuit Clerk to notify the Attorney General of a prosecutor's motion in this type of proceeding and the Court found that according to Missouri case law, the purpose of a notice is "is to apprise the affected individual of, and permit adequate preparation for, an impending hearing." The Court did state that this case needed to be resolved as "promptly as possible."

State v. MATTHEW JAY SCHURLE, WD83914 (SEPTEMBER 7, 2021)

The defendant appealed from a guilty verdict on the following charges, delivery of methamphetamine, possession of marijuana and possession of paraphernalia. The defendant stated that there was insufficient evidence to support the conviction for delivery of a controlled substance, further that the Court erred (plainly) in finding he waived his right to counsel and finding he was not indigent and thus, not eligible for appointed counsel. The Court found that there was sufficient evidence for the conviction for the "delivery" charge but that the trial court erred in not conducting a hearing to determine whether the defendant's waiver of counsel was knowingly and intelligently.

The Court stated that in order to sustain a conviction for delivery of a controlled substance, the State has to prove that the "defendant had (1) conscious and intentional possession of a controlled substance, either actually or constructively; (2) awareness of the presence and illegal nature of the substance; and (3) the intent to deliver the substance." The defendant was arguing that when he was arrested, he was not in "actual" possession of a sufficient quantity of methamphetamine. The question became, is a "residue amount" enough under the statue to support a delivery conviction. The appellate court acknowledged that the State must prove that the defendant possessed a quantity of a controlled substance with the intent to distribute that quantity and the Defendant intended to sell that quantity.

However, the Court did not find that the defendant must be "caught in the act" of "possessing a distributable quantity of methamphetamine at the moment of his arrest, or that he actually be observed in possession of such a quantity." The Court found a jury could "draw an inference of such possession from the circumstantial evidence" from direct or indirect evidence. The Court found that by the defendant possessing the digital scale that had residue of methamphetamine, cash in bills, his nervousness at the scene, he lies about his travel and his attempt to prevent the officer from searching his vehicle supported the "common-sense conclusion that Schurle had recently been selling Methamphetamine". The Court did acknowledge that there were no Missouri cases on this issue but found support from other jurisdictions and concluded that "a majority of those courts have held that a defendant may be convicted if the evidence supports the inference that the defendant was recently in possession of a distributable quantity of a controlled substance, even if the defendant is not caught, or observed, in actual possession of a distributable quantity."

As to the issue of allowing the defendant to proceed without counsel, the appellate court found the trial court plainly erred by allowing the defendant to proceed without counsel. The Court noted Section 600.051 requirement of a signed written waiver and the failure to hold an evidentiary hearing on this issue was problematic for this case. The State conceded the issue in its brief. The Court cited the 6th and 14th amendments to the United States Constitution that guarantee the defendant a right to an attorney in a felony prosecution unless the defendant

waives the assistance of counsel. The Court stated that for a waiver of counsel to be effective, due process requires the waiver to be made "waiver be made knowingly and intelligently" and the trial court must conduct "a thorough evidentiary hearing".

State v. DANIEL HALLMARK, ED108366 (September 7, 2021)

The defendant was charged with 21 counts of child sex crimes against seven victims. The defendant's attorney filed a "Motion to Dismiss Improperly Joined Counts or For Severance of Offenses" based upon the claim that he would suffer substantial prejudice if the court elected not to sever the charges. The trial judge denied defendant's motion "finding joinder proper and severance inappropriate. In denying severance, the court noted the evidence was not overly complex, the jury would not have difficulty distinguishing the offenses and Appellant failed to show he would be prejudiced." The defendant was found guilty on a number of the charges.

On the joinder issue, the Court stated that it must consider the following:

1. Joinder must be proper as a matter of law
2. A trial court's decision will not be reversed absent a showing of:
    a. An abuse of discretion and
    b. A clear showing of prejudice and/or
    c. Its ruling is clearly against the logic of the circumstances then before it and
    d. The trial court's ruling must be so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.
3. Joinder is proper where the charged offenses are of the same or similar character, and are based on two or more connected acts or transactions or are part of a common scheme or plan.
4. Missouri courts favor liberal joinder of offenses as a means of achieving judicial economy and will find joinder appropriate where any of the § 545.140 RSMo. or Rule 23.05 criteria exist.

In this case, the Court found:

- "The evidence presented at trial was straightforward and simple.
- The jury heard testimony from the victims in the case as well as police witnesses involved in the investigation.
- In total, there were only 11 witnesses and the testimony was not beyond the sophistication of the average juror.
- Nothing in the record or the transcript of the trial indicates a properly instructed jury would be unable to distinguish what was relevant to each victim and to each charge.
- The elements of each offense were plainly set out in a separate instruction for each count."

The trial court's decision was affirmed.

State v. JAMES C. STREET, ED109099 (SEPTEMBER 14, 2021)

The defendant was convicted at a bench trial for assault in the 3rd degree, a Class D felony because it was charged under the Hate Crime Statute. The defendant's point on appeal is that there was insufficient evidence that he assaulted a person because of race.

While in their cars – the defendant and victim had a dispute over a parking spot at a gas station. The defendant got the spot and the victim pulled up to a gas pump. The defendant then got out of his car and walked over to the Victim's car screaming a racial slur word at the Victim telling the Victim, he did not belong there and go back to Ferguson using the racial slur several times. The Victim wanted to know what he did and eventually the Victim stated, "screw you" and went into the gas station. At some point, the Victim and the defendant had words at the door of the gas station and the defendant punched the Victim in the face. A witness said the defendant used the racial slur word 10 times. He was charged with an assault 3rd, found guilty and eventually sentenced to a 5-year SES.

The appellate court reviewed Section 557.035, RSMo. The court pointed out that the defendant's motive for committing the crime can be inferred from his conduct, before, during and after the crime. The Court ruled that by the defendant repeatedly and angrily referring to Victim using a racial slur and suggesting the Victim go "back" to Ferguson, it was reasonable to infer under these circumstances that defendant meant Victim did not belong there in Fenton because he was Black and negatively associated Victim with the recent racial unrest in Ferguson. Since these statements occurred right before the assault, it was clear evidence that the assault was motivated by the Victim's race.

The legal issue was whether the "evidence" proved the "because of" element in Section 557.035, RSMo. The Court rejected the argument of the defendant that there was evidence from which "a reasonable trier of fact could have concluded that he had a non-racial motivation for punching Victim …"

"Within seconds of a brief and common parking lot interaction with a Black man he did not know, defendant repeatedly screamed an extremely offensive racial slur at him, indicated he did not belong in that part of town because he was Black, and punched him in the face. This was more than sufficient evidence from which the trial court could reasonably conclude that but for Victim's race, defendant would not have assaulted him.:"

The Judgement was affirmed.

State v. SPRADLING, SD 36333 (SEPTEMBER 15, 2021**)**

The defendant was charged with committing two counts of the class D felony of kidnapping in the second degree, two counts of the unclassified felony of armed criminal action, one count of the class E felony of unlawful use of a weapon, and one count of the class D felony of unlawful possession of a firearm by a felon. On appeal, the defendant alleged that the trial court erred in failing to strike three prospective jurors for cause.

At one point, the trial court asked the following:

> THE COURT: Folks, there's been a few of you that have expressed an opinion about what you believe the law is or at least ought to be. You understand that the Court will

> give you written instructions if you're chosen to serve as jurors in this case. Those instructions are, in fact, what the law is. What I want to know is if you have an opinion that's contrary to the instructions that I'm going to have to give at the end of this case, are you going to be able to set your opinion about what the law – what you think the law should be and be able to follow the instructions of what the law is? And I'll give you the example. The one that I think is going to come up is self-defense. If I give you an instruction that – and I think [defense counsel] has already, basically, acknowledged that his client has a felony, or at least he expects that's going to be the evidence, that he has a felony – as a felon, he has a right to defend himself, and it lays out the elements that you have to find and believe, are you going to be able to follow the instructions and the evidence you are to hear even though you might personally believe that a felon can never possess a firearm to defend themselves? Or are you going to sit there and go, "Nope. No felon can ever have a firearm. No self-defense"? So are you going to follow my instructions? Is there anyone here that will not follow my instructions? That's fine. That's what I want to see. I want to see – keep your hands up so I can call those numbers."

After this question and responses, ten prospective jurors raised their hands and the trial court struck them for cause. There were three prospective jurors who were not struck and were not among this group, but the defendant's counsel felt that based upon their prior answers, they should have been struck for cause. Defendant contends the trial court abused its discretion by denying the request to strike three prospective jurors for cause. The defendant believed that each of the three prospective jurors "unequivocally indicated that [he or she] would not consider the evidence of and a jury instruction regarding whether [Defendant] acted in self-defense, and no follow-up question elicited a direct, unequivocal assertion from [each venireperson] that [he or she] would follow the trial court's instruction regarding self-defense."

The Court found that the three prospective jurors did not give "unequivocal answers" as defendant's trial counsel asserted. The Court felt that there was never a direct question by the defendant's attorney as he alleged, and the trial court cleared up any concern in regard to their answers when the trial court made its inquiry. The Court felt that the three prospective jurors silence in response to the trials court's inquiry "constituted an unequivocal assurance of impartiality for the purpose of rehabilitation".

RECTOR v. State, SD 36895 (SEPTEMBER 20, 2021)

Rector timely filed a post-conviction motion alleging ineffective assistance by appellate counsel because the appellate counsel did not raise the issue of a "late-endorsement" of a witness by the State on the 2nd day of trial. The appellate counsel testified that she did not raise the issue because she did not believe it would be successful. The motion court ruled against the Defendant and the appellate court found that "(b)ecause there is no reasonable probability that the outcome of Rector's direct appeal would have been different had that issue been raised."

The Court set out the two-prong test set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) on the issue of ineffective assistance of counsel in a 29.15 hearing:

1. Did the trial attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and
2. Was the defendant prejudiced thereby.

Further, the defendant in his motion must ". . . must demonstrate that the claimed error was sufficiently serious that, if it had been raised, there is a reasonable probability the outcome of the appeal would have been different."

This Court, finding that even if the appellate counsel would have raised this objection, there was no reasonable possibility that the appellate court have reversed the defendant's conviction. The Court stated that there were four factors when determining the trial court erred in allowing the late endorsement. The four factors are:

1. Whether the defendant waived the objection;
2. Whether the State intended surprise or acted deceptively or in bad faith, with the intention to disadvantage the defendant;
3. Whether in fact the defendant was surprised and suffered any disadvantage; and
4. Whether the type of testimony given might readily have been contemplated.

In this case, since the Court found three of the four factors present, the Court also held that if the defendant was really surprised or prejudiced by the late endorsement, the defendant could have requested a continuance to conduct further discovery. The Court found that not asking for a continuance led to the inference that the late endorsement was not damaging to the party. The Court concluded again that the defendant failed to demonstrate the outcome of his direct appeal would have been any different had appellate counsel raised that claim.

State v. PAINE, WD 83500 (SEPTEMBER 21, 2021**)**

The defendant was convicted of a UUW, a class E felony. The defendant, a taxicab driver, threatened the victim by waiving a weapon in victim's face when the defendant caught the unarmed victim writing in dust the word, "sucker" on the back of the defendant's cab window. The defendant's counsel filed a motion in limine and wanted the trial court to preclude evidence that the cab driver defendant – prior to the incident with the victim - had left the vehicle running to assist the Westport Security officers in another incident where shots were fired. The State felt this incident was relevant to rebut the defendant's self-defense claim with the victim, but the defendant wanted the evidence excluded because he felt it portrayed him as a "loose cannon". The trial court overruled the motion.

The Court held that plain error was not present in this case when the very evidence the defendant was complaining on appeal was not objected to by the trial counsel when presented at the trial and was actually discussed during the defendant's opening statement.

ALLEN TUCKER v. State, SD 36845 (SEPTEMBER 22, 2021**)**

A jury found Allen Tucker guilty of first-degree sexual abuse and attempted enticement of a child. The defendant filed a 29.15 motion alleging three issues:

1. The defendant's counsel failed to object to a deputy's comment about the defendant's right to remain silent; and
2. The defendant's counsel not objecting to a forensic interviewer's testimony about the credibility of the victim; and
3. The defendant's counsel failing to object when the prosecutor asked the Defendant on cross-examination to comment on "So you want everyone to believe that everyone is lying except for you?"

As to these three issues, the appellate court stated:

1. The defendant's trial counsel believed the portion of the deputy's comment was "advantageous to the defense" and he did not want to draw attention to invocation of the right to remain silent. The court stated that "(a) strategic decision to bolster a defendant's credibility by permitting the jury to hear about the defendant's interview, including the portion in which he invoked his right to remain silent, "is subject to a 'strong presumption that trial counsel's conduct was reasonable and effective.' "
2. The defendant's trial counsel felt that this testimony was better attacked through cross-examination than by objection.
3. The defendant's trial counsel wanted the jury to think the Defendant was unafraid to answer the prosecutor's questions.

The Court citing the Strickland two-prong test believed the defendant's counsel rationales were within the range of professional judgment and affirmed the motion court's decision to deny the defendant relief.

State v. SHAWN YOUNT, ED 108967 (SEPTEMBER 28, 2021**)**

The defendant was convicted of 4 counts of Burglary in the 2nd degree. The defendant appealed on the following issues:

1. The trial court erred in finding the defendant a "dangerous offender" under Section 558.016 and 558.021, RSMo. and if the defendant was not a "dangerous offender", then the enhanced sentences were improper.
2. Testimony by a detective to text messages by an accomplice implicating the defendant in the crimes was inadmissible hearsay.

The Court addressed the issue of the police office's testimony first. This Court held that:

Authorship and authentication of text messages can be proven by:

(1) an admission by the purported author that he actually sent the relevant messages or an admission by the purported author that the number from which the message was received was his phone number;
(2) testimony from the person who received the text message that she regularly receives messages from the author from that phone number; or
(3) a personalized signature on the text message or some other distinct, personal identifier (collectively "the three relevant categories of text-message-authentication evidence under Harris"). See, State v. Harris 358 S.W.3d 172 (Mo. App. 2011).

The Court found that the trial court's ruling was correct.

In regard to the "dangerous offender issue", the Court transferred the case to the Supreme Court because of a conflict between the plain meaning of Section 558.016.4 and the notes on use for MACH-CR 2.30 – what is required to find a defendant a "dangerous offender".

State v. EDWARD DURBIN, SD 36757 (October 7, 2021)

Edward Durbin appealed his conviction of the class F felony of attempted child molestation. Durbin's contention was the trial court abused its discretion by refusing to disclose to Defense counsel records of the victim from the Missouri Department of Social Services, Local children's Division and middle school (the records).

Durbin was at an acquaintances home and was accused of trying to sexually molest the daughter of a family friend while the victim's mother and grandmother were absent. Prior to and during the trial Durbin's counsel made numerous requests to have the records disclosed for purposes of cross examination and/or impeachment, and if not granted that the court "in the alternative" review the records "in camera and disclose to the Defense what it deems appropriate". The Trial Court thereafter reviewed the records in camera and ruled "none of the records would be disclosed" as none were relevant or material. Durbin was subsequently convicted. Durbin timely filed a Motion for New Trial, asserting error by the trial court in disallowing disclosure of the records. Prior to sentencing, the victim and victim's mother filed "Victim Sentencing Statements". Based upon the information in those sentencing statements, Durbin renewed his Motion for New Trial, based again upon error by the Trial Court. Multiple Motions and hearings ensued, during which time the Trial Court again reviewed in camera the records (over 1000 pages), and again ruled none of the records were relevant or material. Ultimately Durbin was convicted and sentenced and appealed.

The Southern District used the standard of abuse of discretion when reviewing the alleged error by the trial court. Did the conduct of the trial court cause fundamental unfairness to Durbin? If reasonable persons can disagree as to whether the trial court acted correctly, there is no abuse of discretion. The Southern District reasoned the trial court granted Durbin not one, but two in camera reviews and further allowed Durbin's counsel great latitude at the time of the trial in cross examination, and while the trial court clearly exercised its discretion, it did not abuse its discretion. Judgment of the trial court was affirmed.

In the Matter of MLH v. Juvenile Officer WD84193 (October 19, 2021)

Appellant, MLH, a juvenile was placed on probation and ordered to wear an electronic monitoring device. Shortly thereafter, the Juvenile Officer in charge of MLH's case filed a motion to have MLH placed in juvenile detention facility due to probation violation, specifically tampering with electronic monitoring equipment and being habitually absent from her home. MLH was thereafter placed into the juvenile detention facility. While in a juvenile detention facility, MLH assaulted an aide at the facility and was charged with assault. The trial court ultimately ordered the MLH be committed to Buchanan County Academy. Prior to the appeal being heard, MLH was released from the Buchanan County Academy and placed on probation. M.L.H. appealed the trial courts decision, alleging the court applied the incorrect legal standard, the court's decision was against the weight of the evidence, and that the evidence was insufficient to reach its conclusion.

The Western District ruled M.L.H.'s appeal was not rendered moot due to her release from juvenile detention. M.L.H. remained on probation, and a decision in her favor would free her from the restrictions and supervision incidental to probation. Further, even if M.L.H. were no longer subject to supervision, a live controversy would nevertheless exist due to the potential future consequences of the circuit court's adjudication.

In determining whether M.L.H. acted "recklessly" in assaulting a staff member at the juvenile detention facility, the Western District reasoned the circuit court applied an objective standard in determining whether M.L.H.'s conduct "constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." § 562.016.4, RSMo. M.L.H. argued this was error, and the circuit court was required to consider her personal life experiences (including childhood trauma) in determining whether she acted reasonably. The Western District stated even though the objective "reasonable person" standard of care applicable had to take account of certain of M.L.H.'s generalized characteristics (such as her age and mental capacity), the standard was *not* a subjective test based on her particular, individual life history.

The Western District continued stating the circuit court's determination the Juvenile Officer had proven beyond a reasonable doubt M.L.H. did not act in self-defense was not against the weight of the evidence. The trial court reasonably found that M.L.H. used more force than was reasonably necessary to respond to the staff member's actions.

Finally, the Western District found sufficient evidence to establish M.L.H. was required by court order to wear electronic monitoring equipment, an essential element of the adjudication for tampering with that equipment. The Western district went on, stating because the order requiring M.L.H. to submit to electronic monitoring was entered by the same judge, in the same case, in which the allegation of tampering with monitoring equipment was being adjudicated, the Juvenile Officer was not required to introduce the court's prior order (ordering the wearing of the electronic monitoring equipment) into evidence, or formally request that the court take judicial notice of such order.

PAUL JOSEPH MOTTET v. DOR WD84301, (October 12, 2021)

The Director of Revenue appealed from the judgment of the Circuit Court of Putnam County, Missouri, denying the Director's motion to set aside judgment under Rule 74.06 after the trial court entered judgment for Paul Mottet and against the Director who, by and through its legal representative, the prosecuting attorney, failed to appear when the case was called for trial and failed to adduce any evidence.

The sole point on appeal, alleged the trial court erred in denying a motion to set aside judgment because the trial court's judgment was void. Appellant relied on section 56.060, RSMo ("[a] prosecuting attorney shall commence and prosecute all civil and criminal actions in the prosecuting attorney's county in which the county or state is concerned, [and] defend all suits against the state or county, . . ."); section 56.090, RSMo ("No judge shall allow the cases alluded to in sections 56.060 . . . to be tried before him, unless the prosecuting attorney or someone properly qualified to prosecute for him is present."); and section 56.120, RSMo ("If [the prosecuting attorney] be sick or absent, such court shall appoint some person to discharge the duties of the office until the proper officer resumes the discharge of his duties."). In so relying, the Director argues that the general provisions in chapter 56 of the Revised Statutes of Missouri regarding the duties of prosecuting attorneys apply to *any* case in which the prosecutor is required to represent a state entity, including the Director of the Department of Revenue.

The Western District affirmed the trial court's decision finding the general provisions of chapter 56 were not applicable because the proceeding was civil and not criminal and was not a case against the state or county. Instead, it was a case against the Director of the Department of Revenue regarding the revocation of Mottet's driver's license. The Western District went on to say the legislature would not create superfluous language in its statutes, and there should be no need for the "shall" directive in section 302.574.4, RSMo, if section 56.060 was the applicable directive as the appellant alleged. Chapter 302, Missouri's Suspension and Revocation Administrative Procedure Act, was the applicable directive. The Director had the burden to establish grounds for their requested relief and if the Director failed to make the requisite proof, by failing to appear for trial and adduce evidence, the trial court may properly enter judgment for the driver. There is nothing in chapter 302 prohibiting a judgment against the Director when, although duly notified of a trial setting, fails to appear at the trial and fails to adduce evidence. The Judgment of the trial court was affirmed.

ADAM TARWATER v. DOR WD84007 Cons. w/ WD84008, (October 5, 2021)

The Director of Revenue appealed the trial court's judgment setting aside the revocation of Adam M. Tarwater's driver's license pursuant to section 577.041, RSMo. The Director argued the trial court erred in finding Tarwater did not refuse to take a breath test. Tarwater cross-appealed and argued the trial court erred in finding there were reasonable grounds to believe he was driving a motor vehicle while in an intoxicated or drugged condition.

An accident on August 24, 2019 resulted in Tarwater being charged with DWI and the subsequent revocation of his driving privilege. At the scene Tarwater was described as having a strong odor of intoxicants and watery bloodshot eyes. Tarwater was asked to perform Field Sobriety Tests (FST's) and refused. Tarwater was arrested on suspicion of driving under the influence and transported to jail. Tarwater was mirandized and asked to call a lawyer, but instead placed a call to a co-worker. Thereafter, Tarwater agreed to provide a breath sample, but

prior to doing so asked the officer if he would be arrested for DWI if he tested over the legal limit. Tarwater was informed he was already under arrest whether he provided a breath sample or not. Tarwater clearly uttered an obscenity and subsequently refused to provide the breath sample.

At trial, Tarwater testified he had consumed one or two beers approximately 8 hours prior to the accident and did not feel intoxicated. He also testified just before the accident, he purchased three (3) pints of vodka. Finally he testified immediately after the accident he consumed more than one half (1/2) of one (1) of the three (3) bottles of vodka, began to feel the effects of the vodka while speaking to the officer at the scene and was feeling "fairly hazy" at that time. The trial court found Tarwater was in a condition "rendering him incapable of refusing to take [the] breath test and set aside the revocation of Tarwater's driving privilege.

The Western District held the video evidence unequivocally established Tarwater was physically able to vocalize his refusal to submit to a breath test, and did so, which established as a matter of law he had the physical ability to refuse to submit and he exercised that physical ability of his own volition. Whether Tarwater's vocalized refusal to submit was knowing or remembered was not legally relevant. The Western District further found no abuse of discretion by the trial court when it concluded the trooper had reasonable grounds to believe Tarwater was driving while intoxicated. The Case was reversed and remanded with instructions.

What happened to Rule 37?

Let's Start Simple

Missouri Constitution Art. V, Section 1

- The judicial power of the state shall be vested in a Supreme Court and other designated courts, including municipal corporation courts.
- Municipal Courts are subject to rule making power of the Missouri Supreme Court
- Missouri Supreme Court adopted Rule 37 to prescribe procedures to be followed by Municipal Courts

What you have to understand

- The Supreme Court is treating Municipal Courts just like any other court.
- The Supreme Court wants uniformity between all courts.
- The Supreme Court is taking responsibility and directing OSCA to implement changes they direct.
- Sho-Me Courts isn't going away.
- Rule 37, as it now is being read and applied ASSUMES you are using Sho-Me Courts, if you're not, well, that's too bad…

What else you have to understand . . .

- Rule 37's changes aren't perfect and EVERYBODY knows it
- This is all new and is "a work in progress"
- and finally…. "we aren't in Kansas anymore"

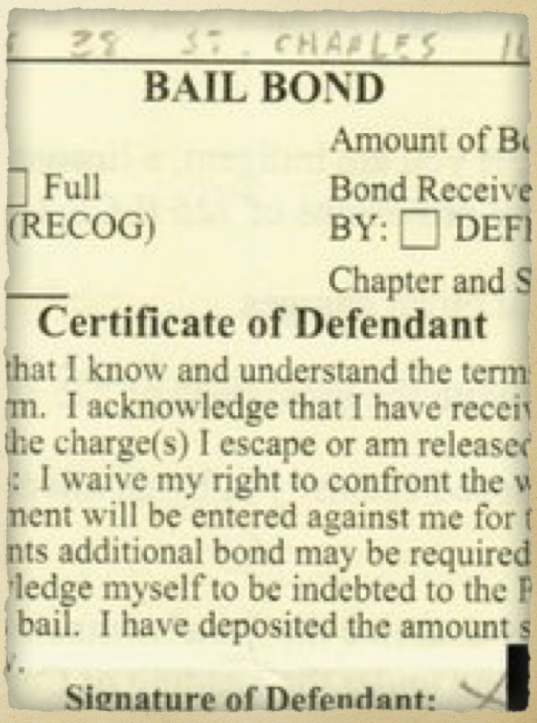

Let's talk Bonds…
Are you ready?

Bail Bonds

- There are drastic changes to Rule 37 bond requirements
- The changes want courts to default to recognizance bonds unless there is a reason to ask for a monetary bond - i.e failure to appear in court or danger to self or society
- When do you release?
- After 48 hours you MUST conduct a bond hearing if no release
- What do you do to ensure compliance with reviewing Bond conditions?

Rule 37.15 - Right to Release - Conditions

- Subparagraph (b),(c), (d), (e) and (f) have significant changes which go into effect January 1, 2020
- The changes encourage courts to default to recognizance bonds unless there is a reason to ask for a monetary bond - i.e failure to appear in court or danger to self or society.



29 ST. CHARLES

BAIL BOND

Amount of B

☐ Full (RECOG)

Bond Receive

BY: ☐ DEF

Chapter and S

Certificate of Defendant

hat I know and understand the term
m. I acknowledge that I have recei
he charge(s) I escape or am release
: I waive my right to confront the w
nent will be entered against me for
nts additional bond may be required
ledge myself to be indebted to the
bail. I have deposited the amount s
.

Signature of Defendant:

Bail Bonds

- 37.15(b) - the defendant SHALL be released
- 37.15 (c)- the court shall release the defendant on the defendants own recognizance … unless the court determines such release will not secure the appearance of the defendant…
- If the court believes the Defendant won't return on his/her own, then it shall impose the least restrictive conditions necessary to secure the appearance of the defendant

What must you order in setting a bond?

- The Defendant will appear in the court in which the case is prosecuted or appealed from time to time as required to answer the charge *37.15(b)(1)*
- The defendant will submit to the orders, judgment and sentence, and process of the court having jurisdiction over the defendant *37.15(b)(2)*
- The defendant shall not commit any new offenses and shall not tamper with any victim or witness in the case nor have any person do so on the defendants behalf *37.15(b)(3)*
- The defendant will fully comply with any and all conditions imposed by the court in granting the release *37.15(b)(4)*

What other conditions might be able to be imposed?

- The Court upon appropriate determination may impose "the least restrictive condition or combination of conditions of release . . ." *37.15(c)*
- The Court can not impose any condition or combination of conditions of release "greater than necessary to secure the appearance of the defendant at trial or at any stage of the proceedings. . ." *37.15(c)*

How do you know what constitutes the least restrictive conditions

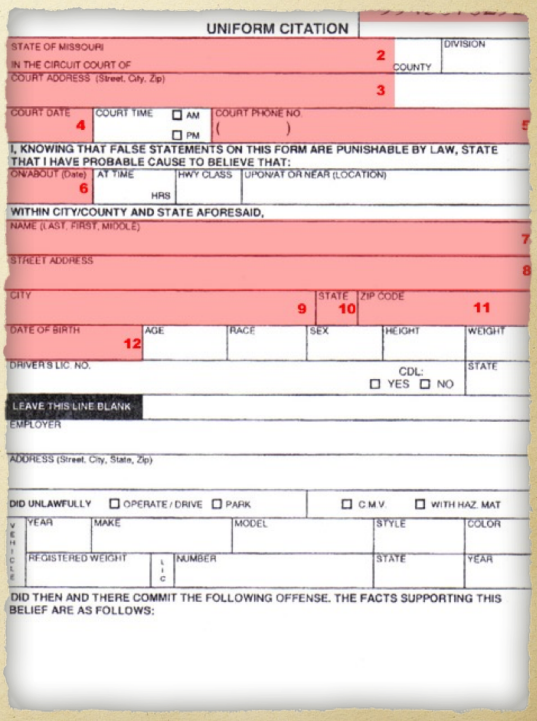
- Must first consider non-monetary conditions
- If non-monetary conditions are not enough, or the safety of the community or other persons might be in doubt, then the court can consider monetary conditions or a combination.
- If a court is going to order a monetary bond, it cannot order more than is necessary to secure the appearance of the defendant or to protect the safety of the community or other persons - this is impermissible.
- If you find additional conditions of release are required besides what Rule 37.15(b) specifies, you MUST impose additional condition(s)

What additional conditions might be allowable
Rule 37.15(c)

- Before we had 6 conditions
- Effective January 1, 2020 there are 16 conditions
- It is suggested you carefully review your docket entry for setting bond conditions. If you haven't looked at it since January 1, 2020 it may not be correct due to the massive rewrite of rule 37.15.

37.33
Notice of Violation
a/k/a Citation

- Has to include court date and time for initial appearance
- Must include date of birth of the accused
- Must include the state approved charge code if one exists

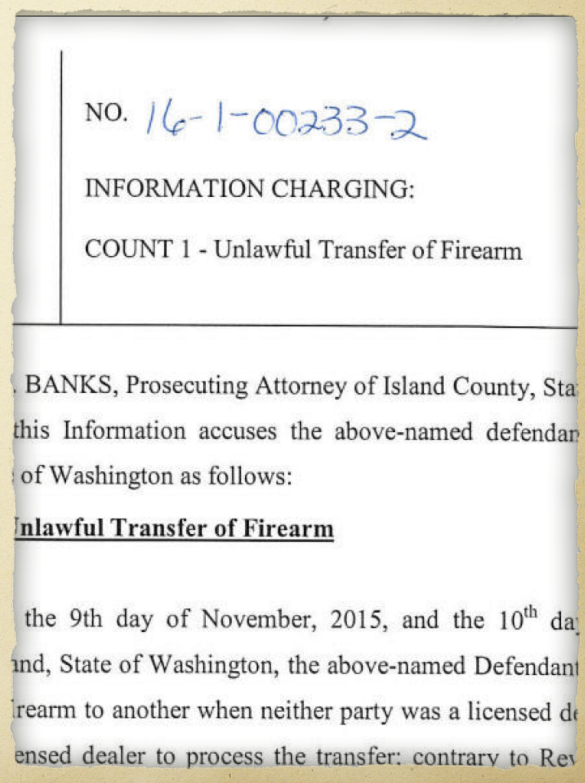


UNIFORM CITATION

STATE OF MISSOURI
IN THE CIRCUIT COURT OF 2 COUNTY
DIVISION
COURT ADDRESS (Street, City, Zip) 3
COURT DATE 4
COURT TIME ☐ AM ☐ PM
COURT PHONE NO. ( ) 5
I, KNOWING THAT FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY LAW, STATE THAT I HAVE PROBABLE CAUSE TO BELIEVE THAT:
ON/ABOUT (Date) 6
AT TIME HRS
HWY CLASS
UPON/AT OR NEAR (LOCATION)
WITHIN CITY/COUNTY AND STATE AFORESAID,
NAME (LAST, FIRST, MIDDLE) 7
STREET ADDRESS 8
CITY 9
STATE 10
ZIP CODE 11
DATE OF BIRTH 12
AGE
RACE
SEX
HEIGHT
WEIGHT
DRIVER'S LIC. NO.
CDL: ☐ YES ☐ NO
STATE
LEAVE THIS LINE BLANK
EMPLOYER
ADDRESS (Street, City, State, Zip)
DID UNLAWFULLY ☐ OPERATE / DRIVE ☐ PARK ☐ C.M.V. ☐ WITH HAZ. MAT
VEHICLE
YEAR
MAKE
MODEL
STYLE
COLOR
REGISTERED WEIGHT
LIC
NUMBER
STATE
YEAR
DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE. THE FACTS SUPPORTING THIS BELIEF ARE AS FOLLOWS:

Information -Rule 37.34

- Information can be based on the prosecutors information and belief
- Information SHALL be supported by a violation notice OR a statement of probable cause
- **An information is not a violation notice**



NO. 16-1-00233-2

INFORMATION CHARGING:

COUNT 1 - Unlawful Transfer of Firearm

. BANKS, Prosecuting Attorney of Island County, Sta
this Information accuses the above-named defendar
of Washington as follows:

Unlawful Transfer of Firearm

the 9th day of November, 2015, and the 10th da
nd, State of Washington, the above-named Defendant
irearm to another when neither party was a licensed de
ensed dealer to process the transfer: contrary to Rev

Probable Cause Rule 37.435

- Must be in writing
- Must state name of accused
- Must state date and place where violation occurred
- Must have facts that support or cause a belief that an ordinance violation was committed
- Must state that the allegations are true
- Must be signed and on a form stating false statements are punishable by law
- Must accompany an information when a warrant is sought and state facts that would support a finding that reasonable grounds to believe the accused will not appear upon issuance of a summons exist

Probable Cause
It's required for a summons

- Under this rule, if a Defendant fails to appear, a summons can not be issued without a statement of probable cause
- When an information charging the commission of an ordinance violation **and a statement of probable cause are filed** a summons shall be issued . . . *Rule 37.43*

Questions . . .

- Does the violation notice double as an information?
- Does the violation notice contain a Statement of Probable Cause?
- Who is responsible for preparing the Statement of Probable Cause?
- Do I have to have a Probable Cause Statement for every case?
- Where do I get this?
- At what point in the case do I need this?
- Again, remember the Supreme Court wants uniformity.

Warrant Contents - 37.45

Warrant Requirements -check your forms

- Must be in writing and issued in the name of the prosecuting municipality
- Must contain the name or description of the person to be arrested to allow identification with reasonable certainty
- Must describe the violation charged
- Must state date it was issued and from where it was issued
- Must command the defendant named to be arrested and brought before the court in person or by interactive video technology
- Must specify the conditions of release **required** by Rule 37.15(b) and **allowed** by Rule 37.15(c) or via determination under Rule 37.15(d)
- Must be signed by judge or clerk when so directed by the judge - **it is this presenters recommendation that warrants be reviewed and signed by the judge - signature stamps are not a good idea**

Possible (*but not the only possible*) language to include in a docket

- "Defendant failed to appear after issuance of a summons. After review, the court finds a) probable cause to believe an ordinance violation has been committed by the defendant; b) probable cause to believe the defendant will not appear upon the issuance of further summons. Warrant ordered by court based upon the findings herein. Based upon the above findings, consideration of both monetary and non-monetary conditions for release as well as the defendants ability to pay, the recommendation of the prosecutor, and consideration of the factors set forth in Rule 37.15, the Court orders issuance of a warrant with bond set pursuant to 37.15 (b), 37.15 (c)(12), 37.15 (c)(13) and/or 37.15 (c)(14) in the sum of $_____. The Court finds this to be the least restrictive condition(s) of release necessary to ensure the appearance of the defendant on this charge."

Uniform Fine Schedule

Like it or not, you're stuck with it

Why???

- Uniformity
- Municipal Courts are a division of the Circuit Court

And then there was the Committee…

- Rule 37.06 was changed and added subparagraph (c). It adds the following definition: **"Committee"**, a committee consisting of judges appointed by the Court to establish the uniform fine schedule for Rule 37 violations bureau".

So… Who's running your Court?

- The Supreme Court
- The Presiding Judge?
- OSCA?
- The Committee?
- The Municipal Judge?

And the correct answer is…

- It all depends on your perspective . . .

Let's see if we can figure this out

- The Supreme Court is in charge according to the Missouri Constitution.
- The Supreme Court writes the rules for Municipal Courts.

So…

- The Supreme Court said "the 'committee' SHALL promulgate and maintain the uniform fine schedule for animal control violations, housing violations and traffic violations disposed through a Rule 37 violations bureau." *Rule 37.495*

that means …

- The Supreme Court, who is in charge of Municipal Courts, has dictated that a committee of judges are to set a schedule of fines for your municipality that you must adopt and enforce. If you do not, there will likely be consequences…

Rule 37.49

- 37.49(a) - any municipal judge may establish a violations bureau
- 37.49(c) - if a violation bureau is established, it shall include the violations (and fines) set forth in 37.495.

Uniform Fine Schedule Rule 37.495 and 37.49

- Initially effective May 1, 2019
- Moving target - changes whenever the Committee promulgates changes approved by the Supreme Court
  - effective January 1, 2022, a new schedule will need to be adopted and put into effect in your municipality.
  - Must your court adopt the schedule set forth in 37.495, even if its not correct and lists charges you don't have?
  - Everything changes in January, right?

37.49(d)

- If you have a violations bureau you SHALL adopt the fine schedule set under 37.495

37.495

- The committee promulgates and maintains the schedule - NOT THE JUDGE

The Fine Collection Center is closed - 37.49(e)

- This rule states if you pay before court and the time for initial appearance, whether electronically, in person or by mail, such is a plea of guilty and waiver of trial. If payment is received after the initial appearance date and time such payment may in the courts discretion be accepted as a plea of guilty and waiver of trial.

When does the Violations Bureau come into play?

- ONLY ON TICKETS PAID BEFORE COURT AND THE TIME FOR INITIAL APPEARANCE
  - The violations bureau is attempting to replace the Fine Collection Center.
  - It's up to the Judge as to whether tickets paid after initial court appearance date and time are accepted at violation bureau fine amounts listed. *37.49(e)*

Here comes the Judge. .

- Once the initial court date and time for appearance passes, if payment has not been received forget about the violations bureau
- But that doesn't mean fines can be in any amount you want.
- How do you reconcile the violations bureau fine schedule with the cap on fines imposed under RSMo 479.353?
- What about local ordinances that don't match the violations bureau?

The Prosecutor has Power

- Under Rule 37.49(c)(1), the Prosecutor may submit (file) a violation that can only be disposed of through court appearance.

Some Questions and Some Answers (just not all the questions or answers)

- Does the Uniform Fine Schedule apply if you don't have Show-Me Courts?
- Can you have more violations on your fine schedule than what is listed?
- Do you have to have a violations bureau?

Some Questions and Some Answers (just not all the questions or answers)

- What if your ordinances allow only specific fines that differ from the Uniform Fine Schedule?
- Can a judge assess a different fine if the Defendant comes to court?

Some Questions and Some Answers (just not all the questions or answers)

- Can a PA make a plea agreement for a different amount than what is listed on the fine schedule?
- Can you still take payments through the violations bureau if a summons for FTA has been sent out?

Let's get in the weeds. .

- 37.49(c) "The violations within the authority of the bureau shall be designated by the order of the judge but shall only include animal control violations, housing violations, or traffic violations. Such violations may be amended from time to time but shall in no event include the following. . . (2) Any violation for which the court orders a summons to be issued"
- Does this mean if a defendant misses first court appearance and you order and send a summons that defendant cannot pay per the violation bureau before the court hearing?

Still in the weeds . . .

- 37.57 - No trial shall be conducted or plea of guilty entered unless the defendant is present, except the court, the prosecuting attorney and the defendant may agree that defendant need not be present.
- 37.64(b) - a defendant must be present when sentence and judgment are pronounced unless the judge, the prosecutor and the defendant consent to the absence of the defendant"
- Do you need a motion or agreement from the Prosecutor, Defendant and Judge to accept payment from violations bureau after the court date and initial summons has gone out?
- What about 37.49(e) - doesn't this give the judge the authority to simply accept late payments?
- "Full payment received on or after the initial appearance date and time may, in the court's discretion, be accepted as a guilty plea and waiver of trial." 37.49(e)

really in the deep stuff. .

- If you authorizes payments from the violation bureau to be accepted after the date of the initial court appearance, when do you no longer accept payments - in other words what constitutes a payment that is too late?
- Is a specific order necessary for this type of practice?

Solution?

- PA files motion pursuant to 37.57 and/or 37.64
- Judge issues order allowing payments after summons but prior to court appearance after summons is issued
- Does this work? Do you even need this?

Mentally exhausted and tired of trying to figure it all out?


Night Court
Time for something we can all relate to . . .


Biography
CHANNEL

What about Rule 37.65?

It's changed . . .

- The Judge must make inquiry ANYTIME payment is due. *37.65(a)*
- There are now two (2) classes of Defendants
  - Defendants who have the ability to pay but can't right now *37.65(b)*
  - Defendants who have no ability to pay - and will never have the ability to pay *37.65(c)*

more changes . . .

- If a Defendant fails to pay and a show cause hearing is scheduled for **criminal contempt** there are now requirements that require you to look outside rule 37 to comply. *37.65(d)*
- If all the due process requirements for the show cause hearing are met, the court can only order incarceration following the show cause hearing if certain findings are made. Docket entry should reflect "alternative measures are not adequate to meet the municipalities interest in punishment and deterence" **or** "the defendant had the ability to pay and willfully failed to do so" *37.65(d)*

FTA means no more summons under 37.65?

- 37.65(e) states the court "shall issue a summons" for show cause hearings "**unless the defendant has failed to appear at a prior court date in the case**". . .
- "In the event the Defendant has previously failed to appear or fails to appear on the summons the court may issue a warrant to secure the Defendants appearance for a hearing on the order to show cause." *37.65(e)*
- **WORD OF CAUTION** - This provision is peculiar to summons for show cause orders on payment plans. There is no similar provision elsewhere in Rule 37.

Can you ever put a Defendant in Jail under Rule 37?

Rule 37.65(f) - incarceration

- A Defendant **can not** be incarcerated for failure to pay a fine, fee or cost UNLESS
  - The judge holds a hearing giving adequate notice to the Defendant
  - Judge makes certain required findings **in writing** which state
    - Failure was NOT due to inability to pay but was willful *37.65(f)(1)*
    - There was a failure to make a bona fide effort to pay *37.65(f)(1)*
    - Failure to pay was not the fault of the Defendant and alternatives to incarceration do not meet the municipalities interest in punishment and deterrence *37.65(f)(2).*

Contempt of Court

A Blessing or a Curse . . . or is it even available?

- "When an offender sentenced to pay a fine defaults in the payment of the fine or in any installment the fine or installment shall be collected by any means authorized for the collection of money judgments other than a lien against real estate or may be waived at the discretion of the sentencing judge." *RSMo 558.006*

but what about 37.65(g)?

- Rule 37.65(g) states a judge, after a show cause hearing, can make certain findings as specified in Rule 37.65(g)(1-4) and may thereafter impose incarceration for a term not to exceed thirty (30) days when findings are made by the court as set out in Rule 37.65(f).
- ". . . If the judge finds the defendant's failure to comply with an order for an alternative sanction was willful, the judge **may impose punishment for criminal contempt as authorized by law.**" *37.65(g)(4)*

What's the "takeaway" from the Rule 37.65 changes?

1. Written docket entries - be safe not sorry

2. Have Orders that incorporate the language of the Rule - don't reinvent the wheel

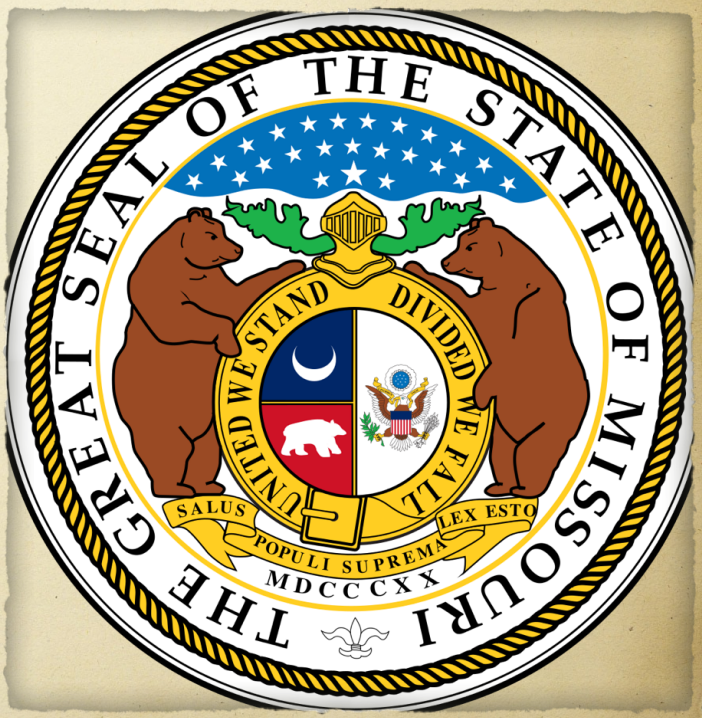
3. If jail you are going to jail someone on a payment plan, make sure you have appropriate written docket entries - no written order - no jail

4. Minimum Operating Standards require "strict compliance"

5. Contempt should be used sparingly if at all

What are you doing post MOS?

- Judge must be decision maker
- Judge must sign all warrants
- Judge must recall all warrants
- Judge must approve all amendments



Open Courtrooms

- Everyone is welcome - no invitation required
- Must have sufficient and proper space

The Buck Stops Here

- Judge is in charge and directs the clerk(s)
- Daily contact
- Review of files and finances
- Responsible for Compliance

Financial and Bookkeeping

Don't mess up. . .

- One account for bonds and fines - Per OSCA Show-Me Courts will separate the funds in the system
- Small courts can have clerk and one city finance official on account
- Only one clerk, Judge not required to be on account

No Money . . .

- If your City can't pay . .
  .
- The Court goes away. .
  .


That's all Folks!
Thank you for your participation and attention during my presentation
"Don't shoot the piano player - he's doing the best he can"

1. What do you do if an attorney negotiates a plea on behalf of a Defendant and sends the client to court to do the plea without the attorney?

a. Take the plea if the attorney and the Defendant signed the plea agreement.
b. Refuse to accept the plea and tell the client he paid too much for their attorney
c. It depends on the charge

2. What can you do if your court administrator tells you than an attorney or Defendant is rude to them?

a. Teach them a lesson, put them in jail
b. Nothing to the attorney, attorneys are exempt from an ethics complaint for being rude.
c. It depends on the behavior.

3. Defendant Smarty Pants tells the Judge that they have no right to judge him, he does not recognize the court and he will not plead guilty or not guilty to anything. Defendant proceeds to speak for 10 more minutes about his beliefs and the Judge's patience has expired. Judge orders the bailiff to remove the Defendant from the court room and screams, "you are ridiculous, you have no idea what you are talking about, you are going to spend the night in jail!" Judge should have:

a. Held a contempt hearing
b. Entered a not guilty plea and set the case for trial
c. Dismissed the case, the pay is not worth it.

4. Defendant Joe Cool arrives in court in a tailored suit, carrying the latest Iphone, dripping in gold jewelry with a diamond studded pinky ring. He tells you he cannot afford the $200 fine imposed after his guilty plea for indecent exposure. What should you do?

a. Stop laughing at him, you're a Judge
b. Ask for his tax returns
c. Provide him with the Supreme Court indigency form and hold a hearing

5. Defendant asks you a bunch of questions, hems and haws, and when you ask for his/her plea, they say, I can't afford a lawyer, so I guess I have to plead guilty. The PA is not seeking jail time on the charge. What do you do?

a. Hurry up, assess a fine and move on to the next case
b. Tell him/her you will not accept the plea and give him/her a new court date
c. Offer a continuance, explain that they have a right to an attorney, and that a plea must be voluntary

6. Judge Harper starts court and notices that the first person on the docket is his son's travel baseball coach. Coach Obvious has an accident ticket. You must decide how to proceed with arraignment. Judge Harper considers the judicial canons and decides he must:

a. Recuse and send the case to the conflicts judge
b. Arraign the coach and takes his plea; Would never let his kid play for him again anyway, he's a horrible coach
c. Stay on the case if he wants to plead guilty and assess the standard fine, but if he wants a trial, Judge Harper will recuse and send it to the conflicts judge

d. Recuse and send it to the conflicts judge with a note in the file to double this guy's fine. Judge Harper's talented son has batted last all season

7. A defendant stands before you charged with driving while suspended. The defendant wants to plead guilty and shows you she has got her license reinstated. She has talked to the Prosecuting Attorney and showed him her new license but because of her criminal history, he refuses to amend the ticket. The judge knows that if the defendant pleads to the current charge, her license will be suspended again for points. The Judge should:

a. Amend the ticket himself and take the defendant's plea to a lesser offense that will allow her to keep her license
b. Take the defendants plea to the Driving While Suspended and explain the collateral consequences of the points
c. Dismiss the ticket, the defendant has a new license and the purposes of justice have been served
d. Tell the Prosecuting Attorney to amend the ticket or you will never rule in his favor again

8. Judge Jones runs into the Mayor at a local Optimist Club dinner and the Mayor takes the opportunity to tell Judge Jones that he is very unhappy with all the speeding that is occurring in front of his new home. He knows the police are cracking down on those speeding because he watches from his front porch as they are stopped and given tickets. The Mayor now wants the Judge to do his part. He tells the Judge, "You can double those fines and it will stop those speedsters and by the way, the city can use the extra revenue to pay for your new courtroom and full-time clerk required by those minimum operating standards". The Judge should:

a. Buy the Mayor a drink and happily double those fines
b. Leave the fines the same and tell the police to stop writing tickets on the Mayor's street
c. Double the fines as along as the judge stays within statutory limits
d. Keep the fines the same as the judge does not want any perception that he is accessing fines for revenue

9. Judge Smith works for a very small town with limited funds. The City Council dutifully hired a court administrator to work 30 hours a week when it became mandatory under the Minimum Operating Standards. The Council even hired the Prosecutor a part time clerk. The Court administrator is scheduled to go on her dream vacation and will be out for two weeks. The City Administrator told the Prosecuting Attorney clerk to fill in for the court clerk while she is on vacation. The Prosecuting Attorney clerk will just be answering phones not doing any "real" court work. Judge Smith should:

a. Agree with the arrangement as long as the PA clerk is just answering the phone
b. Tell the city administrator that this arrangement will not work as there is a conflict of interest and the city will have to provide someone else to answer the phone
c. Tell the city administrator that this creates a conflict for the court and he will just close the court office during that two weeks
d. Go on vacation with the court clerk

10. Judge Dudd works for a mid-size city and has three court clerks. One of the clerks has a brother in law who is running for city council. The clerk asks the judge if she can help her brother in law in any way to get elected. He would be great for the city and Judge Dudd agrees. Judge Dudd can ethically tell his clerk that she can:

a. Hand out his cards at the court window
b. Put his bumper sticker on her car and in her yard
c. Campaign for him during parades and speaking events
d. All of the above
e. None of the above

11. While shopping at a local convenience store, Judge gets into a verbal dispute with a customer which results in the store manager calling the local police for assistance. When the police arrive the judge and the customer are still yelling and calling each other everything, but a "good shopper." The police officer cites the judge and the customer for peace disturbance. Could the citation for peace disturbance give rise to the judge being disciplined or sanctioned?

a. Maybe, if the citation results in a conviction.
b. No, the act of being cited for peace disturbance would not give rise to discipline.
c. Yes, even if the citation does not result in a conviction.
d. All of the above.

12. The judge requested that his clerk ask the prosecutor some questions to clear up a matter that wasn't clear from the evidence presented during the trial. Is it appropriate for the clerk to contact the prosecutor in this instance?

a. Yes, so long as the clerk memorializes the conversation in a docket entry in the court file.
b. No because the clerk has the same responsibilities and prohibitions as the judge.
c. Yes, so long as the other side is notified.

13. While conducting a call docket, the defense attorney appears before the court on Webex video conferencing wearing a baseball cap and smoking a cigar. Would it be appropriate for the judge to ask defense counsel to step off camera and dress appropriately for court and to extinguish the cigar in this instance?

a. No, because a call docket conducted via Webex is not a court proceeding under Missouri Supreme Court Rules.
b. No, the judge should not be concerned with the dress code of defense counsel.
c. No, the judge should expel defense counsel from the Zoom meeting room.
d. None of the above.

14. Are Judges duty bound to report an attorney who appears in court and appears to be under the influence?

a. Yes, an attorney under the influence may result in ineffective assistant of counsel.
b. No who doesn't like to drink before court appearances.
c. It depends if the attorney can be under the influence and still perform their duties.

15. John, the prosecutor, has a glass of wine with his dinner prior to arriving to court. When speaking with the clerk prior to the start of court, he notices that John is slurring his words and has bloodshot eyes. The clerk advises the judge of his observations. What should the judge do in this instance?

a. Observe John during the court proceedings and take action only if John is unable to do his job as the prosecutor.
b. Before the start of the docket, the judge should advise John that tonight he will not be serving as the prosecutor for the docket.
c. If a is true, then John should be referred to a lawyer assistance program.
d. All of the above are correct.
e. Only a and c are correct.

16-18. Recently a DWI caused a death of a young girl in a residential neighborhood and the public has been calling for stronger sentences and jail time for DWI's. At dinner, an old friend of yours stops by the table to say hello. He states that he disagrees with a local article on the subject as a friend's son has just gotten a DWI and "is a good college kid that just made a mistake." At the time of this interaction, you do not know if the case he is talking about is in front of you or not.

What is the best answer; how does Rule 2-2.4 apply to this fact pattern?

a. "A judge shall not be swayed by partisan interests, public clamor or fear of criticism."
b. "A judge shall not permit family, social, political, religious, or other relationships to influence the judge's judicial conduct or judgment."
c. "A judge shall not convey or permit others to convey the impression that any person or organization is in a special position to influence the judge."
d. Both A and B.
e. All of the above.

What is the best answer given the facts known; should the Judge recuse themselves from the case?

a. Yes.
b. No.
c. Maybe.

What is the best answer for the judge's response under Rule 2-2.4 External Influences on Judicial Conduct?

a. Ignore the statement to maintain judicial independence and not offend a friend.
b. State that the public must be respected, I will be giving stronger sentences.
c. Explain that the independence of the judiciary requires an application of law and facts uninfluenced by the public, family or friends.
d. State that if a judge's impartiality might reasonably be questioned a judge should recuse from the case.

19. Judge is getting married and learns that their fiancée is the Prosecutor's distant cousin. Can the Judge and the Prosecutor continue to work in the same court?

a. Yes
b. No
c. It depends on how distant the cousin is and if the Prosecutor sends them a nice wedding gift.

20. A judge signs an administrative order requiring that all proceedings shall be conducted in person. Sally, a defendant charged with driving while intoxicated advised the court in writing that she pleads not guilty, is immunocompromised and cannot appear in court in person. Should the judge allow Sally to appear via WebEx video conferencing?

a. Yes.
b. No, the administrative order applies to everyone.
c. Yes, only if she provides the court with a note from her doctor outlining her medical condition.