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1983 Statutory Revisions in the Criminal Field

by Philip A. Cherner

This article summarizes 1983 Colorado legislation in the criminal field. All bills are effective July 1, 1983, unless otherwise noted.

Sexual Assaults

H.B. 1254 broadens the scope of first degree sexual assault, C.R.S. 1973, § 18-3-402, to include sexual intrusion as offending conduct. Second degree sexual assault, C.R.S. 1973, § 18-3-403, is modified to pertain only to sexual intrusion accomplished by means other than specified in the first degree sexual assault statute.

The offense of pimping, C.R.S. 1973, § 18-7-206, was elevated from a class five to a class three felony by *H.B. 1017*, effective March 22, 1983.

H.B. 1101, effective March 3, 1983, changed the culpable mental state in the definition of sexual contact, C.R.S. 1973, § 18-3-401(3), from "intentional" to "knowing."

Child Abuse

The penalty for failing to report child abuse was elevated from a class two petty offense to a class three

misdemeanor by *H.B. 1014*, effective April 27, 1983.

H.B. 1019, effective April 22, 1983, makes a significant change in the witnesses competency statute, C.R.S. 1973, § 13-90-106, effective April 22, 1983:

A witness under ten may testify in any civil or criminal proceeding for sexual abuse, sexual assault or incest, when the child is able to describe or relate in language appropriate for a child of that age, the events or facts respecting which the child is examined.

S.B. 26 makes it a class three felony to inflict sexual assault on a child if the offender is in a "position of trust" or if the offender uses force, threats or intimidation to achieve his purpose. "Position of trust" is defined broadly. This bill is effective June 15, 1983. The bill also provides that the court shall expedite all cases involving unlawful sexual offenses and, further, that the statutory privilege between the victim and his or her physician is abrogated, as is the husband/wife privilege. A procedure for obtaining and using videotape depositions of child witnesses is created. Both incest and aggravated incest are broadened and their penalties are enhanced. The definitions of both include not only sexual penetration, but sexual intrusion and sexual contact.

Controlled Substances

In this area, the legislature amended some statutes but created no new crimes.

H.B. 1200, effective May 4, 1983, redefined marijuana, apparently in response to *People v. Anzures*, Colo.App., 599 P.2d 921 (1979).

H.B. 1146 repealed C.R.S. 1973, § 18-5-306, the imitation control substances statute passed in 1981 and replaced it with a more comprehensive law, C.R.S. 1973, § 18-5-601. The bill also adds imitation controlled substances to the nuisance statute, C.R.S. 1973, §§ 16-13-303 and 304.

While not strictly in the area of controlled substances, it is important to note that *H.B. 1497* added real estate to the nuisance law also, thereby making confiscation of real property used in connection with a controlled substance offense a possibility.

Witnesses/Evidence

H.B. 1340 amended the marital privilege, C.R.S. 1973, § 13-90-107(1)(a), to insure it does not apply to communications prior to the marriage about acts which occurred prior to the marriage.

H.B. 1152 replaces the present transactional immunity statute, C.R.S. 1973, § 13-90-118, with use and derivative-use immunity.

Culpable Mental State

H.B. 1286 creates a broader test for sanity release and prohibits the release of any inmate previously found insane without a hearing, whether or not the recommendation of the state hospital is contested.

A new definition of insanity is set forth in *H.B. 1289*. The definition adopted is the M'Naughton Rule. The bill specifies a procedure for pleading not guilty by reason of impaired mental condition, a procedure which is much like pleading not guilty by reason of insanity. A defendant acquitted on these grounds is committed to the State Hospital until cured.(fn1)

Traffic

In this area the major legislation, of course, is the new Driving Under the Influence ("DUI") statute, *H.B. 1287*. The statute creates the crime of driving while presumptively intoxicated---that is, when blood alcohol level exceeds .15 percent. The statute further creates an express consent to the testing of blood, breath or urine with immediate revocation of the driver's license (subject to a later hearing) upon refusal. Refusal to take any such test is now admissible against the individual during the criminal trial. The prosecution cannot allow the defendant to plead guilty to a lesser non-alcohol-related offense without stating on the record that it is not possible to make a *prima facie* case for the original charges.

The penalties enacted during the 1982 legislative session are essentially unchanged. The court is instructed to take judicial notice that the testing procedures used are apparently accurate; however, the defense can challenge the accuracy of the equipment used at the time. The driver's license is automatically suspended for one year if a defendant is found guilty of DUI, and if the defendant has a blood alcohol of .15 percent or higher or has refused to take the test, his license is revoked. In fact, the Department of Revenue can hold a hearing on the presence of the blood alcohol alone and take the license for a .15 percent level prior to the criminal proceeding.

There are provisions for consecutive suspensions and/or revocations of licenses for various offenses. An individual found to have .15 percent blood alcohol while driving will have his license taken immediately by the arresting officer if still in custody when the test results are available. If this is done, the driver is given a seven-day temporary permit and may request a hearing. District Court challenges to Department of Revenue hearings are still permitted, but the court is instructed to grant a stay of the Department's order only if it finds that the defendant is likely to be successful on the merits. The penalty for driving under suspension, when the suspension is caused by a DUI conviction, is increased from six months to one year, and the minimum mandatory sentence is thirty days. The statute purports to limit collateral attack on prior alcohol-related convictions to six months from the date of conviction.(fn2)

Several less significant traffic bills were also passed during the 1983 session. Pursuant to the Supreme Court's finding the statute unconstitutional, *H.B. 1124*, effective March 15, 1983, repeals a portion of the hit and run statutes---C.R.S. 1973, § 42-4-1403(3). This section was held to deny equal protection in *People v. Mummaugh*,--- Colo.____, 644 P.2d 299 (1982). *H.B. 1108* clarifies the penalty for driving without an operator's license in C.R.S. 1973, § 42-2-101 and provides a separate penalty for driving with an expired license.

H.B. 1110, effective April 18, 1983, clarifies the emergency exception to driving under suspension, C.R.S. 1973, § 42-2-130.

Mere failure to show proof of liability insurance when driving is now a crime; however, producing a policy to the court which is valid at the time of the offense is an affirmative defense---*H.B. 1167*.

Sentencing

H.B. 1340 is probably the most significant sentencing bill passed in the 1983 session. By its terms, the prosecution need no longer show the defendant is able to make restitution payments to obtain a revocation of a deferred judgment, deferred prosecution, probation or parole. It is sufficient to make a *prima facie* case to show only that the defendant has not made the payments previously ordered by the court.

S.B. 76 adds the crime of criminal attempt to the mandatory sentencing statute, C.R.S. 1973, § 16-11-309.

S.B. 26, effective June 15, 1983, creates an additional sentencing alternative for sex offenders. If an offender falls within the act, he can be sentenced to a term of incarceration and an additional term of probation. The offender can also be ordered to pay any treatment costs incurred by the victim as part of the probation.

New Offenses

H.B. 1142 creates certain additional escape-related offenses, including holding hostages and escaping while confined as a juvenile.

It is now a class three misdemeanor to use a postage meter owned by the state of Colorado for private use---
H.B. 1170.

H.B. 1225 makes it illegal to tap into or otherwise use a computer owned by another without authorization.

H.B. 1484 creates certain requirements for second-hand dealers (commonly known as flea market operators) and attaches criminal sanctions for failure to comply.

H.B. 1340 redefines second degree criminal trespass, C.R.S. 1973, § 18-4-503, to make it a felony to enter onto agricultural land, defines agricultural land and makes similar changes to third degree criminal trespass, C.R.S. 1973, § 18-4-504. The statute also creates a new crime of failing to leave the premises after being ordered to do so by authorities.

S.B. 26, effective July 15, 1983, creates a new crime of procuring children for sexual exploitation and makes it a class three felony.

Miscellaneous

The Organized Crime Strike Force obtains statutory sanction through *S.B. 177*.

S.B. 72, effective June 10, 1983, repeals the portion of the first and second degree official misconduct statutes held unconstitutionally vague in *People v. Beruman*, --- Colo. ---, 638 P.2d 789 (1982). *H.B. 1566*, effective June 3, 1983, provides for the transfer of foreign nationals incarcerated in Colorado prisons pursuant to treaties between the United States and other countries.

H.B. 1106 repeals the requirement that when a defendant demands a jury for a minor offense, the number of jurors must be specified.

H.B. 1349 and *H.B. 1340* make substantial amendments to the victim compensation statutes, C.R.S. 1973, § 24-4.1-101 *et seq.*, the most noticeable of which is the allowance of compensation for property damage.

H.B. 1422, effective May 20, 1983, exempts the Department of Corrections from major portions of the Colorado Administrative Procedure Act, C.R.S. 1973, §§ 24-4-103, 105 and 106.

S.B. 78 provides for the impanelling of judicial district-wide grand juries.

Juvenile

H.B. 1290 sets forth procedures for juvenile preliminary hearings, which, in some instances, may be combined with a detention hearing.

H.B. 1233 eliminates the statutory right to a jury trial for juveniles charged with what would be class two and three misdemeanors if committed by an adult, if the prosecution is not seeking commitment.

H.B. 1395 establishes standards for juvenile diversion programs, effective May 3, 1983.

NOTES

Footnotes:

1. *See*, Sammons, 12 "Legislative Update," 1251 *The Colorado Lawyer* (August 1983).
2. *See*, Vitek, "The New Colorado 'Per Se' DUI Law," 1451 *The Colorado Lawyer* (September 1983).

This newsletter is prepared by the Criminal Law Section of the Colorado Bar Association. This month's column was written by Philip A. Cherner, Denver, Deputy State Public Defender.

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