MONTANA CRIMINAL CODE OF 1973
ANNOTATED (1980 rev. ed.)

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PREFACE

This 1980 revision of the "Montana Criminal Code of 1973 Annotated" uses the new numbering system adopted in the Montana Code Annotated 1979, Title 45. There are seven types of annotations: (1) Historical Note, (2) Annotator's Note, (3) Criminal Law Commission Comment, (4) Cross References, (5) Library References, (6) Law Review Commentaries and (7) Notes of Decisions.

The "Historical Note" gives information regarding (a) the original enactment of the statute, (b) any subsequent amendments, (c) the source of the statute (most frequently the Model Penal Code, or the Penal Codes of the states of Illinois, Minnesota, New York, or Wisconsin) and (d) the prior statutory coverage of the subject area and date of repeal, if any. Where a statute has yet to be interpreted by the Montana court, interpretations from the source state can be especially helpful.

The "Criminal Law Commission Comments" are printed in this revised edition exactly as they appeared in the original enactment of the Montana Criminal Code of 1973. These comments were written for the 1973 version of the Code and are still valid if the statute remains unchanged. Some of the comments, however, are no longer applicable due to statutory amendments or subsequent and contrary court interpretation of the statute. The "Annotator's Note," however, supplements the "Criminal Law Commission Comment," and does reflect statutory changes which have occurred since the initial enactment of the Code as well as relevant statutory construction and interpretation by the Montana Supreme Court.

Related statutes and defined terms are indicated in the "Cross References" section and should be referred to for further annotations. Corpus Juris Secundum references and West Key numbers are indicated in the "Library References" section of the annotations. Included in the "Law Review Commentaries" are references to law review articles dealing either specifically with the statutory material or more generally with the area of law, as well as references, in the case of statutes derived from the Model Penal Code, to the commentaries in the drafts of the Model Penal Code discussing the source statute.

The "Notes of Decisions" are not exhaustive, either with respect to source state annotations or Montana case annotations although an effort was made to include the more significant holdings. The Montana case annotations will be supplemented by the forthcoming annotations to the Montana Code Annotated. Montana has, by now, developed a body of case law interpreting many of these statutes. There remain, however, a number of statutes which have not been construed by the Montana Supreme Court and the source state must still be looked to as providing the probable interpretation in Montana. Many states have adopted the Model Penal Code in whole or in part, but there is, as yet, no reference work which indicates which states have adopted which statutes. We have, therefore, no annotations to similar statutes by other jurisdictions for statutes derived from the Model Penal Code. (The American Law Institute has recently begun work on such a project but no completion date is set).

This revision includes statutory material which was not part of the 1973 Criminal Code, but which has been inserted in the Criminal Code (Title 45) by the Code Commissioner in the recodification of the Montana Code Annotated. Title 45, Chapter 8, Part 3, on "Weapons" and Chapter 9, on "Dangerous Drugs" are among the new statutory materials. There are no Criminal Law Commission Comments for those sections. Every effort has been made to annotate these sections as completely as possible according to the other six divisions of the annotations. Those who have worked to give this revision its final form hope it will prove a helpful research tool for those involved in the criminal justice system in Montana.

MONTANA CRIMINAL CODE OF 1973, ANNOTATED (1980 rev. ed.)

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Chapter I: GENERAL PRELIMINARY PROVISIONS

Part 1--Construction and Applicability

45-1-101. Short title. This act shall be known and may be cited as the "Criminal Code of 1973."

Historical Note

Enacted: M.C.C. 1973, § 94-1-101, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. Crim. Code (Ill. C.C.), 1961, Title 38, § 1-1.

Annotator's Note

The Criminal Code of 1973 represents the second phase of the revisions to Title 94, R.C.M. 1947 by the Montana Criminal Law Commission. The Commission, created by Sec. 1, Ch. 103, Laws of Montana 1963 (March 1, 1963), first submitted a draft on Criminal Procedure in 1966 which was enacted as Title 95, R.C.M. 1947 in 1967. While some states use the term Criminal Code to refer to both substantive and procedural law, in Montana the new Code contains only substantive law and definitions. Much of the Code was taken from the Illinois Criminal Code of 1961. Other sources include the Michigan, Wisconsin and New York Criminal Codes and the Model Penal Code (1962). The decision notes and law review references which follow relate to those jurisdictions which have similar provisions to the Criminal Code of 1973. For purposes of identification the Code will be referred to throughout the Annotations as Montana Criminal Code of 1973 and abbreviated as M.C.C. 1973.

Notes of Decisions

Construction and Application

The Illinois courts have stated that because the Criminal Code of 1961 was adopted by the legislature following a long period of study by eminent lawyers and legal scholars, the published comments regarding the various articles and paragraphs of the Code, of those who drafted the legislation, deserve consideration in interpretation of intent contained in the Code. People v. Miller, 55 Ill. App.2d 146, 204 N.E.2d 305, 307 (1965), reversed in part on other grounds, vacated in part 35 Ill.2d 62, 219 N.E.2d 475 (1966).

The Montana Supreme Court has accepted as authoritative guides to interpretation of the Montana Criminal Code the official comments of the Criminal Law Commission published in the Revised Codes of Montana and the Annotator's Notes contained in this volume. See State v. Klein, 169 Mont. 350, 547 P.2d 754 (1976); State v. Shannon, 171 Mont. 25, 554 P.2d 743 (1976); State v. Fuger, 170 Mont. 442, 554 P.2d 1338 (1976); and State v. Scanlon, ____ Mont. ____, 569 P.2d 368, 33 St. Rptr. 1355 (1977).

In adopting a statute from a sister state (Illinois), Montana adopts the construction placed on it by the highest court of the state from which it is adopted. State v. Murphy, ____ Mont. ____, 570 P.2d 1103, 34 St. Rptr. 1175 (1977).

45-1-102. General purposes and principles of construction. (1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens harm to individual or public interests;

(b) to safeguard conduct that is without fault from condemnation as criminal;

(c) to give fair warning of the nature of the conduct declared to constitute an offense;

(d) to differentiate on reasonable grounds between serious and minor offenses.

(2) The rule of the common law that penal statutes are to be strictly construed has no application to this code. All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justic

Historical Note

Enacted:	M.C.C. 1973, § 94-1-102, Sec. 1, Ch. 513, Laws of Montana 1973.
Source:	Ill. C.C. 1961, Title 38, § 1-2, R.C.M. 1947, § 94-101.
Prior Law:	En. Sec. 6, Mont. Pen. C. 1895; re-en. Sec. 8098, Rev.C. 1907; re-en. Sec. 10712, R.C.M. 1921. Cal. Pen. C. Sec. 6, R.C.M. 1947, § 94-101 repealed Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

Paragraph (1) and clauses (a) through (d) are taken verbatim from Ill. C.C. 1961, Title 38, § 1-2. Paragraph (2) comes directly from R.C.M. 1947, § 94-101. Attention is therefore directed to decisions from both jurisdictions regarding the appropriate section.

This section sets forth certain generally recognized purposes of the substantive criminal law. Attention is directed to the preventive considerations without placing undue emphasis upon any one purpose.

Criminal Law Commission Comment

This section expresses the legislative purpose of the code and provides a convenient reference for the interpretation of its more specific provisions. See also the provisions of the Bill of Rights of the Montana constitution [Art. II, 1972 Constitution] which outline the basic concepts of criminal law.

Cross References

Criminal Act and Mental State M.C.A. 1978, § 45-2-103
Criminal Procedure Purpose M.C.A. 1978, § 46-1-102
Sentence and Judgment M.C.A. 1978, §§ 46-18-101, 46-18-102

Library References

Crim. Law Key #13
Statutes Key #241(1)
C.J.S. Crim. Law §§ 1-24
C.J.S. Statutes §§ 389, 390

Notes of Decisions

In General

The rule that statutes in derogation of common law must be strictly construed has been held not to apply to code provisions, including penal code provisions, liberal construction being the rule as to all. Continental Supply Co. v. Abell, 95 Mont. 148, 163, 24 P.2d 133 (1933). However, the Illinois courts have held that criminal statutes must be construed strictly against the state. People v. Hughes, 123 Ill. App.2d 115, 260 N.E.2d 34, 37 (1970). They are to be construed strictly in favor of the accused and nothing is to be taken by intendment or implication against the accused beyond the obvious or literal meaning of the statutes. People v. Kessler, 11 Ill. App.3d 321, 296 N.E.2d 631 (1973), aff'd in part, rev'd in part on other grounds 57 Ill.2d 493, 315 N.E.2d 29, cert. denied 419 U.S. 1054 (1974), on remand 30 Ill.App.3d 1021, 333 N.E.2d 69 (1975).

In determining legislative intent in this code, the entire criminal code and each of its sections is to be considered. People v. Hairston, 46 Ill. App.2d 348, 263 N.E.2d 840, 846 (1970). An act is criminal where the statute either makes such conduct unlawful or imposes a punishment for its commission. People v. Graf, 93 Ill. App.2d 43, 235 N.E.2d 886, 889 (1968).

Legislative Authority

The legislature has the inherent power, within its constitutional limits, to prohibit any act as criminal and to fix punishment for the commission of crimes, to determine the manner of executing punishment, to provide penological systems and to establish rules and regulations for government and discipline of inmates. People ex rel. Kubala v. Kinney, 25 Ill.2d 491, 185 N.E.2d 337, 388 (1962).

Test of Penal Statute

In determining whether a penal statute is adequate the test is whether it is sufficiently definite and certain to enable those who read it to know what acts are proscribed and what conduct will make them liable for criminal punishment. People v. Jackson, 66 Ill. App.2d 276, 216 N.E.2d 316, 318 (1966).

In determining whether a statute is unconstitutionally vague, court must apply rule that no person should be held criminally responsible for conduct which he could not reasonably understand to be proscribed; however, where language used in statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, statute is not unconstitutionally vague. Ceen v. Checker Taxi Co., Inc., 42 Ill. App.3d 93, 355 N.E.2d 628 (1976).

Criminal statute violates requirements of due process if it fails to adequately give notice as to what action or conduct is proscribed but, impossible standards of specificity are not required. People v. Schwartz, 64 Ill.2d 275, 356 N.E.2d 8 (1976), cert. denied. 429 U.S. 1098 (1977).

Since one purpose of the criminal law is to protect individuals and public interests [M.C.A. 1978, § 45-1-102(1); formerly R.C.M. 1947, § 94-1-102(1)], and since a private person may not excuse a criminal act, Gilbert v. United States, 359 F.2d 285 (9th Cir. 1966), former R.C.M. 1947, § 94-8-223 relating to the felony of sale and manufacture of silencers and explosives for wrongful use (repealed 1977) was held not to be unconstitutionally vague because it did not specify that the destruction of person or property be without the consent of the victim. State v. McBenge, ____ Mont. ____, 574 P.2d 260, 264 (1978).

45-1-103. Application to offenses committed before and after enactment.

(1) The provisions of this code apply to any offense defined in this code and committed after January 1, 1974.

(2) Unless otherwise expressly provided or unless the context otherwise requires, the provisions of this title and Title 46 govern the construction of and punishment for any offense defined outside of this code and committed after January 1, 1974, as well as the construction and application of any defense to a prosecution for such an offense.

(3) The provisions of this code do not apply to any offense defined outside of this code and committed before January 1, 1974. Such an offense must be construed and punished according to the provisions of law existing at the time of

the commission thereof in the same manner as if this code had not been enacted.

Historical Note

Enacted: M.C.C. 1973, § 94-1-103, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 7, Ch. 359, Laws of Montana 1977

Source: N.Y. Pen. C., Title 39, § 5.05. See also R.C.M. 1947, § 94-103

Prior Law: R.C.M. 1947, § 94-103, repealed Sec. 32, Ch. 513, Laws of Montana 1973; N.Y. Penal Law 1909, §§ 22, 38

Annotator's Note

The second paragraph of this section is meant to control only in cases of doubt as to the construction of an offense defined outside of this code where the meaning of the statute is difficult to ascertain. However, where the definition of the offense outside the code clearly includes a particular mental state or other element, that definition controls.

The 1977 amendment substituted "January 1, 1974" throughout the section for references to the effective date of this code; substituted "this title and title 95" in subsection (2) for "this code"; and made minor changes in phraseology and punctuation.

Criminal Law Commission Comment

This section is intended to provide for the transition from the old Criminal Code to the new Criminal Code. The provisions of the new Criminal Code apply only to offenses committed after its effective date [January 1, 1974]. See also Section 33, Chapter 513, Laws of 1973 [Effective Date note below].

Cross References

Other limitations as to applicability M.C.A. 1978, § 45-1-104
Classification and limitations M.C.A. 1978, §§ 45-1-201 through 45-1-206
Definitions and state of mind M.C.A. 1978, §§ 45-2-101 through 45-2-104
Other factors affecting individual liability M.C.A. 1978, §§ 45-2-201 through 45-2-213
Liability for acts committed by another M.C.A. 1978, §§ 45-2-301 through 45-2-312
Justifiable use of force M.C.A. 1978, §§ 45-3-101 through 45-3-115

Library References

Criminal Law Key #12
C.J.S. Crim. Law. § 23

Law Review Commentaries

Note. Repeal or amendment implied from later inconsistent enactment. 37 Colum. L. Rev. 292 (1937).

Notes of Decision

In General

If a statute carries a penalty making its violation a crime, the provision should be expressed with a degree of certainty in order that it may be understood without having to rely on inferences. State v. Salina, 116 Mont. 478, 482, 154 P.2d 484 (1944).

Constitutionality

Savings clause of this chapter providing that offenses committed prior to the effective date of this act must be punished according to the provisions of law existing at time of commission thereof in same manner as if this chapter had not been enacted did not provide for an unconstitutional discrimination even though it did discriminate with respect to sentencing between persons committing similar offenses before and after such date. U.S. ex rel. Hayden v. Zelker, 506 F.2d 1228 (2nd Cir. 1974).

There is no constitutional impediment to making a new penal law only prospective in application; if there is a change in the law abolishing a crime or altering its definition, the State may prefer to retain the right to prosecute for the act previously committed in deliberate defiance of the law as it then existed. People v. McDaniel, 79 Misc.2d 848, 361 N.Y.S.2d 555 (1974).

Effective Date

Section 33 of Ch. 513, Laws 1973 read "The Montana Criminal Code and all other provisions of this act are effective January 1, 1974, and shall apply to all offenses alleged to have been committed on or after that date. The Montana Criminal Code and all other provisions of this act do not apply to offenses committed prior to its effective date and prosecutions for such offenses shall be governed by the prior law, which is continued in effect for that purpose, as if this act were not in force. For the purposes of this section, an offense was committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto."

Miscellaneous Offenses

Where defendant came into possession of stolen property in 1973 but his possession was not discovered until 1974, defendant should have been prosecuted under the law in effect on the date of the theft, i.e. under the old code rather than the new code. State v. Jimison, _____ Mont. _____, 540 P.2d 315 (1975).

The provisions of the 1973 Montana Criminal Code do not apply to offenses committed prior to its effective date. Where the alleged burglary occurred prior to the effective date of the code, the old burglary statute, R.C.M. 1947, § 94-901, applies. State v. Austad, 166 Mont. 425, 427-8, 533 P.2d 1069 (1975).

Sentencing

Prisoner, who was serving sentence as a second-felony offender based on his plea of guilty when his sentence was vacated because he had not been advised of his right to appeal and who was then resentenced, was not entitled to be resentenced pursuant to the Revised Penal Law in effect on date of resentencing, since the vacating of sentence and reimposition of sentence nunc pro tunc as of original date of sentence was merely a procedural device whereby time to appeal was reinstated. People ex rel. Caruth v. La Vallee, 37 A.D.2d 661, 323 N.Y.S.2d 18 (1971).

New Penal Law evinced legislative intent not to apply punishment provisions thereof in prosecutions for crimes committed prior to its effective date even where punishment was mitigated; and defendant who was convicted and sentenced subsequent to effective date of new Penal Law for attempted robbery in second degree committed prior to that date was properly sentenced under old law even though new Penal Law reduced maximum sentence for offense. People v. Pepples, 32 A.D.2d 1041, 303 N.Y.S.2d 796 (1969), aff'd. 27 N.Y.2d 785, 315 N.Y.S.2d 851, 264 N.E.2d 345 (1970).

45-1-104. Other limitations on applicability. (1) This code does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered, and the civil injury is not merged into the offense.

(2) No conduct constitutes an offense unless it is described as an offense in this code or in another statute of this state. However, this provision does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment, or decree.

Historical Note

Enacted:	M.C.C. 1973, § 94-1-104, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	R.C.M. 1947, §§ 94-103, 94-106, 94-108; Ill. C.C., 1961, Title 38, §§ 1-3, 1-4
Prior Law:	R.C.M. 1947, § 94-106, 94-108, repealed Sec. 32, Ch. 531, Laws of Montana 1973; Ill. Rev. Stat. 1961, Ch. 38, §§ 600, 601

Annotator's Note

The text for this section comes directly from Ill. C.C. 1961, Title 38, § 1-3, 1-4 and preserves most of the provisions of the prior Montana law. The absence of references concerning court martial proceedings is conspicuous. The

code, however, preserves the authority of a court-martial to impose military penalties by the clause "employ any sanction authorized by law."

Subsection (2) of this section completes the process of replacing common law definitions of offenses with statutory definitions. The suppression of all common law definitions does not mean, however, that the large body of interpretive rules is superseded. These rules are still of value and would be difficult to replace.

Criminal Law Commission Comment

It has been contended that the victim of a criminal offense should be denied civil relief until he has performed his public duty to prosecute the offender. The English courts developed the rule that a civil action cannot be maintained until after prosecution, if the offense involved a felony.

Legislatures in a number of states have reached the opposite conclusion declaring the criminal and civil aspects to be independent. See R.C.M. 1947, § 94-106. This appears to be the prevailing American rule and is continued by this section.

Subsection (2) is intended to complete the process of replacing the common law definitions of offenses with statutory definitions--a process which has continued for many years.

The language that the provision does not affect the power of a court to "employ any sanction authorized by law" is intended to preserve the power of courts of justice to punish for contempt and the authority of properly constituted courts of justice to act as courts martial. See R.C.M. 1947, § 94-108.

Cross References

Sentence M.C.A. 1978, §§ 46-18-201 through 46-18-203

Library References

Crim. Law Key #10
C.J.S. Crim Law § 18
Action Key #5
Statutes Key # 241(1)
C.J.S. Actions § 11
C.J.S. Statutes §§ 389, 390

Law Review Commentaries

Comment. Constructive criminal contempt--Conclusiveness of answer under oath. 24 Ill.L.Rev. 598 (1930). Comment. Right to jury trial for accused contemnors. 67 N.W. L. Rev. 694 (1972). Pollak. Sanctions on attorneys who abuse the judicial process 44 U. Chi. L. Rev. 619 (1977).

Notes of Decisions

Civil Actions and Criminal Prosecutions

Criminal prosecutions and civil actions are separate actions which may be based upon the same factual situations. Prosecution of the criminal action against the defendant has been ruled not to be a bar to the complaining witness' right to institute a civil action. People v. Stacy, 64 Ill. App.2d 157, 212 N.E.2d 286, 288 (1965). Ordinarily, acquittal in a criminal case is no bar to a civil suit. People v. Small, 319 Ill. 437, 150 N.E. 435 (1926). Similarly, acquittal in a criminal prosecution has been held not to be res judicata in a civil case based on the same facts. Simon v. Nitzberger, 327 Ill. App. 553, 64 N.E.2d 396 (1946).

Admissibility of Criminal Prosecutions in Civil Actions

As a general rule, judgment of conviction for assault and battery is inadmissible as evidence to establish the facts on which the judgment was rendered in a subsequent civil action. Doyle v. Gore, 15 Mont. 212, 213, 38 P. 939 (1895). Note, however, that Rule 803(22) of the Montana Rules of Evidence which, in effect, makes evidence of conviction of a felony admissible (at least against the objection that it is hearsay, which is the principal reason for excluding such evidence) limits the applicability of Doyle v. Gore to misdemeanor cases. Also, both the Montana and Illinois courts have indicated that a plea of guilty to a criminal charge may be admitted in a subsequent civil action as an admission against interest of the party making the plea. Sikora v. Sikora, 160 Mont. 27, 499 P.2d 808, 812 (1972); Smith v. Andrews, 54 Ill. App.2d 51, 203 N.E.2d 160, 164 (1964).

Applicability of Common Law

Under this code, conduct is not an offense unless proscribed by statute. In addition, it has been held that the elements of the common law crimes, such as burglary, have no application. See People v. Blair, 1 Ill. App.3d 6, 272 N.E.2d 404, 406 (1971), aff'd. 52 Ill.2d 371, 288 N.E.2d 443. In regard to the new section on Theft (M.C.A. 1978, § 45-6-301), that provision was held by an Illinois court to encompass all forms of theft and did not conflict with this section. People v. Jackson, 66 Ill. App.2d 276, 214 N.E.2d 316, 318 (1966).

Power to Punish Contempt

It is a fundamental right of courts to punish for contempt. State v. District Court of Tenth Jud. Dist., 92 Mont. 94, 99, 10 P.2d 586 (1932). The court may imprison or fine those in contempt, but may not recompense an injured party for damages. Eberle v. Greene, 71 Ill. App.2d 85, 217 N.E.2d 6, 10 (1966). "Direct contempt" has been defined by an Illinois court as any conduct committed in the presence of a judge during the course of a judicial hearing which is calculated to embarrass, hinder, or obstruct the administration of justice or which is designed to undermine the court's dignity or authority and which has the tendency of bringing the administration of justice into disrepute and encouraging public disrespect. People v. Gilliam, 83 Ill. App.2d 251, 227 N.E.2d 96, 99 (1967).

Part 2--Classification and Limitations

45-1-201. Classification of offenses. (1) For the determination of the court's jurisdiction at the commencement of the action and for the determination of the commencement of the period of limitations, the offense shall be designated a felony or misdemeanor based upon the maximum potential sentence which could be imposed by statute.

(2) An offense defined by any statute of this state other than this code shall be classified as provided in this section and the sentence that may be imposed upon conviction thereof shall be governed by this title and Title 46.

Historical Note

Enacted: M.C.C. 1973, § 94-1-105, Sec. 1, Ch. 513, Laws of Montana, 1973

Amended: Sec. 8, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: R.C.M. 1947, §§ 94-112, 94-113, 94-114, Repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section represents a considerable change in the classification of offenses from prior law. The section must be read in conjunction with the new definitions for felony and misdemeanor located in 45-2-101. The two sections when taken together emphasize that the potential sentence determines jurisdiction, prosecution, and the running of the statute of limitations while actual classification of the offense will not occur until judgment and sentencing. This position is intentionally opposite State v. Atlas, 75 Mont. 547, 551, 244 P. 477 (1926) and the federal court position that the potential sentence determines the grade of the crime. However, the section is in accord with Gransberry v. State, 149 Mont. 158, 162, 423 P.2d 853 (1967): "Whether [the crime] is felony or misdemeanor is not determined until
Subsection (2) is similar to M.C.A. 1978, § 45-1-103(2) and provides that offenses outside the Code are to be governed by the provisions of the new Code insofar as the classification of offenses.

The 1977 amendment substituted "this title and title 95" at the end of subsection (2) for "this code."

Criminal Law Commission Comment

The actual sentence imposed upon conviction determines the classification of the offense. The potential sentence determines the court's jurisdiction at the commencement of the action and is determinative of the commencement of the period of

limitations. The section is at least partially contra the holding in State v. Atlas, 75 Mont. 547, 551, 244 P. 477 (1926) in which the Montana supreme court held that the potential sentence determines the grade of the crime.

Cross References

Application to offenses committed before and after enactment M.C.A. 1978, § 45-1-103
Time Limitations M.C.A. 1978, §§ 45-1-205, 45-1-206
Definitions of "felony" and "misdemeanor" M.C.A. 1978, §§ 45-2-101(15), 45-2-101(30)
Deliberate homicide M.C.A. 1978, § 45-5-102
Aggravated kidnapping M.C.A. 1978, § 45-5-303
Burglary M.C.A. 1978, § 45-6-204
Compounding a felony M.C.A. 1978, § 45-7-305

Library References

Crim. Law Key #27
22 C.J.S. Crim. Law § 6, 7

Notes of Decisions

Constitutionality

In Montana, the discretion to classify an offense as a felony or misdemeanor belongs to the sentencing court since the classification depends entirely upon the actual sentence imposed by the trial court upon conviction. Where the power to classify a crime as a felony or a misdemeanor is given to the judge through the sentence he imposes, there is no equal protection violation as there is where that power is given to the prosecutor. State v. Maldonado, ____ Mont. ____, 578 P.2d 296, 302 (1978).

Convictions in Other Jurisdictions

In construing state statutes relating to voter disqualification, a Montana voter cannot be denied the right to vote because of conviction of an offense in federal court that would not be a felony by Montana statutory definition. Melton v. Oleson, 165 Mont. 424, 530 P.2d 466 (1974), overruling State ex rel. Anderson v. Lousek, 91 Mont. 448, 8 P.2d 791 (1932).

Jurisdiction Where Information Amended

Where original information charged defendant with commission of a felony and the District Court had original jurisdiction, it did not lose jurisdiction when the state subsequently reduced the charge to a lesser included misdemeanor over which the District Court would not have had original subject matter jurisdiction. State v. Shults, 169 Mont. 33, 36, 544 P.2d 817 (1976).

Sections 45-1-202 through 45-1-204 reserved.

45-1-205. General time limitations. (1) A prosecution for criminal homicide may be commenced at any time.

(2) Except as otherwise provided by law, prosecutions for other offenses are subject to the following periods of limitation:

(a) a prosecution for a felony must be commenced within 5 years after it is committed;

(b) a prosecution for a misdemeanor must be commenced within 1 year after it is committed.

(3) The period prescribed in subsection (2) is extended in a prosecution for theft involving a breach of fiduciary obligation to an aggrieved person as follows:

(a) if the aggrieved person is a minor or incompetent, during the minority or incompetency or within 1 year after the termination thereof;

(b) in any other instance, within 1 year after the discovery of the offense by the aggrieved person or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense and is not himself a party to the offense or, in the absence of such discovery, within 1 year after the prosecuting officer becomes aware of the offense.

(4) An offense is committed either when every element occurs or, when the offense is based upon a continuing course of conduct, at the time when the course of conduct is terminated. Time starts to run on the day after the offense is committed.

(5) A prosecution is commenced either when an indictment is found or an information or complaint is filed.

Historical Note

Enacted: M.C.C. 1973, § 94-1-106, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 9, Ch. 359, Laws of Montana 1977

Source: R.C.M. 1947, §§ 94-5701, 94-5702, 94-5703, 94-5705. Ill. C.C. 1961, Title 38, §§ 3-5, 3-6, 3-8

Prior Law: R.C.M. 1947, §§ 94-5701 through 94-5703 repealed Sec. 32, Ch. 513, Laws of Montana 1973; Ill. Rev. Stat. 1961, Ch. 38, § 632a

Annotator's Note

Subsection (1) of this section comes from R.C.M. 1947, § 94-5701. A major distinction between the new code and the older law is the substitution of the word homicide for the antiquated terms "murder" and "manslaughter." These terms have been entirely removed from the new code. Subsection (2) must be taken in conjunction with M.C.A. 1978, § 45-1-201 which defines misdemeanors and felonies for purposes of time limitations in regard to potential penalties for the alleged offense. Subsection (3), which extends the time limitation for thefts involving breaches of fiduciary duty is taken from Ill. C.C., Title 38, § 3-6(a). However, a difference between the Illinois source and the Code provision is the absence in Montana of a maximum period of time after commission of the offense in which actions must be brought. Several other states have similar provisions extending time limitations for thefts difficult to detect, including: Alabama, Georgia, Mississippi, New York, and Nevada. Subsection (3)(a) suspends the running of the statute during the period of the victim's incompetence. Subsection (4) comes from Ill. C.C. 1961, Title 38, § 3-8, and refers both to continuing offenses within the Code and to those outside the Code. Subsection (5) embodies R.C.M. 1947, § 94-5705 and adds the clause "or an information or complaint is filed."

The 1977 amendment substituted "by law" in subsection (2) for "in this Code" and made minor changes in phraseology, punctuation and style.

Criminal Law Commission Comment

This section describes the general time limitations on prosecutions; the extension thereof under certain conditions; and the exclusion of certain periods in the calculation of limitations.

Subsection (1) continues the present Montana provision that no time limit exists with respect to homicide.

Subsection (2) similarly preserves the present general time limitations in Montana of five (5) years for all other felonies and one year for misdemeanors.

Subsection (3) is designed to permit increases in the general time limitations with respect to certain offenses which are capable of being readily concealed by the offender, from both the victim and the law enforcing authorities, over substantial periods of time and beyond the general limitations applicable to those offenses.

Subsection (4) states the general rule that the period of limitation does not start in the case of a "continuing offense" until the last act of the offense is performed. The rule would be applicable to a series of related acts constituting a single course of conduct extended over a period of time, often occurring in cases of embezzlement, conspiracy, bigamous cohabitation, and nuisance.

When the limitation period has not run on the offense charged, but has run on

an offense included therein, the general rule is that the defendant cannot be convicted of the included offense, since to hold otherwise would permit the prosecutor, by charging a more serious inclusive offense not barred by the limitation, to circumvent the limitation on the lesser offense. [State v. Chevlin, 284 S.W.2d 563 (Mo. 1955)].

Unless time is a material ingredient in the offense or in charging the same, it is only necessary to prove that it was committed prior to the finding of the indictment or filing the information or complaint. [State v. Rogers, 31 Mont. 1, 4, 77 P. 293 (1904)]. The general statute of limitations applicable to misdemeanors should not be enlarged beyond what its plain language imports, and whenever the exceptions embodied in subsection (3) are invoked, the case should clearly and unequivocally fit within the exceptions. [State v. Clemens, 40 Mont. 567, 569, 107 P. 896 (1910)].

Cross References

Classification of offenses M.C.A. 1978, § 45-1-201
Definitions of "felony" and "misdemeanor" M.C.A. 1978, §§45-2-101(15), 45-2-101(30)
Homicide M.C.A. 1978, §§ 45-5-101 through 45-5-104
Theft and related offenses M.C.A. 1978, §§ 45-6-301 through 45-6-327
Filing of information M.C.A. 1978, §§ 46-11-201 through 46-11-204
Guardians of incapacitated persons M.C.A. 1978, §§ 72-5-301 through 72-5-325

Library References

Criminal Law Key #145, 147, 151, 157
C.J.S. Crim. Law §§ 225-237

Law Review Commentaries

Comment. Criminal law--judgment, sentence, and final commitment--whether consecutive sentences may be imposed on conviction for independent felonies against the same victim charged in one indictment. 32 Chi.-Kent L. Rev. 164 (1954).

Notes of Decisions

Construction and Application

In a general statute of limitations an exception cannot be enlarged beyond that which its plain language imports, and whenever the exception is invoked the case must unequivocally fall within it. State v. Clemens, 40 Mont. 567, 569, 107 P. 896 (1910). Because statutes of limitation are only measures of public policy, and are therefore entirely subject to the legislature's will, they may be changed or repealed in any case where a right to acquittal has not been absolutely acquired by the completion of the original period of limitations. People v. Isaacs, 37 Ill.2d 205, 226 N.E.2d 38, 52 (1967).

Requirements as to Time

The Montana court has held that unless time is a material ingredient in

the offense or in charging the offense, it is necessary only to prove that the offense was committed prior to the findings or to the filing of the information or the indictment. State v. Rogers, 31 Mont. 1, 4, 77 P. 293 (1904). However, it should be noted that a complaint is subject to dismissal where the criminal complaint alleges a date that the crime was allegedly committed beyond the statute of limitations. People v. Hill, 68 Ill. App.2d 369, 376, 216 N.E.2d 212 (1966).

Continuing Offenses

As provided by subsection (4) of this section, the statute of limitation begins running when the course of the conduct is terminated. See, for example, People v. Konkowski, 378 Ill. 616, 39 N.E.2d 13, 16 (1941); People v. Haycraft, 3 Ill. App.3d 974, 278 N.E.2d 877, 885 (1972). It should be noted, however, that two punishments are not to be imposed for a single act, even though different ingredients are involved in the two crimes. People v. Dushewycz, 27 Ill.2d 257, 189 N.E.2d 299, 301 (1963).

Right to Speedy Trial

An Illinois court has held that it is only under most unusual circumstances that the beginning of a prosecution which is not barred by the statute of limitations under this section would constitute a deprivation of a right to speedy trial. People v. Plazewski, 2 Ill. App.3d 378, 276 N.E.2d 459, 462 (1971).

45-1-206. Periods excluded from limitation. The period of limitation does not run during:

(1) any period in which the offender is not usually and publicly resident within this state or is beyond the jurisdiction of this state; or

(2) any period in which the offender is a public officer and the offense charged is theft of public funds while in public office; or

(3) a prosecution pending against the offender for the same conduct, even if the indictment, complaint or information which commences the prosecution is dismissed.

Historical Note

Enacted: M.C.C. 1973, § 94-1-107, Sec. 1, Ch. 513 Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 3-7

Prior Law: R.C.M. 1947, §§ 94-5704, 94-5706, repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The exclusions contained in this section come directly from Ill. C.C. 1961, Title 38, § 3-7. Subsection (1) excludes the offender who is absent from the state. Additionally, the statute has been interpreted to exclude the offender who, although remaining in the state, absents himself from his residence with an effort to conceal himself. People v. Ross, 325 Ill. 417, 156 N.E. 303 (1927). This subsection also embodies R.C.M. 1947, § 94-5704. Subsection (2) tolls the statute for public officials with regard to larceny of public funds. The language of this subsection appears broad enough to prevent running of the statute while the offender continues to hold any public office. This exclusion should be read along with M.C.A. 1978, § 45-1-205(3) if the offense is one which is difficult to discover. Subsection (3) preserves the substance of R.C.M. 1947, § 94-5706 which tolls the statute while proceedings are pending. The phrase "for the same conduct" is broad and is designed to cover the case in which the initial prosecution is dismissed because of a substantial variance between allegation and proof. The earlier Illinois law which this section changed had the language "for the same offense"--terminology thought to be too narrow by the revisors of the Illinois code.

Criminal Law Commission Comment

Certain occurrences should stop the period from running. Subsection (1) tolls the statute for the offender who is absent from this state, or absents himself from his usual place of abode and makes some effort to conceal himself.

Subsection (3) is intended to preserve the substance of the former Montana provision which tolled that statute while proceedings were pending.

Note that the phrase "same conduct" is intentionally broad.

Cross References

General time limitations M.C.A. 1978, § 45-1-205
Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Filing of information M.C.A. 1978, §§ 46-11-201 through 46-11-204
Rules for determining residence M.C.A. 1978, § 1-1-215

Library References

Criminal Law Key No. 151, 152, 160
C.J.S. Crim. Law §§ 228, 229, 237

Notes of Decisions

Absence from State

In interpreting the prior Montana law, R.C.M. 1947, § 94-5704, the Montana Supreme Court held that the state's burden of proving that the defendant, who had

left the state with the intention of going to Ireland, was outside of the state for a period of at least 20 days was met by testimony which provided a legitimate inference that such a trip must have involved an absence from the state for at least that length of time. State v. Knilans, 69 Mont. 8, 17, 220 P. 91 (1923). The Illinois court has held that the period of a defendant's imprisonment in another state was to be excluded in determining whether an Illinois indictment was barred by the statute of limitations. In that case the defendant, at the time the offense was committed, had a technical legal residence in Illinois, but while visiting his father in Kentucky was arrested and extradited to Missouri where he served a prison term. The Illinois court held that the defendant was not "usually and publicly resident" in Illinois during the time of his imprisonment in Missouri. People v. Carman, 385 Ill. 23, 52 N.E.2d 197 (1944).

Pending Proceedings

It is a general rule that once an indictment is returned the statute of limitations is tolled. Such a rule was upheld even where the indictment was not on the docket for part of the time because it had been stricken with leave to reinstate. People v. Johnson, 363 Ill. 45, 1 N.E.2d 386, 388 (1936). For a discussion of pending proceedings in a conspiracy indictment see People v. Link, 365 Ill. 266, 6 N.E.2d 201, 207, cert. den. 302 U.S. 690 (1937). The Illinois court has also held that a prior indictment charging the same offense which has been quashed or set aside need not be valid to toll the running of the statute of limitations. People v. Hobbs, 361 Ill. 469, 198 N.E. 224 (1935).

Pleadings

In a case in which the statute of limitations had been tolled by the filing of a first indictment which was later dropped, the Illinois court held that the state was not required to allege in a new indictment the particular disposition of the original indictment, but the state was required to allege the tolling of the statute of limitations on the basis of pendency of prior proceedings against the same defendant for the same conduct. People v. Isaacs, 37 Ill.2d 205, 226 N.E.2d 38, 52 (1967). See also, People v. Rochola, 339 Ill. 474, 171 N.E. 559, 560 (1930). The occurrence of events which would toll the statute of limitations must not only be proved but must be pleaded as well. People v. Hawkins, 34 Ill. App.3d 566, 340 N.E.2d 223 (1975).

Burden of Proof

Where indictment was not brought within statutory period of limitations but contained allegation that the defendant, for a specified period greater than period between the date of limitation and the date on which the indictment was brought, was not usually and publicly resident within the state, in absence of proof of that allegation at the trial, the defendant could invoke the statute of limitations as a bar to prosecution of the action. People v. Carman, 385 Ill. 23, 52 N.E. 2d 197 (1944).

Chapter II: GENERAL PRINCIPLES OF LIABILITY

Part 1--Definitions and State of Mind

45-2-101. General definitions. Unless otherwise specified in the statute, all words will be taken in the objective standard rather than in the subjective, and unless a different meaning plainly is required, the following definitions apply in this title:

Historical Note

Enacted: M.C.C. 1973, § 94-2-101, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 190, Laws of Montana 1975; Sec. 1, Ch. 405, Laws of Montana 1975; Sec. 1, Ch. 443, Laws of Montana 1975; Sec. 10, Ch. 359, Laws of Montana 1977; Sec. 1, Ch. 10, Laws of Montana 1979

Source: See specific subsection

Prior Law: See specific subsection

Annotator's Note

The phrase, "and unless a different meaning plainly is required, the following definitions apply in this title," added in 1977 to the preamble of § 45-2-101, clarified the intent that the definitions in this section are to be controlling in all but the most ambiguous situations.

Note on Amendments

Chapter 190, Laws of Montana 1975, substituted "controlled substance as defined in chapter 3 of Title 54, R.C.M. 1947 [now "Title 50, chapter 32"], and alcoholic beverage" in subdivision (25) [now (24)] for "substance having an hallucinogenic, depressant, stimulating, or narcotic effect, taken in such quantities as to impair mental or physical capability;" and made a minor change in punctuation.

Chapter 405, Laws of Montana 1975, deleted former subdivision (68) which read: "'Without consent' means: (a) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnaping, to be inflicted on anyone; or (b) the victim is incapable of consent because he is: (i) mentally defective or incapacitated; or (ii) physically helpless; or (iii) less than sixteen (16) years old." See M.C.A. 1978, § 45-5-501(2) which incorporates this definition.

Chapter 443, Laws of Montana 1975, inserted the second sentence in subdivision

(28) [now (27)]; and made a minor change in punctuation.

Section 10, Chapter 359, Laws of Montana 1975, inserted "and unless a different meaning plainly is required, the following definitions apply in this title" before subdivision (1); inserted "is or" before "is not a matter of official record" in subdivision (11)(d); deleted subdivision (20) which read "'He, she, it.' The singular term shall include the plural and the masculine gender the feminine except where a particular context clearly requires a different meaning;" renumbered subdivisions (21) through (67) as (20) through (66), respectively; substituted "one or more persons" in present subdivision (20) for "one person;" inserted "or a secret" before "designed process" in subdivision (48)(j); inserted "official" before "proceeding" in subdivision (66); and made minor changes in style, phraseology and punctuation.

Chapter 10, Laws of Montana 1979, made minor changes in phraseology and punctuation.

(1) "Acts" has its usual and ordinary meaning and includes any bodily movement, any form of communication, and where relevant, a failure or omission to take action.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(1), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New and Ill. C.C. 1961, Title 38, § 2-2

Prior Law: None

Annotator's Note

Because the term "act" is so central to the construction and operation of the new Code, the drafters chose the broadest possible definition in this subsection. Both the Illinois code and the Model Penal Code define act as "including a failure to take action." To ensure that there was no ambiguity or possibility that the usual meaning of "act" was eliminated the first clause of the definition was developed and added to the Illinois wording. For case notes see § 45-2-101(8).

Cross References

Definition of "conduct" M.C.A. 1978, § 45-2-101(8)
Voluntary Act M.C.A. 1978, § 45-2-202
General requirements of criminal act and mental state M.C.A. 1978, § 45-2-103
Theft M.C.A. 1978, § 45-6-301
Official misconduct M.C.A. 1978, § 45-7-401

Notes of Decisions

In General

"Conduct" constituting offense of involuntary manslaughter with motor vehicle, or reckless homicide, is "act" of driving motor vehicle in manner likely to cause collision resulting in death, with resulting collision and death, accompanied by mental state of recklessness, while act constituting offense of failing to reduce speed to avoid accident is "act" of driving motor vehicle and "failing" to reduce its speed to avoid collision, with such failure resulting in collision; since act includes failure or omission, offense of failing to reduce speed to avoid accident is "act" of driving motor vehicle in manner likely to cause collision, with such act resulting in collision. In Interest of Vitale, 3 Ill.Dec. 603, 44 Ill. App.3d 1030, 358 N.E.2d 1288 (1976), aff'd 16 Ill.Dec. 456, 71 Ill.2d 229, 375 N.E.2d 87 (1978).

Under obstructing justice statute, defendant's failure to dig up body which he had concealed or to indicate the concealment to the authorities did not constitute a continuing series of acts which prevented 18-month limitations from running, and statute of limitations commenced to run on date of concealment, and not on date defendant disclosed to the authorities that he had concealed evidence. People v. Criswell, 12 Ill. App.3d 102, 298 N.E.2d 391, 77 A.L.R.3d 717 (1973).

Statute which proscribed deviate sexual conduct (formerly R.C.M. 1947, § 94-5-505; now M.C.A. 1978, § 45-5-505) held not to be unconstitutionally vague and ambiguous where R.C.M. 1947, § 94-2-101 (now M.C.A. 1978, § 45-2-101) set forth definitions which made the formulation of the offense specific and absolutely lacking in vagueness. State v. Ballew, 166 Mont. 270, 275, 532 P.2d 407 (1975).

(2) "Administrative proceeding" means any proceeding the outcome of which is required to be based on a record or documentation prescribed by law or in which a law or a regulation is particularized in its application to an individual.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(3), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Model Penal Code (M.P.C.) 1962, § 240.0(8)

Prior Law: None

Annotator's Note

As discussed in The Proposed Official Draft of the Model Penal Code, May 4, 1962 at p. 196, "'Administrative proceeding' is defined so as to include quasi-judicial proceedings and, also, some proceedings directed toward formulation of regulations, if the law contemplates that the outcome shall be based on evidence and

findings. The definition will also cover some actions that might be called 'executive' or 'administrative,' where the official action applies a general rule to an individual, e.g. in granting or revoking a license."

Cross References

Local government M.C.A. 1978, Title 7

(3) "Another" means a person or persons, as defined in this code, other than the offender.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(2), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 2-3

Prior Law: None

Cross References

Accountability for conduct of another M.C.A. 1978, § 45-2-301

Notes of Decisions

Complaint which charged that accused, "with the intent to obtain control over property of TOTAL CONCEPT 1420 North Main Street, Rockford, Illinois, delivered to TOTAL CONCEPT a check . . . with an intent to defraud and knowing . . . that it would not be paid," sufficiently alleged a "person" within this section to effect that, with regard to fact that essential elements of deceptive practice offense are intent to defraud and obtain control over property of "another," term "another" means a person or persons other than the offender. People v. Curtis, 22 Ill. App.3d 4, 316 N.E.2d 557 (1974).

(4) "Benefit" means gain or advantage or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not an advantage promised generally to a group or class or voters as a consequence of public measures which a candidate engages to support or oppose.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(4), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(1)

Prior Law: None

Annotator's Note

This subsection and the new section on corrupt influences prohibits the giving or receiving of any non-pecuniary benefit such as political support, honoraries, etc. to influence official discretionary functions. The wording is taken directly from the Model Penal Code.

Cross References

Definition of "pecuniary benefit" M.C.A. 1978, § 45-2-101(43)
Bribery in official and political matters M.C.A. 1978, § 45-7-101
Gifts to public servants by persons subject to their jurisdiciton M.C.A. 1978, § 45-7-104

(5) "Bodily injury" means physical pain, illness, or any impairment of physical condition and includes mental illness or impairment.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(5), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Substantially the same as M.P.C. 1962, § 210.0(2)

Prior Law: None

Annotator's Note

This definition is designed to provide a broadened replacement for the term "bodily harm" used in the old Criminal Code. "Bodily harm" or "physical harm" as used in the new Code are synonomous with the term bodily injury. This definition is substantially the same as the definition adopted in the Model Penal Code 1962, § 210.0(2) which is similar to Wisconsin's statute, § 939.22 (1955).

Cross References

Definition "serious bodily injury" M.C.A. 1978, § 45-2-101(53)

Justifiable use of force M.C.A. 1978, §§ 45-3-101 through 45-3-115
Assault M.C.A. 1978, §§ 45-5-201, 45-5-202
Intimidation M.C.A. 1978, § 45-5-203
Robbery M.C.A. 1978, § 45-5-401
Sexual intercourse without consent M.C.A. 1978, § 45-5-503
Criminal mischief and arson M.C.A. 1978, §§ 45-6-101 through 45-6-103

(6) "Cohabit" means to live together under the representation of being married.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(6), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Cross References

Incest M.C.A. 1978, § 45-5-613

(7) "Common scheme" means a series of acts or omissions motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan which results in the repeated commission of the same offense or affects the same person or the same persons or the property thereof.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(7), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

This definition as applied in the new bad check and forgery statutes imposes higher penalties for elaborate plans which result in the illegal obtaining of property or services than penalties imposed for single fraudulent acts.

Cross References

Issuing a bad check M.C.A. 1978, § 45-6-316
Forgery M.C.A. 1978, § 45-6-325

(8) "Conduct" means an act or series of acts and the accompanying mental state.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(8), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 2-4

Prior Law: None

Annotator's Note

Because this definition and many of the statutes making references to the word "conduct" come from Illinois, attention is directed to decisions from that jurisdiction. Perhaps the most important use of the term in Montana law occurs in the statutes on Multiple Prosecutions: M.C.A. 1978, §§ 46-11-501 through 46-11-505, which come from Ill. C.C. 1961, §§ 3-3, 3-4. Attention is also directed to the decision of the Supreme Court in Ashe v. Swenson, 397 U.S. 436 (1970) which has an important impact upon multiple prosecution for the same conduct.

Cross References

Definition of "acts" M.C.A. 1978, § 45-2-101(1)
Substitutes for negligence and knowledge M.C.A. 1978, § 45-2-102
Responsibility--intoxicated or drugged condition M.C.A. 1978, § 45-2-203
Liability for acts committed by or for another M.C.A. 1978, §§ 45-2-301 through 45-2-312
Assault M.C.A. 1978, § 45-5-201
Effect of multiple charges and former prosecutions M.C.A. 1978, §§ 46-11-501 through 46-11-505

Law Review Commentaries

Comment. Constitutional law--Multiple prosecutions for multiple offenses arising from single criminal act may violate due process. 1965 Univ. of Ill. Law Forum 927 (1965).

Notes of Decisions

In General

The United States Supreme Court has recently ruled that where the defendant was acquitted of robbing one of four men who were robbed in the same transaction, the Fifth Amendment guarantee against double jeopardy and the doctrine of collateral estoppel prohibited prosecution of the defendant for robbing another of the men when prosecution was based upon the same conduct as previously litigated. Ashe v. Swenson, 397 U.S. 436, 443 (1970). However, when several offenses are based upon the "same conduct" of the defendant, he may be convicted of each, but only concurrent sentences may be imposed; when several offenses are not based upon the same conduct they may be prosecuted separately and sentence may be concurrent or consecutive. People v. Lerch, 131 Ill. App.2d 900, 268 N.E.2d 901, 904 (1971), reversed on other grounds 52 Ill.2d 78, 284 N.E.2d 293 (1972). Conduct for which only one sentence may be imposed can involve a series of unlawful acts on part of defendant. People v. Walton, 13 Ill. App.3d 492, 301 N.E.2d 114 (1973). Whether two offenses have resulted from the same "conduct," so that more than one sentence cannot be imposed, must depend upon the circumstances in any given case unless one of the two offenses is necessarily involved in the other. People v. Sykes, 10 Ill. App.3d 657, 295 N.E.2d 323 (1973). The word "conduct" is used in the same sense as the "same transaction." People v. Weaver, 93 Ill. App.2d 31, 236 N.E.2d 362, 364 (1968). See also, People v. Limauge, 89 Ill. App.2d 307, 231 N.E.2d 599, 601 (1967), in which the court held that prosecution and conviction of defendant for driving while his license was revoked did not prevent subsequent prosecution of the defendant for reckless homicide.

Single Act

It is often difficult to determine at which point one course of conduct ends and another begins. An Illinois court has ruled that aggravated battery and an ensuing rape resulted from the same conduct so that imposition of separate sentences for the two crimes was improper and conviction for the lesser crime of aggravated battery had to be reversed. People v. Weaver, 93 Ill. App.2d 31, 236 N.E.2d 362, 365 (1968). Similarly, concurrent sentences on charges of rape and burglary with intent to commit rape were held to be not authorized, where burglary with intent to commit rape was held to be a lesser included offense. People v. Ritchie, 66 Ill. App.2d 302, 213 N.E.2d 651, 657 (1966), aff'd., 36 Ill.2d 392, 222 N.E.2d 479 (1967). Where defendant was apprehended in act of attempting to pry open a door with two screwdrivers, the offenses of attempted burglary and possession of burglary tools held to have resulted from same "conduct" or "same transaction." People v. Gaines, 11 Ill. App.3d 14, 295 N.E.2d 569 (1973). Where defendant was demanding victim's money as he hit him with board, there was only one act of misconduct and sentence should have been for attempted armed robbery only. People v. Ashford, 17 Ill. App.3d 592, 308 N.E.2d 271 (1974).

Separate Acts

Double jeopardy was held not to be a bar to convictions for both attempted escape and criminal mischief although proof of the digging of a hole in the jail wall established the requisite act for each offense. The Montana court held that the defendants could be prosecuted for both offenses because the crimes had different elements and the prosecution was required to establish differing facts in proving two distinct mental states and two separate criminal results. State v. Davis, ____ Mont. ____, 577 P.2d 375 (1978). Separate offenses may arise from a series of closely related acts which consist of crimes which are clearly distinct and require different elements of proof. People v. Montgomery, 18 Ill. App.3d 828, 310 N.E.2d 760 (1974). Separate sentences may be imposed for distinct acts which are indepen-

dently motivated or otherwise separable although they arise out of same conduct. People v. Thompson, 3 Ill. App.3d 684, 278 N.E.2d 1 (1972). In People v. Gates, 123 Ill. App.2d 50, 259 N.E.2d 631, 635 (1970), in which the Illinois court held that where the three offenses charged involved three different mental states, the offenses did not result from the same conduct and the defendant's conviction did not improperly amount to convictions of several offenses arising from the same transaction. Similarly, in People v. Walker, 2 Ill. App.3d 1026, 279 N.E.2d 23 (1971) defendant's actions in threatening complainant with death, raping her twice, then slitting her throat and abdomen and thereafter robbing her and leaving her to the elements, were held to constitute three separate acts for which consecutive sentences could be imposed upon conviction of rape, armed robbery and attempted murder, since the three offenses, although not wholly unrelated, involved three distinct mental states and hence did not result from the same "conduct."

In a bar hold-up where the defendant's companion shot the bartender after the bartender sought to prevent the robbery, firing of a fatal shot represented the commencement of a new, distinct and separable course of action from the attempted robbery. People v. Tolliver, 133 Ill. App.2d 266, 273 N.E.2d 274, 278 (1971). Where defendants robbed occupant of apartment and then beat him up and stabbed him, the beating and stabbing were held to be independently motivated and accompanied by different mental state from the initial threat of force and did not constitute the same "conduct," within this section, thus, imposition of sentences for both armed robbery and aggravated battery was not improper. People v. Whitley, 18 Ill. App.3d 995, 311 N.E.2d 282 (1974). Where battery immediately precedes robbery, it is normally held to be a component of a robbery; if it follows the robbery, it is usually regarded as a separate offense. People v. Ashford, 17 Ill. App.3d 592, 308 N.E.2d 271 (1974). Where second theft of item from automobile in parking lot was separate and distinct, even though closely related in time and space, from first theft of another item from another automobile in same lot, the offenses were held not to have arisen out of same conduct, and it was not error to sentence defendant for each offense with the sentences to run consecutively. People v. Sykes, 10 Ill. App.3d 657, 295 N.E.2d 323 (1973).

(9) "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(9), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 2-5

Prior Law: None

Annotator's Note

Former R.C.M. 1947, § 94-4809 provided that no person could be convicted except

upon a verdict or judgment. Because this section did not specifically define the point at which a conviction occurred problems arose in determining when a person could be said to have been placed in double jeopardy. See, for example, Petition of Williams, 145 Mont. 45, 57, 399 P.2d 732 (1965). Attention is directed to M.C.A. 1978, §§ 46-18-101 et seq. which sets forth procedure for sentencing and judgment. The wording for this subsection defining "conviction" comes directly from the Illinois source.

Cross References

Definition of "conviction" M.C.A. 1978, § 46-1-201(2)
Waiver of counsel M.C.A. 1978, § 46-8-102
Imposition of sentence M.C.A. 1978, §§ 46-18-201 through 46-18-203
Postconviction hearing M.C.A. 1978, Title 46, Chapter 21

Notes of Decisions

In General

The term "conviction" means the finding of guilt by court or jury and an adjudication of that fact. That occurred here. There was a finalized judgment of conviction in the trial court. If the term "conviction" means anything at all, it means a conviction finalized on the trial court level. People v. Spears, 83 Ill. App.2d 18, 226 N.E.2d 67, 71 (1967). Defendant was not placed in jeopardy at proceeding before judge which was nothing more than probable cause hearing, clearly defined and described as such, and where no finding of guilt or innocence was made, although judge had jurisdiction to try misdemeanor cases. People v. Tate, 47 Ill. App.3d 33, 361 N.E.2d 748 (1977). Conviction is not final for purposes of appeal until sentence is imposed. People v. Pruitt, 45 Ill. App.3d 399, 359 N.E.2d 1051 (1976). Defendant's admission of a violation of probation held to be a "conviction" entitling defendant to a postconviction hearing on his contention that his admission was induced by an unfulfilled promise by the state's attorney to recommend a different sentence than was imposed. People v. Pier, 51 Ill.2d 96, 281 N.E.2d 289 (1972).

(10) "Correctional institution" means the state prison, county or city jail, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(10), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 2-14

Prior Law: None

Annotator's Note

This definition is adopted from the Illinois definition of "penal institution."

(11) "Deception" means knowingly to:

(a) create or confirm in another an impression which is false and which the offender does not believe to be true;

(b) fail to correct a false impression which the offender previously has created or confirmed;

(c) prevent another from acquiring information pertinent to the disposition of the property involved;

(d) sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not of value or is or is not a matter of official record; or

(e) promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did not intend to perform.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(11), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 15-4

Prior Law: None

Annotator's Note

This subsection defines a term essential to the new sections on Theft and

Deceptive Practices (M.C.A 1978, §§ 45-6-301 through 45-6-327). The definition supplants and simplifies a variety of former laws relating to fraudulent practices such as false pretenses, larceny by trick, fraudulent conveyances, etc. The objective of the commission in replacing the old theft sections was to remove any reference to the old common law elements which encumbered the former Code. Subsection 11(e) makes the false promise of future performance punishable under the new theft act, although such promises were not punishable under the common law or under prior Montana statutes. The wording for this definition comes directly from the Illinois source.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Theft M.C.A. 1978, § 45-6-301
Deceptive practices M.C.A. 1978, §§ 45-6-317, 45-6-318

Library References

Larceny Key No. 14
C.J.S. Larceny, §§ 7, 20, 23, 36, 44

Notes of Decisions

In General

In applying this definition to the Illinois theft section, which is substantially the same as the new Montana theft law, the Illinois courts have ruled that the theft section prohibits obtaining goods or property by false promises of future payments. People v. Kamsler, 67 Ill. App.2d 33, 214 N.E.2d 562, 565 (1966). In People v. Earles, 130 Ill. App.2d 695, 264 N.E.2d 550, 551 (1970), the Illinois court ruled that where the defendant had continually represented to the complaining witness that he was conducting a business, in order to deceive the complaining witness and induce him to invest in such business, the indictment charged a crime although the first misrepresentation and the only investment occurred before the law making such an activity an offense was enacted, where the misrepresentation had continued after the statute was in effect.

Instructions

The Illinois appellate court has held that instructions which define deception in language of this section were not erroneous because they failed to contain part of the section which stated that failure to perform standing alone was not evidence that the offender did not intend to perform, where the evidence showed eight failures to perform. People v. Kamsler, 67 Ill. App.2d 33, 214 N.E.2d 562, 567 (1966).

(12) "Defamatory matter" means anything which exposes a person or a group,

class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or to injury to his or its business or occupation.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(12), Sec. 1, Ch. 513, Laws of Montana 1973

Source: 40A Minn. Stat. Anno., § 609.765

Prior Law: R.C.M. 1947, § 94-2801 et seq., repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This definition was taken directly from the Minnesota law, which in turn comes from Wisconsin Stat. § 942.01(2). The definition and the new statute on Criminal Defamation replaces numerous provisions in the old Code on libel, giving false information for publication, etc. The definition recognizes criminal liability for defamation of a group--a protection not found in prior Montana law. For case notes see M.C.A. 1978, § 45-8-212.

Cross References

Criminal defamation M.C.A. 1978, § 45-8-212.

Library References

Libel and Slander Key No. 141, 148, 149, 156
C.J.S. Libel & Slander, §§ 281, 288, 289, 300

Law Review Commentaries

Donnelly. History of Defamation. 1949 Wis. L. Rev. 98 (1949)

Donnelly. The Law of Defamation: Proposals for reform. 33 Minn. L. Rev. 609 (1949)

Evans. Legal Immunity for Defamation. 24 Minn. L. Rev. 607 (1940).

Hallen. Excessive Publication in Defamation. 16 Minn. L. Rev. 160 (1932).

Note. Libel--Defamation--Attack on Reputation--Exposing to hatred, contempt or ridicule. 7 Minn. L. Rev. 352 (1923)

(13) "Deprive" means to withhold property of another:

(a) permanently;

(b) for such a period as to appropriate a portion of its value;

(c) with the purpose to restore it only upon payment of reward or other compensation; or

(d) to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(13), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 223.0(1)

Prior Law: None

Annotator's Note

This definition is taken without significant change from the Model Penal Code, proposed official draft, 1962. The definition is designed to cover both permanent and prolonged withholding of property from the rightful owner. The definition intentionally avoids any distinction based on "possession," "custody," or "title"--concepts which have provided much confusion in the prior law on larceny and false pretenses. See also, Ill. C.C., Title 38, § 15-3 (1961) defining "permanently deprive" which has marked similarities to the definition of "deprive" in this section.

Cross References

Theft and related offenses, see especially M.C.A. 1978, §§ 45-6-301 through 45-6-308

Library References

Larceny Key No. 2
C.J.S. Larceny, §§ 1, 82

(14) "Deviate sexual relations" means sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(14), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-4118, repealed, Sec. 1, Ch. 513, Laws of Montana 197[illegible]

Annotator's Note

This definition replaces the prior law concerning "crime against nature," which was quite ambiguous in defining which conduct was prohibited. When read in conjunction with the new provision on deviate sexual conduct (M.C.A. 1978, § 45-5-505), this definition prohibits homosexuality and bestiality but does not outlaw acts between consenting adults of the opposite sex.

Criminal Law Commission Comment

This definition covers homosexuality and bestiality.

Cross References

Deviate sexual conduct M.C.A. 1978, § 45-5-505

Library References

Sodomy Key No. 1
C.J.S. Sodomy, § 1

Notes of Decisions

This definition and those contained in sections 45-2-101(54) (sexual contact), 45-2-101(55) (sexual intercourse) and former section 94-2-101(68) (now section 45-5-501, definition of "without consent"), when read into section 45-5-505 (prohibiting deviate sexual conduct) are sufficient to protect section 45-5-505 from the contention that it is unconstitutional for vagueness. State v. Ballew, 166 Mont. 270, 532 P.2d 407 (1975).

(15) "Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in the state prison for any term exceeding 1 year.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(15), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-112, 94-113, 94-114, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Under prior law, the determination of whether an offense was a felony depended solely upon where the maximum punishment was to be served. Under the new definition, both the length of the sentence and the jail in which the sentence is served are determining factors. When read with M.C.A. 1978, § 45-1-201, the new section on classification of offenses, the Code emphasizes that while potential sentence determines jurisdiction, including the classification of any offense necessary to the definitions of the principal offense, and the determination of the commencement of any period of limitations, the sentence actually imposed upon conviction determines the classification of the offense.

Cross References

Provisions of this code to be liberally construed M.C.A. 1978, § 45-1-103(2)
Classifications and limitations M.C.A. 1978, §§ 45-1-201 through 45-1-206
Definition of "misdemeanor" M.C.A. 1978, § 45-1-201(30)
Deliberate homicide M.C.A. 1978, § 45-5-102
Sexual Intercourse without consent M.C.A. 1978, § 45-5-503
Burglary M.C.A. 1978, § 45-6-204
Compounding a felony M.C.A. 1978, § 45-7-305

Library References

Crim. Law Key No. 27
C.J.S. Crim. Law, §§ 6, 7

Notes of Decisions

Convictions in Other Jurisdictions

Under this section, the sentence actually imposed after conviction determines whether the defendant is guilty of a felony or a misdemeanor. Melton v. Oleson, 165 Mont. 424, 530 P.2d 466 (1974). This definition relates only to crimes under state law and does not apply to crimes classified by federal statutes. A conviction under federal law cannot be the basis for disqualifying a voter unless such conviction would be classified as a felony under Montana law.

(16) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(17), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 2-8

Prior Law: None

Annotator's Note

This definition is taken from the last clause of the Illinois source. Forcible felonies include such offenses as homicide, assault, kidnapping, robbery, sexual assault, arson, burglary, etc. As applied in the new Code, one who is committing a forcible felony has no right to use force to defend himself (M.C.C. 1973, § 94-3-105).

Cross References

Justifiable use of force--definition M.C.A. 1978, § 45-3-101
Use of force by aggressor M.C.A. 1978, § 45-3-105

Notes of Decisions

Threat of violence

Defendant's advice to victim that defendant had been hired to kill the victim, but if given a certain sum would leave the city, was reasonably construed as a "threat of physical force or violence" under this section, despite its conditional character. People v. Rhodes, 38 Ill. App.2d 389, 231 N.E.2d 400, 404 (1967).

(17) "A frisk" is a search by an external patting of a person's clothing.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(16), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

The term "frisk" is distinguished from the term "search" in that the objective of a search is to protect the officer, prevent escape and obtain evidence while the objective of a frisk is the detection of concealed weapon in order to protect the officer. Under the new Stop and Frisk law (M.C.A. 1978, §§ 46-5-401, 46-5-402) a peace officer may detain and frisk a person who he believes may have been connected with the commission of an offense or be of aid in investigation of an offense provided that the officer has reasonable cause to suspect the presence of a dangerous weapon.

Cross References

Stop and Frisk M.C.A. 1978, §§ 46-5-401, 46-5-402

Library References

Words and Phrases
C.J.S. Searches, § 1

(18) "Government" includes any branch, subdivision, or agency of the government of the state or any locality within it.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(18), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(2)

Prior Law: None

Annotator's Note

This definition and the new provisions on Offenses Against Public Administration (M.C.A. 1978, Title 45, Chapter 7) are taken directly from the Model Penal Code.

Cross References

Offenses against public administration M.C.A. 1978, Title 45, Chapter 7

(19) "Harm" means loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to any person or entity in whose welfare he is interested.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(19), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(3)

Prior Law: None

Annotator's Note

This definition and the corresponding section on Threats and Other Improper Influence in Official and Political Matters (M.C.A. 1978, § 45-7-102) are taken verbatim from the Model Penal Code. These sections and the new Bribery section provide an all inclusive prohibition of the corrupt influencing of governmental processes.

Cross References

Bribery in official and political matters M.C.A. 1978, § 45-7-101
Threats and other improper influence in official and political matters M.C.A. 1978, § 45-7-102

(20) "A house of prostitution" means any place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(21), Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 10, Ch. 359, Laws of Montana 1977

Source: M.P.C. 1962, § 251.2

Prior Law: R.C.M. 1947, § 94-3607, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Under prior law, a "house of prostitution" was referred to as a "house of ill fame" and the crime of prostitution was punishable on a public nuisance theory. Under the new provisions, any form of prostitution is outlawed, as is any house of prostitution--whether it be discreet or indiscreet. The definition is taken directly from the Model Penal Code. The 1977 amendment changed the reference to "one person" to "one or more persons."

Cross References

Promoting prostitution M.C.A. 1978, § 45-5-602
Aggravated promotion of prostitution M.C.A. 1978, § 45-5-603
Evidence in cases of promotion M.C.A. 1978, § 45-5-604

Library References

Prostitution Key No. 1 et seq.
C.J.S. Prostitution, § 1 et seq.

Law Review Commentaries

Comment. Prostitution and related offenses. Model Penal Code, Tentative Draft No. 9, § 207.12, p. 169 (May 8, 1959).

(21) "Human being" means a person who has been born and is alive.

Historical Note

Enacted: M.C.C. 1973, & 94-2-101(22), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 210.0(1)

Prior Law: None

Annotator's Note

Under this definition, which is supported by both the Model Penal Code and the majority of commentators, unborn children and deceased persons are not human beings for the purposes of offense against the person.

Cross References

Offenses against the person M.C.A. 1978, Title 45, Chapter 5

Library References

Homicide Key No. 7
C.J.S. Homicide, § 1 et. seq.

(22) "An illegal article" is an article or thing which is prohibited by statute, rule, or order from being in the possession of a person subject to official detention.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(23), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-4208, 94-35-264, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This definition and the new section on Transferring Illegal Articles (M.C.A. 1978, § 45-7-307) consolidates the prior law listed above and expands the definition to include not only articles to aid escape and alcoholic beverages but also any other article prohibited by governmental regulation to be in the possession of a prisoner. To complete the offense, the offender must have had reasonable knowledge that the item was illegal and have had the purpose to convey it.

Cross References

Transferring illegal articles or unauthorized communication M.C.A. 1978, § 45-7-307

Library References

Prisons Key No. 17-1/2
C.J.S. Prisons, § 22

(23) "Inmate" means a person who engages in prostitution in or through the agency of a house of prostitution.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(24), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 251.2(1)

Prior Law: None

Annotator's Note

This definition and the corresponding section on Promoting Prostitution (M.C.A. 1978, §§ 45-5-602 through 45-5-604) are taken directly from the Model Penal Code.

Cross References

Promoting prostitution M.C.A. 1978, § 45-5-602
Aggravated promotion of prostitution M.C.A. 1978, § 45-5-603
Evidence in cases of promotion M.C.A. 1978, § 45-5-604

Library References

Prostitution Key No. 1 et seq.
C.J.S. Prostitution, § 1 et seq.

(24) "Intoxicating substance" means any controlled substance as defined in Title 50, Chapter 32, and any alcoholic beverage, including but not limited to any beverage containing 1/2 of 1% or more of alcohol by volume. The foregoing definition does not extend to dealcoholized wine or to any beverage or liquid produced by the process by which beer, ale, port, or wine is produced if it contains less than 1/2 of 1% of alcohol by volume.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(25), Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 190, Laws of Montana 1975; Sec. 10, Ch. 359, Laws of Montana 1977

Source: R.C.M. 1947, § 94-35-107

Prior Law: R.C.M. 1947, § 94-35-107, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Chapter 190, Laws of Montana 1975, substituted "controlled substance as defined in chapter 3 of title 54, R.C.M. 1947 [now Title 50, Chapter 32, M.C.A. 1978], and alcoholic beverage" in subdivision (24) for "substance having an hallucinogenic, depressant, stimulating, or narcotic effect, taken in such quantities as to impair mental or physical capability." Prior to this amendment the original wording of the section seemed to indicate that a substance could not be an "intoxicating substance" unless it had been ingested in quantities sufficient to impair mental or physical capability. This, in effect, eliminated the criminal aspect of possession of such a substance unless ingestion could be shown. The change made by the amendment now without question allows the charge of illegal possession of the defined substance if it is intoxicating by definition as an alcoholic beverage or as included in Title 50, Chapter 32, M.C.A. 1978. The 1977 amendment made minor changes in grammar and punctuation.

Cross References

Unlawful transactions with children M.C.A. 1978, § 45-5-623

Unlawful possession of an intoxicating substance by children M.C.A. 1978, § 45-5-624
Provisions generally applicable to sexual crimes M.C.A. 1978, § 45-5-506

Library References

Intoxicating Liquors Key No. 134
C.J.S. Intoxicating Liquors, §§ 10, 57, 217

Notes of Decisions

In General

In interpreting prior Montana law (R.C.M. 1947, § 94-35-107) the Montana court held that while the statutory definition of intoxicating liquor did not contain the word vodka, the definition did make any beverage containing more than one-half of one per cent alcohol an intoxicating liquor, and the court therefore took judicial notice of commonly accepted and generally understood definition of the word "vodka." State v. Wild, 130 Mont. 476, 492, 305 P.2d 325 (1956).

(25) "An involuntary act" means any act which is:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion; or

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(26), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 2.01

Prior Law: None

Annotator's Note

The minimum elements of an offense (unless absolute liability is imposed) usually are said to be a voluntary act and a certain mental state as prescribed by law. Under the new provision on Voluntary Act, a person is not guilty of an offense (other than one in which absolute liability is provided for the act alone) unless his liability is based on conduct which includes a voluntary act or the omission to

perform an act required by law which the person is capable of performing. The wording for this definition is taken from the Model Penal Code, but a number of states including Illinois, Wisconsin and Louisiana have spelled out the same theory within their criminal codes.

Cross References

General requirements of criminal act and mental state M.C.A. 1978, § 45-2-103
Absolute liability M.C.A. 1978, § 45-2-104
Voluntary act M.C.A. 1978, § 45-2-202

Library References

Criminal Law Key No. 26
C.J.S. Crim. Law, § 37

(26) "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court in this state in any action or proceeding or by any officer authorized by law to impanel a jury in any action or proceeding. The term "juror" also includes a person who has been drawn or summoned to attend as a prospective juror.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(27), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 10.00(16)

Prior Law: None

Annotator's Note

This definition is taken directly from the New York Penal Law. Because of the all-inclusiveness of this definition any attempt to influence a juror or prospective juror is prohibited.

Cross References

Definition of "public servant" M.C.A. 1978, § 45-2-105(51)
Bribery in official and political matters M.C.A. 1978, § 45-7-101
Threats or other improper influence in official and political matters M.C.A. 1978, § 45-7-102

(27) "Knowingly"--a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(28), Sec. 1, Ch. 513, Laws of Montana, 1973

Amended: Sec. 10, Ch. 359, Laws of Montana 1977

Source: M.P.C. 1962, §§ 1.13(13), 2.02

Prior Law: R.C.M. 1947, § 94-118, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Under the new Code, the concepts of "knowingly" and "purposely," replace the old term "intentionally." The terms, however, are not synonomous. "Knowingly" refers to an awareness of the nature of one's conduct or of the existence of specified facts or circumstances. "Purposely" refers to the actor's objective or intended result. The definition for "knowingly" is taken primarily from the Model Penal Code, but a significant departure from the source is the substitution of the phrase "high probability" for "practically certain." Thus, the drafters of the new Code chose to substitute a less rigid requirement. Several states, including New York and Illinois, have enacted similar although not identical provisions. The 1977 amendment made minor grammatical changes.

Cross References

Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
General requirements of criminal act and mental state M.C.A. 1978, § 45-2-103

Library References

Criminal Law Key No. 32, 33

C.J.S. Crim. Law, §§ 47, 48

Law Review Commentaries

Remington and Helstad. The mental element in crime--a legislative problem, 1952 Wis. L. Rev. 644 (1952)

Perkins. A rationale of mens rea. 52 Harv. L. Rev. 905 (1939)

Comments. General requirements of culpability. Model Penal Code, Tentative Draft No. 4, § 2.02, p. 123 (April 25, 1955).

Notes of Decisions

In General

This definition and that of the term "purposely" contained in section 94-2-101(53), R.C.M. 1947 [now § 45-2-101(52), M.C.A. 1978], were intended by the legislature as substitutes for the terms "feloniously" and "intentionally" employed in the old code. State v. Klein, 169 Mont. 350, 547 P.2d 75 (1976). Acting "knowingly" as defined in this section, is not acting accidentally and a defendant who is convicted of knowingly engaging in criminal conduct is not being held criminally liable for accidental conduct. State v. Seitzinger, ____ Mont. ____, 589 P.2d 655, 658 (1979).

Burden of Proof

In prosecution for deliberate homicide, the state must prove that defendant acted "knowingly" or "purposely" as those terms are defined in the criminal code [M.C.A. 1978, §§ 45-2-101(27), 45-2-101(52)]. The state need not prove that the defendant does not suffer from mental disease or defect which would prevent defendant from doing the act purposely or knowingly. State v. McKenzie, ____ Mont. ____, 581 P.2d 1205, 1232 (1978).

Evidence

Evidence that defendant knew source of the items in his possession were stolen, of defendant's furtive actions in displaying the property and of the isolated spot chosen for displaying the property held sufficient to establish that defendant was aware of a "high probability" that he was exerting unauthorized control over the property of the claimants, with an intent to deprive them of the property, and to sustain conviction under R.C.M. 1947, § 94-6-302 [now M.C.A. 1978, § 45-6-301] on theft. State v. Jackson, ____ Mont. ____, 589 P.2d 1009 (1979). Evidence from which a jury can find that the defendant was aware of a high probability that horse was stolen is sufficient to sustain conviction for theft. State v. Farnes, 171 Mont. 368, 558 P.2d 472 (1976).

Instructions

Definition of "knowingly" set forth in this section, including "high probability" language, was properly included in instructions in a prosecution for mitigated deliberate homicide and aggravated assault. State v. Larson, ____ Mont. ____,

574 P.2d 266 (1978). Instructions which incorporated the statutory definitions of "knowingly" [M.C.A. 1978, § 45-2-101(27)] and "purposely" [M.C.A. 1978, § 45-2-101(52)] were approved in burglary case. State v. Radi, ____ Mont. ____, 578 P.2d 1169 (1978). Such instructions were also approved in a capital case for aggravated kidnapping resulting in the victim's death after she was raped. The Montana court also upheld the trial court's refusal to give an instruction explaining the criminal intent and premeditation necessary for a conviction of deliberate homicide, citing and reaffirming its holding in State v. Sharbono, ____ Mont. ____, 563 P.2d 61 (1977), that the legislature had changed the requirements of mens rea and that instructions should properly reflect the new definitions. State v. Coleman, ____ Mont. ____, 579 P.2d 732, 750 (1978).

(28) "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appreciating the nature of his conduct.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(29), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 130.00(5)

Prior Law: R.C.M. 1947, §§ 94-118, 94-4101(2), repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

"Mentally defective" as used in the substantive code is an element employed to determine the validity of consent to the sexual offenses. A person who is incapable of appreciating the nature of his conduct is legally incapable of giving consent to a sexual act. Insanity as an affirmative defense was abolished in Montana by the 1979 legislature (M.C.A. 1978, § 46-14-211, repealed) and evidence of mental disease or defect is now only admissible to show that the defendant did not have a particular state of mind which is an element of the offense charged (M.C.A. 1978, § 46-14-201). The definition of "mentally defective" is taken directly from the New York source and the wording of the "consent as a defense" statute, M.C.A. 1978, § 45-2-211, is similar to the New York source as was the former defense of insanity statute, M.C.A. 1978, § 45-14-211.

Criminal Law Commission Comment

Revised Codes of Montana 1947, section 94-4102(2) [former rape law; now M.C.A. 1978, § 45-5-503] specified that the degree of mental deficiency be such as to render the victim "incapable of giving legal consent." Formulation in terms of capacity to give legal consent is circular and was rejected as failing to provide a meaningful guide. This definition limits criminality to mental disease or defect so serious as to render the victim "incapable of appreciating the nature of his

conduct." A condition such as nymphomania which affects only the woman's capacity to "control herself sexually" where there is no physical or mental disability will not destroy consent, otherwise valid.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
General requirements of criminal act and mental state M.C.A. 1978, § 45-2-103
Consent as a defense M.C.A. 1978, § 45-2-211
Sexual intercourse without consent M.C.A. 1978, § 45-5-503
Mental competency of accused M.C.A. 1978, Title 46, Chapter 14

Library References

Criminal Law Key No. 47, et seq.
Mental Health Key No. 431, et seq.
C.J.S. Criminal Law, §§ 55 et seq.
C.J.S. Insane Persons, § 127

Law Review Commentaries

Schwartz. Morals offenses and the Model Penal Code. 63 Colum. L. Rev. 669 (1963)

Note. The proposed penal law of New York--Sex offenses. 64 Colum L. Rev. 1469, 1539 ff. (1964).

Ploscowe. Sex offenses in the new penal law--Lack of consent. 32 Brooklyn L. Rev. 274, 276 (1966)

(29) "Mentally incapacitated" means that a person is rendered temporarily incapable of appreciating or controlling his conduct as a result of the influence of an intoxicating substance.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101, Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 130.00(6)

Prior Law: R.C.M. 1947, § 94-4101, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Intoxication as a defense is covered by the new section on Responsibility

(M.C.A. 1978, § 45-2-203). This definition, which is taken directly from the New York source is a determinant in the validity of consent to sexual acts. When a person is rendered temporarily incapacitated to give consent this definition applies. When a person is rendered completely unconscious by an intoxicating substance, the term "physically helpless" (M.C.A. 1978, § 45-2-101(45)) is used to define his condition. That the defendant did not administer the intoxicating substance is immaterial as long as the substance was administered by someone without the victim's voluntary consent. This definition is intended to cover the situation where the defendant undermined the judgment and will of the victim by, for example, administering drugs.

Criminal Law Commission Comment

The victim need not be unconscious to be mentally incapacitated.

Cross References

General requirements of criminal act and mental state M.C.A. 1978, § 45-2-103
Responsibility--intoxicated or drugged condition M.C.A. 1978, § 45-2-203
Consent as a defense M.C.A. 1978, § 45-2-211
Sexual intercourse without consent M.C.A. 1978, § 45-5-503

(30) "Misdemeanor" means an offense in which the sentence imposed upon conviction is imprisonment in the county jail for any term or a fine, or both, or the sentence imposed is imprisonment in the state prison for any term of 1 year or less.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(31), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-112, 94-113, 94-114, 94-116, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

A misdemeanor under prior law was defined as any crime punishable by imprisonment in the county jail or for which only a fine was imposed. The determination of whether an offense was a misdemeanor came at the beginning of the proceedings depending upon the maximum sentence prescribed in the Code. Under the new definition and the corresponding section on Classification of Offenses (M.C.A. 1978, § 45-1-201), the maximum potential sentence determines jurisdiction and the commencement of the period of limitations, but the final classification of the

offense does not occur until sentence is imposed. Any crime for which the sentence finally imposed is less than one year or in which the sentence is to be served in a county jail is a misdemeanor.

Cross References

Application of code to offenses committed before and after enactment M.C.A. 1978, § 45-1-103
Classification of offenses M.C.A. 1978, § 45-1-201
General time limitations M.C.A. 1978, § 45-1-205
Official misconduct M.C.A. 1978, § 45-7-401
Definition of "felony" M.C.A. 1978, § 45-2-101(15)

Library References

Crim. Law Key No. 27, 1208
C.J.S. Crim. Law, §§ 6, 7, 1986

(31) "Negligently"--a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when he consciously disregards a risk that the result will occur or that the circumstance exists or when he disregards a risk of which he should be aware that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care. Relevant terms such as "negligent" and "with negligence" have the same meaning.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(32), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen.L. 1965, § 15.05(4), M.P.C. 1962, §§ 1.13(15), 2.02(2)(d)

Prior Law: None

Annotator's Note

Under prior law, the concept of "criminal negligence" occurred most commonly

in the area of involuntary manslaughter. R.C.M. 1947, § 94-2507 contained the clause "without due caution and circumspection," which was held to be synonomous with criminal negligence. State v. Powell, 114 Mont. 571, 576, 138 P.2d 949 (1943). Because the old manslaughter section required an unlawful act not amounting to a felony and because the common law required that the act be more than merely malum prohibitum, the Montana court developed the concept that if an act was done with criminal negligence the act became malum in se to allow a conviction under that section. The new Code deletes all references to these concepts in order to avoid the definitional problems which they produced. The term "negligence," which is a lesser mental state than "knowingly" or "purposely" is found in the lower categories of assault and homicide in the new Code. The inclusion of the term in these sections is necessary to cover such frequent offenses as motor vehicle homicide and firearm mishaps--crimes which were problem areas under prior law. The wording of the definition comes primarily from the New York source, but also borrows language from the Model Penal Code. It should be noted that this definition includes the concept of "recklessness" with the phrase "consciously disregards . . . ." Under the New York law, recklessness is a higher mental state than negligence. Since the distinction between negligence and recklessness if often difficult for juries to make, it has been avoided in the Montana Code.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Causal relationship between conduct and result M.C.A. 1978, § 45-2-201
Negligent homicide M.C.A. 1978, § 45-5-104
Assault M.C.A. 1978, § 45-5-201
Negligent arson M.C.A. 1978, § 45-6-102

Library References

Criminal Law Key No. 19 et seq.
C.J.S. Crim. Law, § 29 et seq.

Law Review Commentaries

Comment. General requirements of culpability. Model Penal Code, Tentative Draft No. 4, § 2.02, p. 123, 126 (April 25, 1955)

Comment. Is criminal negligence a defensible basis for penal liability? 16 Buffalo L. Rev. 749 (1967)

Hall. Negligent behavior should be excluded from penal liability. 63 Colum. L. Rev. 632 (1963)

Note. The proposed penal law of New York--Principles of criminal liability--Culpability. 64 Colum. L. Rev. 1469, 1481 (1964)

Notes of Decisions

In General

A gross deviation under statutory definition of "negligently" held analogous

to gross negligence in law of torts which is generally considered to fall short of a reckless disregard for consequences and differs from ordinary negligence only in degree, not in kind. State v. Bier, ____ Mont. ____, 591 P.2d 1115, 1118 (1979). Legislature may prescribe that an act is criminal without regard to doer's intent or knowledge, but an involuntary act is not criminal, with certain exceptions such as involuntary acts resulting from voluntary intoxication. People v. Shaughnessy, 66 Misc.2d 19, 319 N.Y.S.2d 626 (1971). Criminal negligence is a combination of defendant's subjective state of mind or mental state and conduct which involves substantial and unjustifiable risk that a result or circumstance described by penal statute will occur or exist and gross deviation from standard of conduct or care that reasonable person would observe. People v. Fitzgerald, 45 N.Y.2d 574, 412 N.Y.S.2d 102, 284 N.E.2d 649 (1978).

Miscellaneous Offenses

Defendant's conduct in pulling out, cocking and throwing a loaded gun within reach of his intoxicated wife held to clearly qualify as a gross deviation from the standard of conduct that a reasonable person would have observed and to rise to criminal culpability. State v. Bier, ____ Mont. ____, 591 P.2d 1115, 1118 (1979). Criminally negligent homicide occurs when defendant fails to perceive a substantial and unjustifiable risk of death to the victim. People v. Walker, 58 A.D.2d 737, 396 N.Y.S.2d 121 (1977). Liability for criminally negligent homicide cannot be predicated upon every careless act merely because its carelessness results in another's death. People v. Lewis, 53 A.D.2d 963, 385 N.Y.S.2d 828 (1976). Where passenger train engineer was prosecuted for criminally negligent homicide, his conduct as an engineer of public conveyance of great size, weight and passenger capacity, was to be examined in context of more specialized standards of care applicable to his profession. People v. Tate, 87 Misc.2d 6, 382 N.Y.S.2d 941 (1976).

(32) "Obtain" means:

(a) in relation to property, to bring about a transfer of interest or possession, whether to the offender or to another; and

(b) in relation to labor or services, to secure the performance thereof.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(33), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 223.0(5), Ill. C.C. 1961, Title 38, § 15-7

Prior Law: None

Annotator's Note

Under prior statutes concerning false pretenses and larceny by trick it was

necessary to distinguish between the transferring of title and the transferring of possession. This definition and the sections on Theft and Related Offenses (M.C.A. 1978, §§ 45-6-301 through 45-6-327) avoid these confusing and often impossible distinctions and instead provide a more general description "interest or possession"--which should include any fraudulent transfer. The definition is taken directly from the Model Penal Code and is identical to the Illinois provision.

Cross References

Theft and related offenses M.C.A. 1978, §§ 45-6-301 through 45-6-327

Library References

False Pretenses Key No. 7
Larceny Key No. 1, 2
C.J.S. False Pretenses, § 1 et seq.
C.J.S. Larceny, §§ 1, 4, 7, 9, 82
Words and Phrases (Perm. Ed.)

Notes of Decisions

In General

Where the defendant had allegedly moved around a ticket agent and entered transit authority train platform without paying his fare, the Illinois court held that the defendant could not be convicted of the crime of theft of services before he had boarded the train. People v. Davis, 5 Ill.App.3d 95, 283 N.E.2d 317, 318 (1972).

(33) "Obtains or exerts control" includes but is not limited to the taking, carrying away, or sale, conveyance, or transfer of title to, interest in, or possession of property.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(34), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 15-8

Prior Law: None

Annotator's Note

This definition which is central to the new section on Theft eliminates the distinctions which existed under prior law between obtaining title and obtaining possession. The fraudulent transfer of either title or possession is covered by the new sections and the old distinction is of no importance. This definition and much of the new section on Theft come directly from Illinois. More annotations will be found in the Theft section (M.C.A. 1978, §§ 45-6-301 through 45-6-327).

Cross References

Definition of "obtain" M.C.A. 1978, § 45-2-101(32)
Theft and related offenses M.C.A. 1978, §§ 45-6-301 through 45-6-327

Library References

Words and Phrases (Perm. Ed.)

Notes of Decisions

In General

The Illinois Supreme Court has rules that the term "unauthorized control" in Theft section, which is substantially the same as the Montana theft law, was not unconstitutionally vague by failing to define what conduct was proscribed, in view of this definition and the requirement of a "knowing" mental state. People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969). The "obtaining of unauthorized control" was held to include the initial taking or carrying away of property, but unauthorized possession need not begin at the time of the original taking. People v. Snow, 21 Ill.App.3d 873, 316 N.E.2d 216 (1974). Citing People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 344 (1965), the Montana court upheld a conviction for theft where defendant agreed to sell stray cow which purchaser believed belonged to defendant and made out a bill of sale forging true owner's name. The court held that defendant had "obtained or exerted control" over the cow by bringing about a transfer of title and possession to one other than the owner through a wrongful sale which deprived the owner of his property. State v. McCartney, ____ Mont. ____, 585 P.2d 1321 (1978).

Evidence

Evidence which did not conclusively establish defendant's regular occupancy of or his control over the residence (in which the stolen property was seized) and its contents during the period in which the burglaries occurred or prior to search, associated defendant with the goods, but was held insufficient to prove the essential element of control over the stolen property required for conviction of theft. State v. Campbell, ____ Mont. ____, 582 P.2d 783 (1978).

Instructions

Substitution of phrase, "exerts control," for statutory words "obtains con-

trol" in instructions relating to offense of theft held not to be reversible error. People v. Collins, 48 Ill. App.3d 643, 362 N.E.2d 1118 (1977).

(34) "Occupied structure" means any building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business, whether or not a person is actually present. Each unit of a building consisting of two or more units separately secured or occupied is a separate occupied structure.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(35), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 220.1(4)

Prior Law: R.C.M. 1947, §§ 94-501, 94-502, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This definition and the terms "premises" and "vehicle" provide a comprehensive treatment of such offenses against property as Criminal Trespass, Burglary, Criminal Mischief and Arson (M.C.A. 1978, §§ 45-6-101 through 45-6-103 and §§ 45-6-201 through 45-6-205). These offenses are graded according to the type of structure against which the crime was committed and whether the act created a potential danger to human life. Prior law on arson included an exhaustive listing of different types of structures to allow the offense to be graded. This definition replaces that catalogue. The wording for this subsection comes from but is not identical to the Model Penal Code source. Included within the definition are such items as house trailers, house boats, etc., which are not ordinarily considered to be "structures." It is important to note that the structure need not be occupied to be the subject or arson or burglary--under this definition the building need only be suitable for human habitation.

Cross References

Definition of "premises" M.C.A. 1978, § 45-2-101(47)
Definition of "vehicle" M.C.A. 1978, § 45-2-101(64)
Criminal mischief and arson M.C.A. 1978, §§ 45-6-101 through 45-6-103
Criminal trespass and burglary M.C.A. 1978, §§ 45-6-201 through 45-6-205

Library References

Arson Key No. 2 et seq.

C.J.S. Arson, § 1 et seq.
Burglary Key No. 4, 5, 6
C.J.S. Burglary, § 1 et seq.

Law Review Commentaries

Comment. Arson and related offenses. Model Penal Code, Tentative Draft No. 11, p. 34, 39 (April 27, 1960).

Notes of Decisions

In General

Semi-trailer attached to a sleeper cab tractor was an "occupied structure" and therefore defendant who entered it and removed a number of cases of beer was properly convicted of burglary. State v. Shannon, 171 Mont. 25, 554 P.2d 743 (1976).

(35) "Offender" means a person who has been or is liable to be arrested, charged, convicted, or punished for a public offense.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(36), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

The term "offender" is used extensively in the Code. This general definition indicates that the Code provisions apply to persons who have been involved in any criminal activity for which legal action may be taken. In the Montana Code of Criminal Procedure reference is made to "defendants," indicating those who are charged with a crime.

(36) "Offense" means a crime for which a sentence of death or of imprisonment or a fine is authorized. Offenses are classified as felonies or misdemeanors.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(37), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 1.04(1)

Prior Law R.C.M. 1947, § 94-112, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This definition is merely a recodification of the prior law through adaptation of Model Penal Code wording. Under prior law an offense was defined as including those activities for which punishment was removal from office or disqualification to hold office. Because all offenses against public administration are now punishable with fines and/or imprisonment, reference in this subsection to removal from office is not necessary.

Cross References

Definition of "felony" M.C.A. 1978, § 45-2-101(15)
Definition of "misdemeanor" M.C.A. 1978, § 45-2-101(30)
Classification of offenses M.C.A. 1978, § 45-1-201
Other limitations on applicability of code M.C.A. 1978, § 45-1-104

Library References

Criminal Law Key No. 1
C.J.S. Crim. Law, § 2, 3

Notes of Decisions

In General

The Montana court has held that contempt of court, which is punishable by fine or imprisonment, or both, is a public offense under prior Montana law R.C.M. 1947, § 94-112. State ex. rel. Flynn v. District Court, 24 Mont. 33, 35, 6 P. 493 (1900). Again in interpreting prior Montana law, the court held that the threatened violation of a town ordinance was not a "public offense" within the meaning of § 94-112. State ex. rel. Streit v. Justice Court, 45 Mont. 375, 380, 123 P. 405 (1912).

(37) "Official detention" means imprisonment resulting from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extra-

dition or deportation, or any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society. Official detention does not include suprevision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(38), Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 10, Ch. 359, Laws of Montana 1977

Source: M.P.C. 1962, § 242.6(1)

Prior Law: R.C.M. 1947, § 94-4203, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This subsection defines a term that is used in the new statute on Escape (M.C.A. 1978, § 45-7-306). Prior law punished escapees from custody being held for charges of felonies or misdemeanors but did not clearly delineate that it is an offense to escape from any lawful detention. Under the new Code, the crime of escape is graded according to the degree of offense for which the escapee was being held. A person who violates parole is not an escapee under this subsection. The wording for the definition comes directly from the Model Penal Code source. The 1977 amendment made minor grammatical changes.

Cross References

Escape M.C.A. 1978, § 45-7-306

Library References

Escape Key No. 4, 13
C.J.S. Escape, §§ 14-17, 28

Law Review Commentaries

Comments. Escape from official detention. Model Penal Code, Tentative Draft No. 8, § 208.33, p. 132 (May 9, 1958)

(38) "Official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with such proceeding.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(39), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(4)

Prior Law: None

Annotator's Note

This subsection defines a term used in the new section on Perjury (M.C.A. 1978, § 45-7-201). Under prior law perjury was covered by separate sections on witnesses before legislative assemblies and those before other governmental bodies. This subsection encompasses all testimony before any governmental proceedings. The definition and the section on perjury come directly from the Model Penal Code.

Cross References

Perjury M.C.A. 1978, § 45-7-201

Library References

Perjury Key No. 1
C.J.S. Perjury, §§ 1 et seq.

(39) "Other state" means any state or territory of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(40), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 2-21

Prior Law: None

Annotator's Note

This definition contains the same wording as the Illinois source.

Cross References

Definition of "state" or "this state" M.C.A. 1978, § 45-2-101(57)

(40) "Owner" means a person other than the offender who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(41), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 15-2

Prior Law: None

Annotator's Note

This definition and the new section on Theft (M.C.A. 1978, § 45-6-301) are taken directly from the Illinois source. The definition is comprehensive and includes such interests in property as possession, title and custody--either actual or constructive.

Cross References

Theft and related offenses M.C.A. 1978, §§ 45-6-301 through 45-6-327

Library References

Words and Phrases (Perm. Ed.)

Notes of Decisions

Constitutionality

The Illinois Court has held that this definition and the Illinois section on Theft which has substantial similarities with M.C.A. 1978, § 45-6-301, defining

theft, were not repugnant or vague in providing that an owner can never be an offender. People v. Kamsler, 78 Ill. App.2d 349, 223 N.E.2d 237 (1966).

Construction and Application

The Illinois courts have given this definition a broad interpretation. For example, the resident manager of a hotel was held to have sufficient control over the hotel's property and thus was an "owner" within the definition of this section. People v. Smith, 90 Ill. App.2d 388, 234 N.E.2d 161, 166 (1967). Similarly, the payee of an allegedly stolen check was found to have sufficient interest in the check and the proceeds of the check to meet the requirements of this definition. People v. Jones, 123 Ill. App.2d 389, 259 N.E.2d 393 (1970). However, a defendant in possession of stolen drugs was held not to be "an owner" as defined by this section. People v. Marino, 95 Ill. App.2d 369, 238 N.E. 2d 245, 254 (1968). Also "owner" has been held to include an unincorporated association. People v. Woods, 15 Ill. App.3d 221, 303 N.E.2d 562 (1973).

Indictment and Information

It is necessary in every indictment or information charging theft that the ownership of the stolen property be set forth with accuracy. People v. Baskin, 119 Ill. App.2d 18, 255 N.E.2d 42, 43 (1969). However, slight variations between the actual ownership of the property and the ownership of the property as listed in the complaint is not fatal to the indictment. See, for example, People ex. rel. Insolata v. Pate, 46 Ill.2d 268, 263 N.E.2d 44, 45 (1970); People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969); People v. Tomaszek, 54 Ill. App.2d 254, 204 N.E.2d 30, 34 (1964), cert. den. 382 U.S. 827 (1965).

Proof of Ownership

Proof that one other than accused either owns or has superior possessory interest in property allegedly stolen was held to be an essential element of the offense of theft. People v. Cowan, 49 Ill. App.3d 367, 364 N.E.2d 362 (1977). Ownership of property which is alleged to have been stolen must be alleged in the information and proved in the trial to safeguard the accused against double jeopardy. People v. Insolata, 112 Ill. App.2d 269, 251 N.E.2d 73, 74 (1969). Despite that general rule, however, an earlier court held that proof that corporate owner of burglarized building was the owner of money stolen from that building was not necessary to convict the party taking the money of burglary. People v. Griffin, 48 Ill. App.2d 148, 198 N.E.2d 115, 119 (1964).

Sufficiency of Evidence

In general, Illinois courts have been liberal in allowing that evidence which indicates that the ownership of stolen property was in one other than the defendant is sufficient to support a conviction under indictment charging theft. See, for example, People v. Demos, 3 Ill. App.3d 284, 278 N.E.2d 89, 90 (1971); People v. Insolata, 112 Ill. App.2d 269, 251 N.E.2d 73, 74 (1969); People v. Kurtz, 69 Ill. App.2d 282, 216 N.E.2d 254, rev. in part on other grounds in 37 Ill.2d 103, 224 N.E.2d 817 (1966); People v. Tomaszek, 54 Ill. App.2d 254, 204 N.E.2d 30, 33 (1964), cert. den. 382 U.S. 827 (1965).

Sufficiency of Interest

Co-trustees of premium trust fund were held to have a sufficient possessory

interest in the funds represented by three checks obtained by defendant, to qualify as owners under the theft statute at the time of the theft. People v. Decker, 19 Ill. App.3d 86, 311 N.E.2d 228 (1974).

(41) "Party official" means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts or participates in directing or conducting party affairs at any level of responsibility.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(42), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(5)

Prior Law: None

Annotator's Note

Prior Montana law did not cover attempts to bribe political party officers. This definition and the new chapter on Offenses Against Public Administration (M.C.A. 1978, Title 45, Chpater 7) acknowledge the important public trust placed in party officials and the undermining effect that attempts to exert corrupt influence on such persons can have on the political process. This definition and the sections on Bribery and Corrupt Influences are broad enough to cover all political workers regardless of position. The wording is taken directly from the Model Penal Code.

Cross References

Bribery in official and political matters M.C.A. 1978, § 45-7-101
Threats and other improper influence in official and political matters M.C.A. 1978, § 45-7-102

Library References

Bribery Key No. 1
C.J.S. Bribery, §§1 et seq.

Law Review Commentaries

Comments. Bribery in official and political matters. Model Penal Code, Tentative Draft No. 8, § 208.10, p. 102 (May 9, 1958)

(42) "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of his authority.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(43), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 2-13

Prior Law: None

Annotator's Note

This definition is taken directly from Illinois. All persons who are granted authority to maintain order or make arrests within the state are peace officers as defined by the state. As peace officers, such individuals are permitted certain privileges and defenses under the new Code such as the power to detain, the right to use force, and the privilege to require aid from members of the public.

Cross References

Use of force to prevent escape M.C.A. 1978, § 45-3-106
Use of force in resisting arrest M.C.A. 1978, § 45-3-108
Resisting arrest M.C.A. 1978, § 45-7-301
Obstructing a peace officer or other public servant M.C.A. 1978, § 45-7-302
Failure to aid a peace officer M.C.A. 1978, § 45-7-304
Escape M.C.A. 1978, § 45-7-306
Arrest by a peace officer M.C.A. 1978, §§ 46-6-401 through 46-6-411
Search and seizure M.C.A. 1978, Title 46, Chapter 5

Notes of Decisions

In General

"Peace officer" includes only those individuals who are required by their employment to give full time to preservation of public order. People v. Perry, 27 Ill. App.3d 230, 327 N.E.2d 167 (1975). Police officer is at all times and in all places, vested by duty to maintain public order and duty to effectuate arrests by virtue of his office, and that duty is not affected by whether officer is in or out of uniform. People v. Bouse, 46 Ill. App.3d 465, 360 N.E.2d 1340 (1977). A university security officer was held authorized to make arrest for disorderly conduct while on duty and in uniform. People v. Picha, 44 Ill. App.3d 759, 358 N.E. 2d 937 (1976). But, security guards employed by Chicago housing authority were earlier held not to be "peace officers" within criminal code and could not make arrest for disorderly conduct. Thus, one guard's attempt to handcuff defendant

was held to constitute a battery justifying defendant's efforts to resist the force by kicking the guard. People v. Perry, 27 Ill. App.2d 230, 327 N.E.2d 167 (1975). Statute which allows police officers to carry arms at any time, but allows prison guards to carry arms only in performance of their duties and when commuting to and from their place of work, held not to be invalid as setting forth arbitrary and unreasonable distinction, since police officers have duty to maintain public order wherever they may be and their duties are not confined to specific time or place as are those of prison guards. Arrington v. City of Chicago, 45 Ill.2d 316, 259 N.E.2d 22 (1970).

(43) "Pecuniary benefit" is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(44), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(6)

Prior Law: None

Annotator's Note

This subsection when read in conjunction with the new chapter on Corrupt Influences (M.C.A. 1978, §§ 45-7-101 through 45-7-104) unqualifiedly prohibits the giving or receiving of any pecuniary benefit to influence official discretion. Offers of non-pecuniary benefit such as political support, honoraria, etc. are penalized under M.C.A. 1978, § 45-7-101. The wording comes directly from the Model Penal Code.

Cross References

Definition of "benefit" M.C.A. 1978, § 45-2-101(4)
Bribery and corrupt influence M.C.A. 1978, §§ 45-7-101 through 45-7-104

Law Review Commentaries

Comments. Bribery in official and political matters. Model Penal Code, Tentative Draft No. 8, § 208.10, p. 102 (May 9, 1958)

Comments. Status of section--Bribery in official and political matters. Model Penal Code, § 240.1, p. 196 (1962)

(44) "Person" includes an individual, business association, partnership,

corporation, government, or other legal entity and an individual acting or purporting to act for or on behalf of any government or subdivision thereof.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(45), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 2-15

Prior Law: R.C.M. 1947, § 19-102

Annotator's Note

Under present law, "person" means a corporation as well as a natural person. Under this subsection, the term has been expanded for the purposes of criminal law to include unincorporated associations and government agencies. This definition does not create problems with the new Robbery section (M.C.A. 1978, § 45-5-401) because that section requires actual or threatened "bodily injury" as defined in M.C.A. 1978, § 45-2-101(5). Bodily injury necessarily refers only to natural persons as defined in the Code. The wording for this section is taken with only minor changes from the Illinois source.

Library References

Words and Phrases (Perm. Ed.)

Notes of Decisions

In General

Although the term "person" ordinarily refers to a living human being, it has long been the law in Montana that the definition of person includes corporations as well as natural persons. In re Beck's Estate, 44 Mont. 561, 572, 121 P. 784 (1912). Notwithstanding the broad language of this section, the Illinois court has recently ruled that this section did not alter the existing law concerning whether or not an unincorporated association could be sued in its own name in a civil action. Boozer v. U.A.W., A.F.L.-C.I.O., Local 457, 4 Ill. App.3d 611, 279 N.E.2d 428, 432 (1972). But an "unincorporated association" is included in the concept of "owner" or "person" from whom theft of property is proscribed. People v. Woods, 15 Ill. App.3d 221, 303 N.E.2d 562 (1973).

(45) "Physically helpless" means that a person is unconscious or is otherwise physically unable to communicate unwillingness to act.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(46), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 130.00(7)

Prior Law: None

Annotator's Note

This definition is used in conjunction with the new section describing when a person is deemed to be incapable of consenting to a sexual act. The term should be compared to other states of incapacity defined in the Code such as "mentally defective" (M.C.A. 1978, § 45-2-101(28)) and "mentally incapacitated" (M.C.A. 1978, § 45-2-101(29)). Under this definition a person who is paralytic or drugged to unconsciousness is deemed helpless. The definition is taken directly from New York law as is much of the new chapter on sexual offenses (M.C.A. 1978, §§ 45-5-501 through 45-5-506).

Cross References

Definition of "mentally defective" M.C.A. 1978, § 45-2-101(28)
Definition of "mentally incapacitated" M.C.A. 1978, § 45-2-101(29)
Consent as a defense M.C.A. 1978, § 45-2-211
Sexual crimes M.C.A. 1978, §§ 45-5-501 through 45-5-506

(46) "Possession" is the knowing control of anything for a sufficient time to be able to terminate control.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(47), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 2.01(4)

Prior Law: None

Annotator's Note

"Possession" with reference to such crimes as Theft (M.C.A. 1978, § 45-6-301) and Possession of Burglary Tools (M.C.A. 1978, § 45-6-205) refers to the exertion of control over an item with the purpose of controlling it and for a period of time long enough to allow the possessor's control to be terminated by another. The definition specifically excludes unconscious possession of property such as contraband abandoned by another or stray animals. The definition is broad enough to in-

clude the concepts of constructive possession. The wording has been adapted from the Model Penal Code.

Cross References

Definition of "obtain" M.C.A. 1978, § 45-2-101(32)
Definition of "obtains or exerts control" M.C.A. 1978, § 45-2-101(33)
Possession of burglary tools M.C.A. 1978, § 45-6-205
Theft M.C.A. 1978, § 45-6-301
Illegal branding or altering or obscuring a brand M.C.A. 1978, § 45-6-327

Library References

Words and Phrases (Perm. Ed.)

Law Review Commentaries

Comments. Requirement of voluntary act; omission as basis of liability; possession as an act. Model Penal Code, Tentative Draft No. 4, § 2.01, p. 119 (April 25, 1955)

Notes of Decisions

In General

Exclusive, immediate personal possession is not essential to establish constructive possession. State v. Trowbridge, 157 Mont. 527, 530, 487 P.2d 530 (1971). There is constructive possession when the person charged with possession has dominion and control over the goods although they were not in his actual, physical possession. Id. Possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. State v. Meader, ___ Mont. ___, 601 P.2d 386 (1979).

Sufficiency of Evidence

Testimony that defendant presented passenger copy of flight ticket, together with baggage claim tag, is in and of itself sufficient to establish constructive possession of the contraband in the suitcase. State v. Trowbridge, 157 Mont. 527, 529, 530, 487 P.2d 530 (1971). It is not necessary to show that defendant was in actual physical possession, or had exclusive control over the goods. It is sufficient that it be shown by either direct or circumstantial evidence, that the defendant did have the right to exercise control over the contraband. Id. at 531. Evidence showing that defendant was present in same room where drugs were found and evidence that connected defendant with the premises (i.e. mail addressed to defendant at the premises, personalized license plates bearing defendant's nickname, men's clothing which would fit defendant, belief of landlady that defendant resided at the premises) held sufficient to establish constructive possession of the drugs. State v. Meader, ____ Mont. ____, 601 P.2d 386 (1979).

(47) "Premises" includes any type of structure or building and any real property.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(48), Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 10, Ch. 359, Laws of Montana 1977

Source: N.Y. Pen. L. 1965, § 140.0(1)

Prior Law: None

Annotator's Note

This subsection and the companion terms of "occupied structure" (M.C.A. 1978, § 45-2-101(34)) and "vehicle" (M.C.A. 1978, § 45-2-101(64)) allow for a comprehensive treatment of such crimes against property as Criminal Trespass and Burglary (M.C.A. 1978, §§ 45-6-201 through 45-6-205) and Criminal Mischief and Arson (M.C.A. 1978, §§45-6-101 through 45-6-103). These offenses are graded according to the type of structure against which the crime was committed and whether there was a potential danger to human life. This definition of "premises" includes structures suitable for occupancy to allow prosecution for the lesser included offense of Criminal Trespass when an offender has committed the crime of Burglary. While this definition is taken directly from the New York source, the drafters of the new Code specifically avoided adopting the New York definitions of "building" and "real property" due to differences in the substantive provisions. Since these terms have not been defined, they take on their ordinary grammatical and legal meanings.

Cross References

Definition of "occupied structure" M.C.A. 1978, § 45-2-101(34)
Definition of "vehicle" M.C.A. 1978, § 45-2-101(64)
Criminal mischief and arson M.C.A. 1978, §§ 45-6-101 through 45-6-103
Criminal trespass and burglary M.C.A. 1978, §§ 45-6-201 through 45-6-205

Library References

Trespass Key No. 79
C.J.S. Trespass, §§ 140 ff.

Law Review Commentaries

Note. Subsurface trespass by deviated well. 1 Hous. L. Rev. 21 (1963)
Sharpe. Forcible trespass to real property. 39 N.C. L. Rev. 121 (1961)
Note. Statutory burglary--The magic of four walls and a roof. 100 U. Pa. L. Rev. 411 (1951)

(48) "Property" means anything of value. Property includes but is not limited to:

(a) real estate;

(b) money;

(c) commercial instruments;

(d) admission or transportation tickets;

(e) written instruments which represent or embody rights concerning anything of value, including labor or services, or which are otherwise of value to the owner;

(f) things growing on, affixed to, or found on land and things which are part of or affixed to any building;

(g) electricity, gas, and water;

(h) birds, animals, and fish which ordinarily are kept in a state of confinement;

(i) food and drink, samples, cultures, microorganisms, specimens, records, recordings, documents, blueprints, drawings, maps, and whole or partial copies, descriptions, photographs, prototypes, or models thereof; and

(j) any other articles, materials, devices, substances, and whole or partial copies, descriptions, photographs, prototypes, or models thereof which constitute, represent, evidence, reflect, or record secret scientific, technical, merchandising, production, or management information or a secret designed process, procedure, formula, invention, or improvement.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(49), Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 10, Ch. 359, Laws of Montana 1977

Source: Ill. C.C. 1961, Title 38, § 15-1

Prior Law: None

Annotator's Note

This definition is taken almost verbatim from Illinois and recodifies the

separate definition of property found in various sections throughout the old code. The 1977 amendment made several grammatical changes.

Cross References

Terms relating to instruments and other writings M.C.A. 1978, § 1-1-203

Library References

Larceny Key No. 5
C.J.S. Larceny, §§ 2, 3
Words and Phrases (Perm. Ed.)

Law Review Commentaries

Anderson and Niro. Intellectual property--rights under siege. 23 DePaul L. Rev. 361 (1973)

Notes of Decisions

In General

Indictment for theft must show that something of value was stolen even though an allegation of value is not essential. People v. Brouilette, 92 Ill. App.2d 168, 236 N.E.2d 12 (1968).

(49) "Property of another" means real or personal property in which a person other than the offender has an interest which the offender has no authority to defeat or impair, even though the offender himself may have an interest in the property.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(50), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 223.0(7)

Prior Law: None

Annotator's Note

This subsection defining "property of another" relates to Theft and Related Offenses (M.C.A. 1978, §§ 45-6-301 through 45-6-327). The wording has been adapted from a similar definition in the Model Penal Code. The subsection permits prose-

cution for theft of jointly-owned property, such as that owned by husband and wife, where each co-owner has an interest in the property but neither has the right to dispose of the other co-owner's interest.

Cross References

Theft and related offenses M.C.A. 1978, §§ 45-6-301 through 45-6-327
Definition of "property" M.C.A. 1978, § 45-2-101(48)

Law Review Commentaries

Comment. Of another. Model Penal Code, Tentative Draft No. 1, § 206.1(4), p. 78 (May 1, 1953)

Comment. Actor's interest in the property. Model Penal Code, Tentative Draft No. 2, § 206.11, p. 100 (May 3, 1954)

(50) "Public place" means any place to which the public or any substantial group thereof has access.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(51), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 251.2(1)

Prior Law: None

Annotator's Note

This definition is employed in the new sections on Disorderly Conduct (M.C.A. 1978, § 45-8-101), and Prostitution (M.C.A. 1978, §§ 45-5-601 through 45-5-604). The criminality of Disorderly Conduct depends largely upon the disruption that such behavior causes when done in public areas and the offensiveness of such conduct to most people. The new section on Prostitution prohibits both public and private solicitation, replacing the former law which punished prostitution on a public nuisance theory and instead incorporates the modern concept that prostitution, regardless of how carried on, ought to be suppressed. This definition of "public place" was taken directly from the Model Penal Code.

Cross References

Conduct disruptive of public order M.C.A. 1978, §§ 45-8-101 through 45-8-114
Prostitution and related offenses M.C.A. 1978, §§ 45-5-601 through 45-5-604

Law Review Commentaries

Comment. Prostitution and related offenses. Model Penal Code, Tentative

Draft No. 9, § 207.12, p. 169 (May 8, 1959)

(51) "Public servant" means any officer or employee of government, including but not limited to legislators, judges, and firefighters, and any person participating as a juror, advisor, consultant, administrator, executor, guardian, or court-appointed fiduciary. The term does not include witnesses. The term "public servant" includes one who has been elected or designated to become a public servant.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(52), Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 10, Ch. 359, Laws of Montana 1977

Source: M.P.C. 1962, § 240.0(7), N.Y. Pen. I. 1965, § 10.00(15)

Prior Law: None

Annotator's Note

This subsection defines a term of importance and utility in the new Criminal Code. Under prior law relating to bribery, there was no clear definition of "government official" and consequently numerous sections were required to cover the corrupt influence offenses. Furthermore, these sections did not include persons who had been elected or appointed but who had not yet taken office. This definition permits a consolidation of law to replace the numerous former sections and allows for simplification in language. The wording for the first sentence of the definition is adapted from the Model Penal Code. The last sentence is taken directly from the New York source. The 1977 amendment made minor grammatical changes.

Cross References

Definition of "juror" M.C.A. 1978, § 45-2-101(26)
Offenses against public administration M.C.A. 1978, Title 45, Chapter 7
Definition of "judge" M.C.A. 1978, § 46-1-201(4)

Library References

Criminal Law Key No. 13(1)
C.J.S. Criminal Law §§ 1, 24(1)

Notes of Decisions

In General

Authority to issue an appearance ticket renders a nonpolice officer a "public servant." People v. Lewis, 87 Misc.2d 806, 386 N.Y.S.2d 560 (1976).

(52) "Purposely"--a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(53), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, §§ 2.02(2)(a), 2.02(6)

Prior Law: None

Annotator's Note

A major problem of prior Montana criminal law was the use in the code of numerous terms affecting culpability that were largely undefined. Under the new Code, the mental states required for various degrees of culpability are defined carefully in a hierarchy. "Purposely" is the most culpable mental state and implies a design. This term replaces a term frequently used in the old code, "intentionally." It should be noted that a person need not act toward a particular result; he need act only with the object to engage in certain conduct. Although a person's intentions may be conditional, his mental state is still culpable under this definition, unless the condition negates the specific intent required by statute. Completing the hierarchy of mental states in the new Code are the terms "knowingly" and "negligently," each defined in this section. The wording for this subsection has been taken directly from the two Model Penal Code provisions listed above.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "negligently" M.C.A. 1978, § 45-2-101(31)

General requirements of criminal act and mental state M.C.A. 1978, § 45-2-103

Library References

Criminal Law Key No. 20
C.J.S. Crim. Law, § 29 et seq.

Notes of Decisions

In General

State v. Klein, 169 Mont. 350, 547 P.2d 75 (1976) quotes the Annotator's Note above as constituting a correct interpretation of the language of the section and notes that this definition and that of the term "knowingly" in section 45-2-101(27) replace the terms "feloniously" and "intentionally" used in the old Code. The element of intent may be, and generally is, demonstrated by circumstantial evidence. State v. Farnes, 171 Mont. 368, 558 P.2d 472 (1976).

Instructions

Instructions defining "purposely" and "knowingly" in all material respects as they are defined in the criminal code upheld by Montana Supreme Court. State v. Radi, ____ Mont. ____, 578 P.2d 1169 (1978).

(53) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function or process of any bodily member or organ. It includes serious mental illness or impairment.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(54), Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 10, Ch. 359, Laws of Montana 1977

Source: M.P.C. 1962, § 210.0(3)

Prior Law: None

Annotator's Note

The new sections on Aggravated Kidnapping (M.C.A. 1978, § 45-5-303(2)) and Assault (M.C.A. 1978, §§ 45-5-201 through 45-5-204) are graded in part by the degree of bodily harm threatened or inflicted. Serious bodily injury differs from bodily injury (M.C.A. 1978, § 45-2-101(5)) in the substantiality of pain, risk,

disfigurement or impairment which is created. This definition replaces the ambiguous and narrow phrase found in the prior section on Assault in the First Degree (R.C.M. 1947, § 94-601) "likely to produce death." The wording for the definition is nearly identical to the Model Penal Code source and to N.Y. Pen. L. 1965, § 10.00(10). The final clause of the definition concerning serious mental illness as a type of bodily injury is a new addition by the Criminal Law Commission. The clause applies to those situations in which the victim's mental functions are impaired as a result of a physical attack but in which no substantial physical injury has been manifested.

Cross References

Definition of "bodily injury" M.C.A. 1978, § 45-2-101(5)
Assault M.C.A. 1978, § 45-5-201
Aggravated kidnapping--lesser sentence where release of victim and no serious bodily injury M.C.A. 1978, § 45-5-303(2)

Notes of Decisions

In General

The question of whether the victim of an assault incurred a "substantial risk of death" as a result of his injuries is one fact to be determined by the jury and does not depend on whether the victim ultimately lives or dies. State v. Fuger, 170 Mont. 442, 554 P.2d 1338 (1976).

Sufficiency of Evidence

Where no evidence was presented concerning the size, weight or shape of the projectile which struck the victim nor the velocity at which the slingshot was capable of propelling the projectile and where evidence indicated that victim received a bruise on the jaw requiring no hospitalization and that no bones were broken, there was insufficient proof that the slingshot was a weapon capable of being used to produce death or serious bodily injury. State v. Deshner, ____ Mont. ___, 573 P.2d 172 (1977). Evidence that after being kicked by defendant complainant was admitted to emergency room in Hamilton in semi-conscious state with extensive bruises and swelling around the face, a broken nose and a fractured palate and where examining physician testified that complainant was transferred to Missoula because the facilities at Hamilton were not equipped "to handle seriously injured or gravely injured head-type cases" was sufficient to enable jury to find that complainant's injuries created a "substantial risk of death" although no serious complications actually resulted. State v. Fuger, 170 Mont. 442, 445, 554 P.2d 1338 (1976). The New York court has held that defendant who caused protracted impairment of function of complainant's eye could be found guilty of causing "serious physical injury" (defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ"). People v. Rumaner, 45 A.D.2d 290, 357 N.Y.S.2d 735 (1974).

(54) "Sexual contact" means any touching of the sexual or other intimate

parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(55), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 130.00(3)

Prior Law: None

Annotator's Note

This subsection is used in defining the crime of Sexual Assault (M.C.A. 1978, § 45-5-502). Under prior Montana law, the offense was not specifically listed but was covered by numerous vague sections, none of which defined the proscribed sexual conduct. The wording is changed from the New York source only by the addition of the word "arousing" in the final clause. The term "sexual contact" as defined includes any manipulation, fondling, or penetration of the male or female genital or anal areas and any handling of the female breast to arouse sexual desire. Under prior New York law, the term "sexual parts" was held not to include the anus. People v. Grazman-Bograti, 202 N.Y.S.2d 572 (1960). Consequently, the wording was changed to the broader term "intimate parts." Under the new code, the inadvertent touching of intimate parts is not an offense.

Cross References

Sexual assault M.C.A. 1978, § 45-5-502

Library References

Rape Key No. 1
Sodomy Key No. 1
C.J.S. Rape, §§ 1 et seq.
C.J.S. Sodomy, § 1

Law Review Commentaries

Schwartz. Morals offenses and the Model Penal Code. 63 Colum. L. Rev. 669 (1963)

Note. The proposed penal law of New York--Sex offenses. 64 Colum. L. Rev. 1469, 1539 ff. (1964)

Ploscowe. Sex offenses in the new penal law--Lack of consent. 32 Brooklyn L. Rev. 274, 276 (1966)

Notes of Decisions

Constitutionality

A New York court has recently held that the term "intimate parts" used in

this definition providing that sexual contact means any touching of the sexual or intimate parts of the person for the purpose of gratifying sexual desire of either party, was neither uncertain or vague. People v. Blodgett, 326 N.Y.S.2d 14, 37 A.D.2d 1035 (1971). The definition of "sexual contact" and those contained in sections 45-2-101(14) (deviate sexual relations), 45-2-101(55) (sexual intercourse) and former section 94-2-101(68) (now section 45-5-501, definition of "without consent") when read into section 45-5-505 (prohibiting deviate sexual conduct) are sufficient to protect section 45-5-505 from the contention that it is unconstitutional for vagueness. State v. Ballew, 166 Mont. 270, 532 P.2d 407 (1975).

(55) "Sexual intercourse" means penetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by any body member of another person, or penetration of the vulva or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(56), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, §§ 130.00(1), (2), (3)

Prior Law: R.C.M. 1947, § 94-4103, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This subsection on "sexual intercourse" defines a term used throughout the new chapter on Sexual Crimes (M.C.A. 1978, § 45-5-501). The wording for the definition combines the New York definitions of "sexual intercourse," "deviate sexual intercourse," and "sexual contact." Under prior law, the term "sexual intercourse" was used frequently but was not defined. The drafters of the new Code decided not only to specifically define the term but to provide a broad meaning to allow the punishment of sex offenders who do not inflict "normal" acts upon their victims. In Montana, the essence of sex crimes has always been the element of outrage to the person (R.C.M. 1947, § 94-4103, repealed, Sec. 32, Ch. 513, Laws of Montana 1973). Thus, while any penetration is sufficient to complete the offense, the new Code does not prohibit acts between consenting adults of the opposite sex.

Criminal Law Commission Comment

This definition includes abnormal intercourse, either homosexual or heterosexual, by mouth or anus, as well as normal genital copulation. The definition is broader than former law, although the "infamous crime against nature" of Revised Codes of Montana 1947, section 94-4118 probably covers most abnormal sexual acts. The definition also adheres to the "slight penetration" rule of Revised Codes of Montana 1947, section 94-4103.

Cross References

Definitions of "sexual contact" M.C.A. 1978, § 45-2-101(54)
Sexual crimes M.C.A. 1978, §§ 45-5-501 through 45-5-506

Library References

Rape Key No. 1, 7
Sodomy Key No. 1
C.J.S. Rape, §§ 1 et seq.
C.J.S. Sodomy, §§ 1 et seq.

Law Review Commentaries

Schwartz. Morals offenses and the Model Penal Code. 63 Colum. L. Rev. 669 (1963)

Note. The proposed penal law of New York--Sex offenses. 64 Colum. L. Rev. 1469, 1539 ff. (1964)

Ploscowe. Sex offenses in the new penal law--Lack of consent. 32 Brooklyn L. Rev. 274, 276 (1966)

Notes of Decisions

Constitutionality

This definition and those contained in sections 45-2-101(14) (deviate sexual relations), 45-2-101(54) (sexual contact) and former section 94-2-101(68) (now section 45-5-501, definition of "without consent") when read into section 45-5-505 (prohibiting deviate sexual conduct) are sufficient to protect section 45-5-505 from the contention that it is unconstitutional for vagueness. State v. Ballew, 166 Mont. 270, 532 P.2d 407 (1975).

(56) "Solicit" or "solicitation" means to command, authorize, urge, incite, request, or advise another to commit an offense.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(57), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 2-20

Prior Law: None

Annotator's Note

This subsection defines a term used in the new section on When Accountability Exists (M.C.A. 1978, §45-2-302). Under former Montana law, one who solicited the commission of a crime was criminally liable only if the planned crime was eventually committed. This definition and the sections on Accountability continue the solicitor's liability as a principal if the crime has been committed and broaden that liability by the use of the term "facilitate" which includes any action that aids a criminal activity in the slightest. The new Code adds the crime of Solicitation (M.C.A. 1978, § 45-4-401) which provides that one who solicits may be prosecuted whether or not the planned offense was completed. Because the crime of Solicitation is completely defined within its own section as is the new offense of Soliciting Suicide (M.C.A. 1978, § 45-5-105), this definition is not applicable to those crimes, which have their own specific and individual variations of the term solicit. The wording for this definition is identical to the Illinois source.

Library References

Crim. Law Key No. 45
C.J.S. Crim. Law, §§ 73, 78

Notes of Decisions

Burden of Proof

Where assistance is rendered to crime by words of encouragement and incitement, it must be proved that actual words were addressed to, or heard by, actual criminal. People v. Mitchell, 12 Ill. App.3d 960, 299 N.E.2d 472 (1973).

(57) "State" or "this state" means the state of Montana, all the land and water in respect to which the state of Montana has either exclusive or concurrent jurisdiction, and the air space above such land and water.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(58), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 2-21

Prior Law: None

Annotator's Note

This subsection is primarily applicable to the jurisdictional provisions of the Code (M.C.A. 1978, §§ 45-1-103 et seq.). Code provisions are in force in areas in which the state shares concurrent jurisdiction such as in National Forest areas and on certain Indian lands as defined by Acts of Congress. Additionally, jurisdiction extends to water and to air spaces in which the state shares jurisdiction with regulatory agencies of other states or of the Federal government. The definition is taken directly from the Illinois source.

Cross References

Definition of "other state" M.C.A. 1978, § 45-2-101(39)
Jurisdiction M.C.A. 1978, Title 46, Chapter 2

(58) "Statute" means any act of the legislature of this state.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(59), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

This subsection excludes from the definition of statute under this Code such laws as Constitutional provisions, local ordinances, and administrative regulations.

(59) "Stolen property" means property over which control has been obtained by theft.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(60), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 15-6

Prior Law: None

Annotator's Note

Under former law, receiving of stolen property was an offense separate from larceny. While an essential element of the offense has always been the stolen character of the property, no definition of the term was provided. The new Code makes receiving of stolen property a form of Theft (M.C.A. 1978, § 45-6-301(3)). Because the new section on Theft also encompasses such forms of larceny as false pretenses, larceny by trick, deceptive practices, and embezzlement, property which has been stolen by virtually any means is included within this definition. Property acquired through burglary and robbery is also stolen property as defined by this subsection. Robbery (M.C.A. 1978, § 45-5-401) is a crime against the person. Burglary (M.C.A. 1978, § 45-6-204) prohibits "breaking and entering." Although theft may be a basis for each crime, the stealing of property during the commission of the principal offense is a separate act. By using the word "obtain," this subsection eliminates former distinctions concerning whether the property interest acquired was title or possession. (See M.C.A. 1978, § 45-2-101(33)). The wording for the definition comes directly from the Illinois source.

Cross References

Robbery M.C.A. 1978, § 45-5-401
Criminal trespass and burglary M.C.A. 1978, §§ 45-6-201 through 45-6-205
Theft and related offenses M.C.A. 1978, §§ 45-6-301 through 45-6-327
Definition of "obtains or exerts control" M.C.A. 1978, § 45-2-101(33)

Library References

Words and Phrases (Perm. Ed.)

Law Review Commentaries

Note. Proof of knowledge that property received had been stolen. 24 Ill. B. J. 362 (1936)

(60) "A stop" is the temporary detention of a person that results when a peace officer orders the person to remain in his presence.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(61), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

The new Stop and Frisk statutes (M.C.A. 1978, §§ 46-5-401, 46-5-402), allow a peace officer to detain a person for thirty (30) minutes upon reasonable cause to suspect the person has committed an offense or may be of aid in the investigation of an offense. As defined in this subsection, a "stop" differs significantly from the term "arrest" which is a taking into custody (M.C.A. 1978, § 46-6-101(1)). Attention is directed to M.C.A. 1978, §§ 46-5-401, 46-5-402, for analysis and case annotations to the Stop and Frisk law.

Cross References

Definition of "frisk" M.C.A. 1978, § 45-2-101(17)
Stop and frisk M.C.A. 1978, §§ 46-5-401, 46-5-402
Arrest M.C.A. 1978, Title 46, Chapter 6

(61) "Tamper" means to interfere with something improperly, meddle with it, make unwarranted alterations in its existing condition, or deposit refuse upon it.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(62), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

This subsection defines a term used in the Criminal Mischief section (M.C.A. 1978, § 45-6-101). It must be shown under that section that the offender engaged in the tampering conduct with the intent to cause danger or substantial interference to a person who had an interest in the property. Illustrative of the conduct which would come within this definition are such acts as meddling with public utility equipment and the malicious disarrangement of papers and files. It should also be noted that "depositing refuse" is by this definition made criminal mischief. In this way the Criminal Mischief sections not only cover traditional meddling and destruction, but also the offense of "littering" which was formerly covered by R.C.M. 1947, §§ 94-3335 through 94-3344, repealed, Sec. 32, Ch. 513, Laws of Montana 1973. More serious interferences with property interests are proscribed by the sections on Arson (M.C.A. 1978, §§ 45-6-102, 45-6-103) and the provisions relating to Criminal Trespass (M.C.A. 1978, §§ 45-6-201 through 45-6-203).

Cross References

Criminal mischief and arson M.C.A. 1978, §§ 45-6-101 through 45-6-103

(62) "Threat" means a menace, however communicated, to:

(a) inflict physical harm on the person threatened or any other person or on property;

(b) subject any person to physical confinement or restraint;

(c) commit any criminal offense;

(d) accuse any person of a criminal offense;

(e) expose any person to hatred, contempt, or ridicule;

(f) harm the credit or business repute of any person;

(g) reveal any information sought to be concealed by the person threatened;

(h) take action as an official against anyone or anything, withhold official action, or cause such action or withholding;

(i) bring about or continue a strike, boycott, or other similar collective action if the property is not demanded or received for the benefit of the groups which he purports to represent; or

(j) testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(63), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 15-5

Prior Law: R.C.M. 1947, § 94-1602, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Under prior law, the act of threatening another was made an offense in various sections on Assault and Extortion. Under the new Code, a person is guilty of assault if he knowingly places another in apprehension of a physical contact (M.C.A.

1978, §§ 45-5-201 through 45-5-204) but the term "threat" is no longer used in that section. This subsection, instead, defines a term used in the new provisions on Theft (M.C.A. 1978, §45-6-301), Influencing Official and Political Matters (M. C.A. 1978, § 45-7-102), and Intimidation (M.C.A. 1978, § 45-5-203). Under those sections and the section on Attempt (M.C.A. 1978, § 45-5-103) any obtainment of or attempted obtainment of property, services, political influence, or official favors or any threat to inflict harm, confinement, the commission of a crime, etc. on another are prohibited. The wording for this definition comes directly from Illinois.

Cross References

Intimidation M.C.A. 1978, § 45-5-203
Theft M.C.A. 1978, § 45-6-301
Threats and other improper influence in official and political matters M.C.A. 1978, §45-7-102
Attempt M.C.A. 1978, § 45-4-103

Library References

Larceny Key No. 12
C.J.S. Larceny, §§ 4 et seq., 33 et seq.
Words and Phrases (Perm. Ed.)

Notes of Decisions

Under Illinois law providing that person commits theft when he knowingly obtains, by threat, control over property of owner and intends to deprive owner permanently of useful benefit of property, theft occurred where plaintiff demanded and received $25,000 from company in exchange for information concerning location of engineering documents to which company had legal claim, even if plaintiff had no control over documents. Stamation v. U.S. Gypsum Co., 400 F. Supp. 431 (N.D. Ill. 1975).

(63) (a) "Value" means the market value of the property at the time and place of the crime or, if such cannot be satisfactorily ascertained, the cost of the replacement of the property within a reasonable time after the crime. If the offender appropriates a portion of the value of the property, the value shall be determined as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be considered the amount due or collectible

thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

(ii) The value of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be considered the amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(b) When it cannot be determined if the value of the property is more or less than $150 by the standards set forth in subsection (63)(a) above, its value shall be considered to be an amount less than $150.

(c) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(64), Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 10, Laws of Montana 1979

Source: Michigan Proposed Criminal Code, 1967, § 3201

Prior Law: None

Annotator's Note

While the value of property has always been an important determinant in grading theft and related offenses, under prior law there was no statutory pronouncement concerning how value was to be ascertained. Under the new sections on Theft (M.C.A. 1978, § 45-6-301) and Criminal Mischief (M.C.A. 1978, §45-6-101), if the value of the property interest invaded exceeds $150, the offense is classified as a felony--increased from $50 in the old Code. Part (a) of this definition adheres to the traditional position that most items, both tangibles and intangibles, have a market value or replacement value which can be ascertained readily to determine the value of stolen property. Subparagraphs (i) and (ii) are to be used only when a portion of an item's value has been appropriated, as would occur when a chattel is taken and then returned or where the stolen item is a partially paid or discounted chose in action. In such cases, the value shall be either the economic loss suffered by the victim or the face amount of the instrument. In those instances where the stolen chattel has no value in the market place and has produced no ascertainable loss to the victim, the item is deemed to be worth less than $150

making the offense a misdemeanor. Paragraph (c) continues the rationale of In re Jones, 46 Mont. 122, 125, 126 P. 929 (1912), by allowing aggregation when several thefts have resulted from a common scheme--a series of acts motivated by a single criminal purpose (M.C.A. 1978, § 45-2-101(7)). It should be noted that valuation is not necessary in livestock thefts. The wording for this section is taken from the Proposed Michigan Code, but significant changes in terminology have been made.

Cross References

Definition of "common scheme" M.C.A. 1978, § 45-2-101(7)
Criminal mischief M.C.A. 1978, § 45-6-101
Theft and related offenses M.C.A. 1978, §§ 45-6-301 through 45-6-327

Library References

Larceny Key No. 6
C.J.S. Larceny, § 2

Notes of Decisions

In General

Proof of value held not to be an element of the offense of criminal mischief, but is rather to be considered by trial judge in the exercise of his sentencing discretion and whether a defendant is sentenced for the offense of criminal mischief as a felon or a misdemeanant, is directly contingent upon whether the value of the damage or destruction is shown to be greater or less than $150, respectively. State v. Davis, ____ Mont. ____, 577 P.2d 375, 378 (1978).

Sufficiency of Evidence

Where testimony established that stolen property was purchased new a few years before the theft at a cost in excess of $1,700 and it was shown that defendant attempted to sell the property for $800, there was sufficient evidence of value in excess of $150 and the prices established by defendant were tacit admissions that the property was valued at $150 or more. State v. Jackson, ____ Mont. ____, 589 P.2d 1009, 1015 (1979). Where state's proof of value of damage to wall of county jail consisted of two repair bills amounting to $169, but where bills admittedly contained unspecified charges for repairs not necessitated by defendants' actions, evidence was not sufficient to prove that the damage caused by defendants cost more than $150 to repair. State v. Davis, ____ Mont. ____, 577 P.2d 375, 377 (1978).

Instructions

Where no evidence was introduced which would lead a jury to rationally believe that the stolen property was worth less than $150 and where, in fact, the uncontroverted evidence placed its value between $800 and $1,600, an instruction

on misdemeanor theft was not required. State v. Jackson, ____ Mont. ____, 589 P.2d 1009, 1016 (1979).

(64) "Vehicle" means any device for transportation by land, water, or air or mobile equipment with provision for transport of an operator.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(65), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

This definition is of importance in determining the nature of criminal trespasses (M.C.A. 1978, §§ 45-6-201 through 45-6-203) which are classified according to the type of property interest invaded and by the potential danger to human life. Included within this definition are all those transportation devices defined by the Motor Vehicle Code (M.C.A. 1978, §§ 61-1-101 through 61-1-131) as vehicles, including automobiles, motorcycles, motor driven cycles, emergency vehicles, busses, bicycles, farm and construction equipment, plus numerous vehicles not included within the Motor Vehicle Code such as railroad equipment, aquatic vessels, and aircraft. Any device which transports persons whether self-propelled or driven by motor or animal is a vehicle. A person who enters a vehicle without authority is punishable under Criminal Trespass to Vehicles (M.C.A. 1978, § 45-6-202), while theft of vehicles is governed by the new comprehensive Theft section (M.C.A. 1978, §§ 45-6-301 through 45-6-327). This definition is also applicable to the phrase "motor-propelled vehicle" in M.C.A. 1978, § 45-6-308.

Cross References

Definition of "premises" M.C.A. 1978, § 45-2-101(47)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Criminal trespass and burglary M.C.A. 1978, §§ 45-6-201 through 45-6-205
Theft and related offenses M.C.A. 1978, §§ 45-6-301 through 45-6-327

Notes of Decisions

In General

The trailer portion of a tractor-trailer is a vehicle within the meaning of the Motor Vehicle Code and within the meaning of this section. State v. Shannon, 171 Mont. 25, 27, 554 P.2d 743 (1976).

(65) "Weapon" means any instrument, article, or substance which, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(66), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 10.00(13)

Prior Law: None

Annotator's Note

The use of a "weapon" determines in part whether an offender has committed simple or Aggravated Assault (M.C.A. 1978, §§ 45-5-201, 45-5-202). Under prior law, assault was similarly graded by the use of a weapon, but because the term was not defined continual problems arose in determining whether an instrument was a weapon and whether it could produce injury as used. According to this definition and the Aggravated Assault section (M.C.A. 1978, § 45-5-202), the intentional use of anything capable of producing bodily injury--vehicle, firearm (loaded or unloaded), drug, poison, chemical, etc., which either places a person in reasonable apprehension of serious bodily injury or results in bodily injury of any degree, makes the actor criminally responsible. The wording for this subsection was adopted with some changes from the New York source. Attention is also directed to the renumbered section on Carrying Concealed Weapons (M.C.A. 1978, §§ 45-8-316 through 45-8-331) which also employs this definition.

Cross References

Definition of "bodily injury" M.C.A. 1978, § 45-2-101(5)
Definition of "serious bodily injury" M.C.A. 1978, § 45-2-101(53)
Assault M.C.A. 1978, §§ 45-5-201 through 45-5-204
Concealed Weapons M.C.A. 1978, §§ 45-8-316 through 45-8-331

Library References

Weapons Key No. 4, 6
C.J.S. Weapons, §§ 1 et seq.

Notes of Decisions

In General

Metal pipe used to beat up fellow inmate held to be a "billy" or club, the unauthorized possession of which is prohibited to prison inmates by M.C.A. 1978, §

45-8-318. The court, therefore, did not decide whether the pipe fit within the category of "other deadly weapon," the unauthorized possession of which is also prohibited to prison inmates. State v. Perry, ____ Mont. ____, 590 P.2d 1129, 1131 (1979).

Sufficiency of Evidence

Where no evidence was presented concerning the size, weight or shape of the projectile which struck the victim nor of the velocity at which the slingshot was capable of propelling the projectile and where it only inflicted a bruise on the jaw of the victim and where no hospitalization was required or bones broken, the evidence was insufficient as a matter of law to prove that the assault was committed with a weapon capable of being used to produce death or serious bodily injury. State v. Deshner, ____ Mont. ____, 573 P.2d 172, 174 (1977).

(66) "Witness" means a person whose testimony is desired in any official proceeding, in any investigation by a grand jury, or in a criminal action, prosecution, or proceeding.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(67), Sec. 1, Ch. 513, Laws of Montana 1973
Amended:	Sec. 10, Ch. 359, Laws of Montana 1977
Source:	R.C.M. 1947, § 94-9001, repealed, Sec. 32, Ch. 513, Laws of Montana 1973
Prior Law:	R.C.M. 1947, § 94-9001, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This subsection is a recodification of the term "witness" as defined in former section 94-9001. In the new Criminal Code, the term is used in the section on Tampering With Witnesses and Informants (M.C.A. 1978, § 45-7-206) and the renumbered sections on Witnesses From Without State (M.C.A. 1978, §§ 46-15-112, 46-15-113). This definition, when ~~r~~ead together with the substantive provision on Tampering, prohibits any attempts to induce anyone about to give any testimony at an "official proceeding" (see M.C.A. 1978, § 45-2-101(38)) to give false testimony, to withhold testimony, to elude legal process, or to absent himself from any governmental proceeding.

Cross References

Tampering with witnesses and informants M.C.A. 1978, § 45-7-206

Summoning witnesses to testify M.C.A. 1978, §§ 46-15-112 through 46-15-114
Definition of "official proceeding" M.C.A. 1978, § 45-2-101(38)

Library References

Witnesses Key No. 6
C.J.S. Witnesses, § 1

45-2-102. Substitutes for negligence and knowledge. When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

Historical Note

Enacted: M.C.C. 1973, § 94-2-110, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 2.02(5)

Prior Law: None

Criminal Law Commission Comment

This section is intended to obviate any possible misunderstanding as to what mental state will satisfy the requirements of each statutory provision. Proof of the higher or more specific mental state will satisfy any lesser mental state that may be required by a particular statute.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "negligently" M.C.A. 1978, § 45-2-101(31)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
General requirements of criminal act and mental state M.C.A. 1978, § 45-2-103

Law Review Commentaries

Comment. General requirements of culpability. Model Penal Code, Tentative Draft No. 4, § 2.02, p. 123 (April 25, 1955).

45-2-103. General requirements of criminal act and mental state. (1) A person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in subsections (27), (31), and (52) of 45-2-101. The existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense.

(2) If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements thereof, the prescribed mental state applies to each such element.

(3) Knowledge that certain conduct constitutes an offense or knowledge of the existence, meaning, or application of the statute defining an offense is not an element of the offense unless the statute clearly defines it as such.

(4) A person's reasonable belief that his conduct does not constitute an offense is a defense if:

(a) the offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him;

(b) he acts in reliance upon a statute which later is determined to be invalid;

(c) he acts in reliance upon an order or opinion of the Montana supreme court or a United States appellate court later overruled or reversed; or

(d) he acts in reliance upon an official interpretation of the statute, regulation, or order defining the offense made by a public officer or agency legally authorized to interpret such statute.

(5) If a person's reasonable belief is a defense under subsection (4), nevertheless he may be convicted of an included offense of which he would be guilty if

the law were as he believed it to be.

(6) Any defense based upon this section is an affirmative defense.

Historical Note

Enacted: M.C.C. 1973, § 94-2-103, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 11, Ch. 359, Laws of Montana 1977; Sec. 1, Ch. 580, Laws of Montana 1979.

Source: Ill. C.C. 1961, Title 38, §§ 4-3, 4-8; M.P.C. 1962, § 2.04

Prior Law: None

Annotator's Note

Except in cases where absolute liability is imposed (M.C.A. 1978, § 45-2-104), the new Criminal Code requires, for conviction, that it be established that the act was done voluntarily with one of the three defined mental states--"purposely" (M.C.A. 1978, § 45-2-101(52)), "knowingly" (M.C.A. 1978, § 45-2-101(27)), or "negligently" (M.C.A. 1978, § 45-2-101(31)). This subsection, which is substantially similar to the Illinois and Model Penal Code sources, lists in subsections (1) and (2) the requirements for mental states in the new Code and how these requirements for mental states are to be applied to the individual provisions. Subsections (3) and (4) delineate those instances in which mistake of law will be allowed as a defense. Attention is directed to the new "Montana Administrative Procedure Act," M.C.A. 1978, Title 2, Chapter 4, for the effectiveness of unpublished administrative rules.

The 1977 amendment changed the reference to subsections of R.C.M. 1947, § 94-2-101 (now M.C.A. 1978, § 45-2-101) in subsection 45-2-103(1) to conform to the change in numbering of the subsections of 45-2-101. The 1977 amendment also changed the tense of "prescribes" in subsection (2) from past to present tense and made minor changes in phraseology and punctuation. The 1979 amendment added the last sentence of § 45-2-103(1).

Criminal Law Commission Comment

The accurate description of the mental states which are elements of the various specific offenses is one of the most difficult problems in the preparation of a criminal code.

In a number of other states, efforts have been made to simplify the description of mental states, by defining a small number of terms and using them uniformly throughout the criminal code, with appropriate qualifying language where necessary to describe accurately a particular offense. Subsection (2) provides a general rule for interpretation of statutory references to mental state in defining specific offenses. Often, a single mental state word, such as "knowingly" is placed in a position where grammatically it may apply to all elements of the offense. To so apply it for the purpose of legal interpretation seems logical, since the purpose

that it shall not apply to certain elements of the offense may be expressed readily by a different sentence structure. Subsection (3) states the accepted rule that in the absence of a statutory requirement, knowledge of the law is not an element of the offense. A person's liability for an offense does not depend upon his knowing that his conduct constitutes an offense, or knowing of the existence, meaning, or application of the defining statute. A reasonable reliance upon a statute later determined to be invalid, or upon an authoritative statutory interpretation, later determined to be invalid or erroneous is a defense. Clearly, the state should not punish as criminal, conduct which, according to a formally expressed statement of its duly authorized agents, is not illegal. Proof of the facts upon which such a defense is based should not be difficult, nor should determination of the reasonableness of the defendant's reliance; and since the enactment or interpretation relied upon would be of a public and official nature, collusion to avoid criminal liability seems unlikely. When ignorance or mistake is recognized as a defense, the defendant may be convicted of an included offense which does not involve the mental state negatived by the ignorance or mistake.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "negligently" M.C.A. 1978, § 45-2-101(31)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Absolute liability M.C.A. 1978, § 45-2-104
Montana Administrative Procedure Act M.C.A. 1978, Title 2, Chapter 4

Library References

Criminal Law Key No. 20 et seq., 32, 33
C.J.S. Criminal Law, §§ 29 et seq., 47, 48

Law Review Commentaries

Fingarette. The concept of mental disease in criminal law insanity tests. 33 U. Chicago L. Rev. 229 (1966)

Marcus. Conspiracy: The state of mind crime--intent and proving intent. 1976 Ill. L. F. 627 (1976)

Comment. Ignorance or mistake as a defense. Model Penal Code, Tentative Draft No. 4, § 2.04, p. 135 (April 25, 1955)

Notes of Decisions

Construction and Application

The two essential elements in all criminal offenses are a voluntary act and a mental state. People v. Gray, 36 Ill. App.3d 720, 344 N.E.2d 683 (1976), aff'd 69 Ill.2d 44, 370 N.E.2d 797 (1977), cert. denied 435 U.S. 1013 (1978). Criminal intent is an essential element of crimes, other than certain non-true crimes. People v. Arron, 15 Ill. App.3d 645, 305 N.E.2d 1 (1973). As a general rule criminal

liability requires one of three culpable mental states--knowingly, purposely, or negligently. However, the event of driving a motor vehicle while operator's license is suspended has been held to involve absolute liability and mental state is not involved in the offense. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 868 (1969). Because a defendant's mental state is often difficult to determine, it has been held that in a homicide prosecution the defendant's mental state could be deduced from the facts surrounding the killing when the defendant did not testify as to his thoughts, intuition, or fears. People v. Woods, 131 Ill. App.2d 54, 268 N.E.2d 246 (1971). Circumstances of defendant's involvement in crime are relevant in determining his state of mind. People v. Hendrix, 18 Ill. App.3d 838, 310 N.E.2d 798 (1974).

Indictment and Information

If statutory definition of an offense includes mental state with which the act is committed as an element of the offense, that knowledge or mental state must be alleged in the indictment charging the offense. People v. Mager, 35 Ill. App.3d 306, 341 N.E.2d 389 (1976). As a general rule, an indictment which fails to allege the required mental state as prescribed by statute or to describe the acts which indicate such mental state is fatally defective. People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378, 382 (1970). Thus, where conduct alleged in the indictment may itself be wholly innocent, it is essential that the unlawfulness of the conduct be stated either by an express allegation or by the use of terms or facts which clearly imply such unlawfulness. People v. Campbell, 3 Ill. App.3d 984, 279 N.E.2d 123, 124 (1972). However, it was held to be unnecessary that a mental state defined by statute for the choate offense be alleged in specific terminology in an indictment for attempt to commit that offense. People v. Sanders, 7 Ill. App.3d 848, 289 N.E.2d 110 (1972). Where the offense is one for which absolute liability is provided, such as driving a motor vehicle while operator's license is suspended, it is not necessary for the mental state to be alleged in the information. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 868 (1969).

Instructions

Jury instruction approved on the defense of justification in prosecution for escape, which required that the defendant be faced with a specific threat of death or substantial bodily injury in the immediate future in order to be justified in his escape. The standard to be imposed is objective rather than subjective in accordance with decisions of the California Court of Appeals. State v. Streit, ____ Mont. ____, 576 P.2d 264, 266 (1978). The giving of an instruction that it is unlawful for a person to sell any narcotic drug except if authorized by the Uniform Narcotics Drug Act inadequately instructed jurors regarding the elements of the crime of unlawful sale of a narcotic drug, because it omitted the element of the crime relating to the defendant's mental state. People v. Lewis, 112 Ill. App.2d 1, 250 N.E.2d 812, 817 (1969). Where the defendant was being tried for an offense for which absolute liability was imposed, instructions relating to mental state and condition of the defendant who was being tried for driving a motor vehicle while his operator's license was suspended were properly refused. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 869 (1969).

Defenses

In prosecution for escape where defendant claimed necessity or justification

as a defense. The Montana court held that under Montana law the defense of justification is an affirmative defense which must be proved by the defendant by a preponderance of the evidence. State v. Streit, ____ Mont. ____, 576 P.2d 264, 266 (1978).

45-2-104. Absolute liability. A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in subsections (27), (31), and (52) of 45-2-101 only if the offense is punishable by a fine not exceeding $500 and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

Historical Note

Enacted: M.C.C. 1973, § 94-2-104, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 12, Ch. 359, Laws of Montana 1977

Source: Ill. C.C. 1961, Title 38, § 4-9

Prior Law: None

Annotator's Note

Under the new Criminal Code, most offenses require some degree of culpability, either "purposely," "knowingly," or "negligently" (M.C.A. 1978, §§ 45-2-101(52), (27) (31)), for criminal liability to be imposed. This section provides that when all that is required by a statute is the commission of a specified act without any mental state, such a "strict liability" offense can be no more than a misdemeanor. The wording for this section is quite similar to the Illinois source.

The 1977 amendment changed the references to subsections of R.C.M. 1947, § 94-2-101 (now M.C.A. 1978, § 45-2-101) in subsection (1) to conform to the change in the numbering of the subsections of § 94-2-101 (now § 45-2-101).

Criminal Law Commission Comment

This section is intended to establish strict limitations upon the elimination of a mental state as an element of an offense. Most states have numerous statutes which impose upon the courts the responsibility of determining, as to each such provision, either that mental state is or is not an element, or (particularly in the more serious offenses) that the legislature intended that a particular mental state be implied. (See the careful study of the Wisconsin statutes by Remington, "Liability Without Fault Criminal Statutes," 1956 Wis. L. Rev. 625.) Many such provisions are found in legislation of a regulatory nature, involving

the sale of specified kinds of property to designated classes of persons or to the public, the commission of nuisances, the violation of laws concerning motor vehicles, health and safety, and fish and game laws.

In the old code numerous statutes failed to specify the mental state required and no adequate rule existed for determining whether a particular provision, not interpreted by the court was to be regarded as implying a particular mental state or as imposing absolute liability. (The usual methods of interpretation are summarized in Remington, "Liability Without Fault Criminal Statutes," 1956 Wis. L. Rev. 625 at 629 to 632.)

Section 45-2-104 represents only a partial solution of the problem--a restrictive rule of interpretation. Another part of the solution is in the rephrasing of code provisions which define specific offenses, to indicate clearly the intended mental state and the offenses in which mental state, for some cogent policy reason, is not an element.

Absolute liability is authorized for those offenses in which incarceration is not part of the penalty, and the fine is less than five hundred dollars ($500.00). Many of the old Montana code provisions which do not require proof of specified mental state are in this category, as are many of the penal provisions appearing outside of the Criminal Code. The difficulty of enforcing such provisions if a mental state must be proved may justify the conclusion that the omission of a mental state requirement is intended to create absolute liability. (See Model Penal Code, Draft No. 4, comment on ¶2.05 at page 145; Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55 at 68 to 72, 78 and 79 (1933)).

In addition to restricting absolute liability to offenses not punishable by incarceration or by a fine of more than five hundred dollars ($500.00), this section provides that only a clearly indicated legislative purpose to create absolute liability should be recognized, and in all other instances, a mental state requirement should be implied as an application of the general rule that an offense consists of an act accompanied by a culpable mental state, as provided in section 94-2-103(1), (2) and (3). (See Model Penal Code, Draft No. 4, comment on ¶2.05 at pages 145 and 146; Sayre, supra, at pages 68 to 72 and 79 to 83).

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "negligently" M.C.A. 1978, § 45-2-101(31)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Voluntary act M.C.A. 1978, § 45-2-202
General requirements of criminal act and mental state M.C.A. 1978, § 45-2-103

Library References

Criminal Law Key No. 20 et seq.
C.J.S. Crim. Law, §§ 29 et seq.

Law Review Commentaries

Comment. When culpability requirements are inapplicable to violations and offenses defined by other statutes; effect of absolute liability in reducing grade of offense to violation. Model Penal Code, Tentative Draft No. 4, § 2.05, p. 140 (April 25, 1955)

LaFave and Scott. Criminal Law § 31 (1972)

Note. Criminal liability without fault: A philosophical perspective. 75 Colum. L. Rev. 1517 (1975)

Packer. Mens rea and the Supreme Court. 1962 S.Ct. Rev. 107 (1962)

Remington. Liability without fault criminal statutes. 1956 Wis. L. Rev. 625 (1956)

Saltzman. Strict criminal liability and the U.S. Constitution: Substantive criminal law due process. 24 Wayne L. Rev. 1571 (1978)

Sayre. Public Welfare Offenses 33 Colum. L. Rev. 55 (1933)

Notes of Decisions

In General

To support a conviction under most sections of this Code proof of a mens rea is required. For example, the section on deceptive practices [§ 45-6-317], requires an intent to defraud. People v. Billingsley, 67 Ill. App.2d 292, 213 N.E.2d 765, 768 (1966). However, certain offenses, such as the violation of some vehicle code provisions, involve absolute liability without requiring any mental state. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 868 (1969). Statutes creating offenses involving strict criminal liability are neither unusual nor improper. People v. Lawrence, 17 Ill. App.3d 300, 308 N.E.2d 52 (1974).

Part II--Other Factors Affecting Individual Liability

45-2-201. Causal relationship between conduct and result. (1) Conduct is the cause of a result if:

(a) without the conduct the result would not have occurred; and

(b) any additional causal requirements imposed by the specific statute defining the offense are satisfied.

(2) If purposely or knowingly causing a result is an element of an offense and the result is not within the contemplation or purpose of the offender, either element can nevertheless be established if:

(a) the result differs from that contemplated only in the respect that a

different person or different property is affected or that the injury or harm caused is less than contemplated; or

(b) the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

(3) If negligently causing a particular result is an element of an offense and the result is not within the risk of which the offender is aware or should be aware, either element can nevertheless be established if:

(a) the actual result differs from the probable result only in the respect that a different person or different property is affected or that the actual injury or harm is less; or

(b) the actual result involves the same kind of injury or harm as the probable result, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

Historical Note

Enacted: M.C.C. 1973, § 94-2-105, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 2.03

Prior Law: None

Annotator's Note

This section is substantially the same as the Model Penal Code source. While the principle set forth in this section on causal relationships is generally thought to be common knowledge, there was in fact no statutory provision concerning the subject in the old Code. The mental state terms used in this section are defined in M.C.A. 1978, § 45-2-101 as follows: "Conduct" (8), "knowingly" (27), "purposely" (52), and "negligently" (31).

Criminal Law Commission Comment

This section is concerned with offenses that are so defined that causing a

particular result is a material element of the offense. Subsection (1)(a) treats cause-in-fact as the causal relationship normally regarded as sufficient to create culpability. When concepts of "proximate cause" disassociate the offender's conduct and the result which was cause-in-fact, the reason for limiting culpability is the conclusion that the actor's culpability with reference to the result, i.e., his purpose, knowledge, or negligence, was such that it would be unjust to permit the result to influence his liability or the gravity of the offense. Problems of this kind should be faced as problems of the culpability required for conviction and not as problems of causation.

Subsection (1)(b) contemplates that the general rule of (1)(a) may be unacceptable when dealing with particular offenses. In this event additional causal requirements may be imposed explicitly. Subsections (2) and (3) are drafted on the theory that there is a need to systematize rules that have developed when there is a variance between the actual result and the result sought, contemplated or probable under the circumstances. These subsections assume that liability requires purpose, knowledge or negligence with respect to the result which is an element of the offense. Subsections (2)(b) and (3)(b) make no attempt to catalogue possibilities like intervening or concurrent causes, etc. They set out an ultimate criterion, whether the result was too accidental to have a bearing on the actor's liability or the gravity of the offense. Since the actor has sought a criminal result or has been negligent with respect to that result, he will be guilty of some offense even if he is not held for the actual result. There is an advantage to permit the jury to face the issue squarely with their own sense of justice, e.g., where the defendant shoots his wife and in the hospital she contracts a disease and dies. Her death may be thought to have been rendered substantially more probable by the defendant's conduct yet a jury could regard it as too remote to convict the defendant of murder. It should be noted that the maximum potential punishment for attempt is the same as for the underlying offense, thus placing greater emphasis on purpose than result. See section 94-4-103 [now M.C.A. 1978, § 45-4-103].

Cross References

Definition of "conduct" M.C.A. 1978, § 45-2-101(8)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "negligently" M.C.A. 1978, § 45-2-101(31)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Law Review Commentaries

Comment. Causal relationship between conduct and result; Divergence between result designed or contemplated and actual result or between probable and actual result. Model Penal Code, Tentative Draft No. 4, § 2.03, p. 132 (April 25, 1955)

H.L.A. Hart and Honore. Causation in the Law 361 (1959)

Michael and Wechsler. A rationale of the law of homicide. 37 Colum. L. Rev. 1261 (1937)

Mueller. Causing criminal harm. Essays in Criminal Science 169, 185 (1960)

45-2-202. Voluntary act. A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing. Possession is a voluntary act if the offender knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient time to have been able to terminate his control.

Historical Note

Enacted: M.C.C. 1973, § 94-2-102, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, §§ 4-1, 4-2

Prior Law: R.C.M. 1947, § 94-117, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on "voluntary act" has been taken directly from the Illinois source. The provision recodifies former Montana law, R.C.M. 1947, § 94-117. Because criminal liability requires a voluntary act, except in certain statutes where absolute liability is imposed, that an act was done involuntarily (M.C.A. 1978, § 45-2-101(25)), such as during a seizure, constitutes a defense. A thorough discussion of this section is included in the Commission Comments below.

Criminal Law Commission Comment

The minimum elements of any offense (other than one in which absolute liability for an act alone is imposed) are described as a voluntary act and a specified state of mind. See R.C.M. 1947, section 94-117.

The word "act" is sometimes used loosely to describe not only the person's physical movement, but also certain attendant circumstances and the consequence of the movement. However, in the interest of accurate expression these three components should be separately designated, and "act" should be limited to the relevant physical movements. A further narrowing of the use of the term in a criminal code arises from the fact that a muscular movement may be voluntary ("willed") or involuntary--a physical reflex or compelled motion which is not accompanied by the volition of the person making the motion. Only the voluntary act gives rise to criminal liability. In this code, "act" is used in the narrow sense and with the accompanying mental state, is referred to as "conduct." An "omission" to take some action required by law is distinguished sometimes from an "act," since it denotes lack of physical movement. However, an omission necessarily is defined by describing the act of commission which is omitted; and if the distinction is

made, then the phrase "act or omission" must be used each time reference is made to a person's physical behavior, unless the reference is only to a positive movement, or only to the lack of required movement. Consequently, the use of "act" to include "omission" seems reasonable, and clearly is more convenient. Perkins, "Negative Acts in Criminal Law," 22 Iowa L. Rev. 95 at 107 (1934). This usage, of course, does not preclude the specific reference to an omission when the failure to perform a duty imposed by law is the substance of a particular offense. The criminal law is concerned only with the voluntary phase--the purposeful or negligent omission to perform a duty which the person is capable of performing.

Possession is another aspect of behavior which, while it does not necessarily involve a physical movement is conveniently brought within the definition of "act" when it refers to maintaining control of a physical object. Again, only the voluntary aspect is significant--a consciousness of purpose, derived from knowingly procuring or receiving the thing possessed, or awareness of control thereof for a sufficient time to enable the person to terminate his control. An examination of the former Montana statutory provisions prohibiting possession indicates the suitability of this usage. Some of the provisions in the present law flatly prohibit possession of specified objects, without reference to any accompanying mental state. (E.g., section 94-8-211 [now M.C.A. 1978, § 45-8-316], carrying firearm; section 54-133 [now M.C.A. 1978, § 45-9-102], narcotics; section 94-8-404 [now M.C.A. 1978, § 23-5-103], gambling device; section 94-8-202 [now M.C.A. 1978, § 45-8-303], machine gun.) Others denounce possession with intention to accomplish a specified purpose, such as sale or the commission of another offense. (E.g., section 94-6-205 [now M.C.A. 1978, § 45-6-205], possession of burglary tools; section 94-8-110 [now M.C.A. 1978, § 45-8-201], obscenity.) A few analogous situations involve the ownership or possession of real property used for prohibited purposes.

Cross References

Definition of "act" M.C.A. 1978, § 45-2-101(1)
Definition of "conduct" M.C.A. 1978, § 45-2-101(8)
Definition of "involuntary act" M.C.A. 1978, § 45-2-101(25)
Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Absolute liability M.C.A. 1978, § 45-2-104

Library References

Criminal Law Key No. 1, 20, 26
C.J.S. Crim. Law, §§ 2, 3, 29 et seq., 37

Law Review Commentaries

Perkins. Negative acts in criminal law. 22 Iowa L. Rev. 95 (1934)

Comment. Disposition of the youthful offender. 47 Nw. L. Rev. 224 (1952)

Levy. Criminal responsibility of individuals and international law. 12 U. Chi. L. Rev. 313 (1945)

Silber. Being and doing: A study of status responsibility and voluntary responsibility. 35 U. Chi. L. Rev. 47 (1967)

Wasserstrom. H.L.A. Hart and the doctrines of mens rea and criminal responsibility. 35 U. Chi. L. Rev. 92 (1967)

Notes of Decisions

In General

A cornerstone of the defense of involuntary conduct is that a person, in a state of automatism, who lacks the volition to control or preven his conduct cannot be criminally responsible for the involuntary act. People v. Spani, 46 Ill. App.3d 777, 361 N.E.2d 377 (1977). Automatism, manifested by performance of involuntary acts that can be of a simple or complex nature, is not insanity. People v. Grant, 46 Ill. App.3d 125, 360 N.E.2d 809 (1977) rev'd. on other grounds 71 Ill.2d 551, 377 N.E.2d 4 (1978). Generally, if a person voluntarily commits an unlawful act, and while so doing inflicts personal injury, he is held to be criminally liable. People v. Allen, 117 Ill. App.2d 20, 254 N.E.2d 103, 107 (1969). It is a material element of virtually every criminal offense that the act be done voluntarily. People v. Ball, 126 Ill. App.2d 9, 261 N.E.2d 417, 418 (1970). Because this section defining a voluntary act includes the omission of the performance of a duty imposed by law, it has been held that the contention of a tax collector that he could not be found guilty of official misconduct because he was not shown to have done any act was ineffectual. People v. Haycraft, 3 Ill. App.3d 974, 278 N.E.2d 877, 883 (1972). While there has been no ruling to date defining in broad terminology when conduct becomes involuntary, it has been held that evidence that a defendant was a homosexual who used homosexuality as a way of dealing with his problems, and that therefore he had limited control over his impulses, did not support the defendant's contention that his admitted deviate sexual assault was involuntary. People v. Jones, 43 Ill.2d 113, 251 N.E.2d 195, 197 (1969).

Due Process

The Illinois Supreme Court has held that a defendant was not denied due process by failure of the court to raise sua sponte the issue of the voluntariness of deviant sexual assault by the defendant, when it later became known to the court that defendant was a homosexual, where there was no evidence of the defendant's insanity or his lack of competence to stand trial. People v. Jones, 43 Ill.2d 113, 251 N.E.2d 195, 198 (1969).

Possession as Voluntary Act

This section provides that physical possession which gives the defendant immediate and exclusive control of contraband is sufficient to show possession; however, the Illinois courts have ruled that possession need not always be actual possession. Constructive possession is sufficient where it can be shown that the defendant had the property under his dominion and control. People v. Archibald, 3 Ill. App.3d 591, 279 N.E.2d 84, 87 (1972); People v. Cogwell, 8 Ill. App.3d 15, 288 N.E.2d 729, 730 (1972). See also, People v. Szymezak, 116 Ill. App.2d 384, 253 N.E.2d 894 (1969). Illinois courts have held that to apply doctrine of constructive possession, it must be shown that defendant had immediate exclusive control of area or premises where items allegedly possessed were situated. People v. Day, 51 Ill. App.3d 916, 366 N.E.2d 895 (1977). See also, People v. Collier, 17 Ill. App.3d 21, 307 N.E.2d 678 (1974). However, the Montana court has held

that exclusive, immediate personal possession is not essential to establish constructive possession. State v. Trowbridge, 157 Mont. 527, 530, 487 P.2d 530 (1971). There is contructive possession when the person charged with possession has dominion and control over the goods although they were not in his actual, physical possession. Id. It is not necessary to show that defendant was in actual physical possession, or had exclusive control over the goods. It is sufficient that it be shown either by direct or circumstantial evidence, that defendant did have the right to exercise control over the contraband. Id. at 531. Testimony that defendant presented pas enger copy of flight ticket, together with baggage claim tag, is in and of itself sufficient to establish constructive possession of contraband in suitcase. Id. at 529, 530. Possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. State v. Meader, ____ Mont. ____, 601 P.2d 386 (1979). Evidence showing that defendant was present in same room where drugs were found and evidence that connected defendant with the premises (i.e. mail addressed to defendant at the premises, personalized license plates bearing defendant's nickname, men's clothing which would fit defendant and belief of landlady that defendant resided at the premises) held sufficient to show defendant's control over the premises and constructive possession of the drugs. Id. An Illinois court has pointed out that while presence of others does not necessarily negate constructive possession of contraband, equal access of others to the contraband can act to defeat constructive possession. People v. Cogwell, 8 Ill. App.3d 15, 288 N.E.2d 729 (1972).

Instructions

Where there is no evidence to indicate that the defendant's drugged condition was involuntarily produced, his requested instruction to the effect that a person in a drugged condition is not responsible for his conduct was properly refused. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 869 (1969).

45-2-203. Responsibility--intoxicated or drugged contition. A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

Historical Note

Enacted: M.C.C. 1973, § 94-2-109, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 53, Ch. 329, Laws of Montana 1974

Source: Ill. C.C. 1961, Title 38, § 6-3; R.C.M. 1947, §§ 94- 01(1), 94-119

Prior Law: R.C.M. 1947, §§ 94-119, 94-201, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Section 45-2-203 contains two principles of law concerning i toxication as a defense. The first sentence states the general rule that voluntary intoxication is not a defense and limits the defense of involuntary intoxication only to those situations in which the intoxication has rendered the accused mentally incompetent. Sentence two states the exception to the general rule to intoxication as a defense, by providing that where an offense requires a specific mental state, the intoxicated state of the offender may be considered as a factor in determining whether that required mental state has been established. For example, voluntary intoxication would not be a defense for Negligent Homicide (M.C.A. 1978, § 45-5-104) caused by drunk driving because the crime does not require a specific mental state but instead provides that responsibility stems from the negligent act itself--driving while intoxicated. Voluntary intoxication could be a factor in Deliberate H micide to determine whether the required mental state of "knowingly" or "purposely" has been established. This subsection is somewhat narrower than prior law concerning involuntary intoxication by requiring proof of mental incompetency before a complete defense is raised. Since intoxication may be taken into consideration in determining the existence of a mental state which is an element of the offense, proof of intoxication might reduce the grade of some offenses. However, because the concept of specific intent is deleted from the law, the defendant's intoxication would have to be so debilitating that he was 1) "deprived of the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law [see M.C.A. 1978, Title 46, Chapter 14], or 2) unaware of his conduct or existing circumstances [see § 45-2-101(27)]. In the offense of deliberate homicide, premeditation, deliberation and malice aforethought have been deleted. Nevertheless, recent Montana decisions indicate that the doctrine of State v. Palen, 119 Mont. 600, 178 P.2d 862 (1947), decided under former law, that voluntary intoxication may be a defense in a murder case where specific intent is an essential element of the crime charged, is alive and well to some extent. In both State v. Gone, ____ Mont. ____, 587 P.2d 1291 (1978) and State v. Hardy, ____ Mont. ____, 604 P.2d 792 (1980) the defense of intoxication was raised as precluding the existence of the mental state which was an element of the offense charged. In Hardy the contested element was "purpose to commit an offense . . ." in an occupied structure (burglary) while in Gone the element was "purposely or knowingly causing apprehension." In each case the court pointed to evidence that showed activity by the defendant near the time of the offense which indicated that he was acting consciously and with apparent knowledge of his objectives. Certain mental states, such as "purpose," are viewed by the court as specific enough to be the equivalent of the mental state in Palen. The new cases are open to the construction that even "knowledge" might be defeated by this defense, but the court's emphasis on the conscious nature of the defendant's behavior in Gone and Hardy, indicates at least that it would be very hard to negative "knowledge" without being unconscious or otherwise reduced to purely automatic behavior.

The 1974 amendment deleted former subsection (1) which read: "No person is capable of commi ting any offense unless he has attained his sixteenth birthday at the time the act in question was committed. Any person who has not yet attained his eighteenth birthday shall be subject to the law as provided in Title 10, Chapter 6, R.C.M. 1947"; and deleted subsection designation (2).

Criminal Law Commission Comment

Chapter 5 of Title 95 [now Chapter 14 of Title 46], Competency of the Accused, completes the coverage of this section.

Subsection (2) is taken from Illinois Criminal Code, Chpater 38, section 6-3. This imposes a stricter limitation th n the old code section 94-119(1). Instead of involuntary intoxication being a defense it is necessary for the accused to also prove that he was thereby made mentally incompetent. The second sentence of paragraph (2) makes it clear that intoxication is no defense but is merely a fact which the jury can cons der in determining the existence of a particular mental state. When intoxication has proceeded so far as to render the accused incapable of forming the particular mens rea required for the offense, the defendant is entitled to be acquitted on that charge.

Cross References

Robbery M.C.A. 1978, § 45-5-501
Definition of "intoxicating substance" M.C.A. 1978, § 45-2-101(24)
Mental competency of accused M.C.A. 1978, Title 46, Chapter 14

Library References

Infants Key No. 16, 18
Criminal Law Key No. 46, 53 et seq.
C.J.S. Crim. Law, §§ 55, 66, 621

Law Review Commentaries

Comment. LSD--Its effect on criminal responsibility. 17 DePaul L. Rev. 365 (1968)

Comment. Narcotics addiction and criminal responsibility in Illinois. 1963 U. Ill. L. F. 273 (1963)

Note. Criminal prosecution of chronic alcoholic for public drunkeness is cruel and unusual punishment. 1966 U. Ill. L. F. 767 (1966)

Paulsen. Intoxication as a defense to crime. 1961 U. Ill. L. F. 1 (1961)

Scrignar. Tranquilizers and the psychotic defendant. 53 A.B.A.J. 43 (1967)

Notes of Decisions

In General

As developed by the cases cited below, voluntary intoxication in Montana is generally no defense to a criminal charge. See State v. Warrick, 152 Mont. 94, 446 P.2d 916 (1968); Alden v. State, 234 F. Supp. 661 (D. Mont. 1964); State v. Brooks, 150 Mont. 399, 436 P.2d 91 (1967); State v. Palen, 119 Mont. 600, 178 P.2d 862 (1947); State v. Kirkaldie, ____ Mont. ____, 587 P.2d 1298 (1978). Whether or not a defendant's intoxicated state prevented him from forming the necessary criminal intent to commit an offense is a factual issue to be determined by the jury. State v. Austad, 166 Mont. 425, 430, 533 P.2d 1069 (1975); State v. Hardy, ____ Mont. ____, 604 P.2d 792 (1980). Where the jury has been properly instructed and there is sufficient credible evidence to support its findings, the question of the relationship of voluntary intoxication to specific intent will not be reconsidered on appeal. Id.; State v. Gone, ____ Mont. ____, 587 P.2d 1291 (1978). Unlike deliberate homicide, which requires that the offense be committed purposely or knowingly, negligent homicide only requires a gross deviation from a reasonable standard of care, i.e. criminal negligence, which can arise as a result of intoxication. State v. Kirkaldie, ___ Mont. ____, 587 P.2d 1298 (1978). For a discussion of the distinction between alcoholism-caused insanity and the defense allowed by this section, see State v. Ostwald, ____ Mont. ____, 591 P.2d 646 (1979).

Instructions

Instruction as to involuntary intoxication was properly refused in negligent homicide case where no evidence of involuntary intoxication was presented. State v. Kirkaldie, ____ Mont. ____, 587 P.2d 1298 (1978). Where the jury has been properly instructed and there is sufficient credible evidence to support its findings, the question of the relationship of voluntary intoxication to specific intent will not be reconsidered on appeal. State v. Hardy, ____ Mont. ____, 604 P.2d 792 (1980); State v. Gone, ____ Mont. ____, 587 P.2d 1291 (1978).

Sufficiency of Evidence

Evidence that shows activity by defendant near the time of the offense which indicated that he was acting consciously and with apparent knowledge of his objectives held sufficient to allow jury to find defendant acted with the requisite mental state, despite defendant's contention that his intoxicated state precluded such a mental state and despite evidence of intoxication. State v. Hardy, ____ Mont. ____, 604 P.2d 792 (1980); State v. Gone, ____ Mont. ____, 587 P.2d 1291 (1978).

Guilty Pleas

Where the district court had before it evidence of mitigating circumstances (i.e. evidence that defendant was under the influence of a combination of drugs and alcohol and was possibly suffering from mental distress or instability) which may have prevented defendant from being able to commit an aggravated assault as defined by statute, it should have permitted defendant to withdraw his previously entered plea of guilty to the offense charged. State v. Nelson, ____ Mont. ____, 603 P.2d 1050 (1979).

45-2-204 through 45-2-210 reserved.

45-2-211. Consent as a defense. (1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense.

(2) Consent is ineffective if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense;

(b) it is given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;

(c) it is induced by force, duress, or deception; or

(d) it is against public policy to permit the conduct or the resulting harm, even though consented to.

Historical Note

Enacted: M.C.C. 1973, § 94-2-111, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 13, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: None

Annotator's Note

It is an element of the sexual offenses of Sexual Assault and Sexual Intercourse Without Consent (M.C.A. 1978, §§ 45-5-502, 45-5-503) that the sexual act was committed without the consent of the victim. Thus, consent is a defense which may eliminate criminal responsibility. Subsection (2)(a) provides that certain persons are deemed to be legally incapable of giving consent regardless of actual acquiescence. Subsection (2)(b) protects the y ung and the helpless from their own incapacities. Subsection (2)(c) provides that consent which is forcibly compelled is ineffective. Subsection (2)(d) covers those situations when, for reasons of public policy, such as in "statutory rape" (now covered by M.C.A. 1978, § 45-5-503), certain conduct is prohibited irrespective of consent. The 1977 amendment inserted "it is given by a person who" at the beginning of subsection (2)(b) and made minor changes in punctuation and phraseology.

Criminal Law Commission Comment

Victim consent may eliminate criminal responsibility. However, not every consent is legally valid. The state has an obligation to protect the young and the helpless from their own incapacities. For reasons of public policy, the state may prohibit some conduct absolutely irrespective of anyone's consent.

Cross References

Sexual crimes M.C.A. 1978, §§ 45-5-501 through 45-5-506

Library References

Rape Key No. 8 et seq.
C.J.S. Rape, §§ 11 et seq.

Law Review Commentaries

Schwartz. Morals offenses and the Model Penal Code. 63 Colum. L. Rev. 669 (1963)

Note. The proposed penal law of New York--Sex offenses. 64 Colum. L. Rev. 1469, 1539 ff. (1964)

Ploscowe. Sex offenses in the new penal law--Lack of consent. 32 Brooklyn L. Rev. 274, 276 (1966)

45-2-212. Compulsion. A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or serious bod-

ily harm if he reasonably believes that death or serious bodily harm will be inflicted upon him if he does not perform such conduct.

Historical Note

Enacted: M.C.C. 1973, § 94-3-110, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 7-11

Prior Law: None

Annotator's Note

The wording for this section is substantially similar to the first paragraph of the Illinois source. The meaning of the section is explained fully below.

Criminal Law Commission Comment

Compulsion, coercion, or duress is another long-recognized basis for finding a person not guilty of an offense charged, although his conduct appears to be within the definition of the offense. The justification does not extend to action under threat of damage to property, or of injury less than serious bodily harm or even of death or serious bodily harm which is not imminent; but the person's reasonable fear of imminent death or serious bodily harm if mistaken, is within the principle. (See 1 Bishop on Criminal Law (9th ed.) ¶¶ 346 to 348.)

This established type of formulation has been criticized. However, to broaden the defense to accord completely with the "free will" theory would be to invite routine contentions of some kind of pressure, such as "threats of harm to property, reputation, health, general safety, and to acts done under the orders," with accompanying assertion of individual personality weakness. (Newman and Weitzer, "Duress, Free Will and the Criminal Law," 30 So. Cal. L. Rev. 313, 334 (1954).) Prof. Wharton, after stating the established restrictions upon the defense, comments: "It would be a most dangerous rule if a defendant could shield himself from prosecution for crime by merely setting up a fear from or because of threat of a third person." (1 Wharton's Criminal Law (19th ed.), ¶ 384.)

Library References

Criminal Law Key No. 38
C.J.S. Criminal Law, §§ 44, 49

Law Review Commentaries

Comment. Abolition of marital presumption of coercion. 2 DePaul L. Rev. 245 (1953)

Ellis. Basic aspects of legal incapacity. 1951 U. Ill. L. F. 189 (1951)

Note. Husband and wife--Disabilities and privileges of coverture--whether spouses who have entered into criminal conspiracy between them are immunized because of common law fiction of unity. 33 Chi.-Kent L. Rev. 278 (1955)

Weisiger. Tort liability of minors and incompetents. 1951 U. Ill. L. F. 227 (1951)

Notes of Decisions

In General

An alleged threat to a public official by his superiors that he would lose his position if he did not cooperate with state's attorney's office was ruled not to constitute compulsion sufficient to provide a defense for official's false testimony. People v. Ricker, 45 Ill.2d 562, 262 N.E.2d 456, 460 (1970). See also, People v. Lightning, 83 Ill. App.2d 430, 228 N.E.2d 104 (1967).

Defense to Charge of Escape

In order to establish a defense of compulsion to charge of escape, defendant must establish that (1) the defendant was faced with a threat of death or serious bodily injury (2) there was insufficient time to complain to prison authorities (3) there was insufficient time to resort to the courts (4) the prisoner immediately reported to the police when he obtained a position of safety. The defendant has the burden of proving each element by a preponderance of the evidence. State v. Stuit, ____ Mont. ____, 576 P.2d 264 (1978).

45-2-213. Entrapment. A person is not guilty of an offense if his conduct is incited or induced by a public servant or his agent for the purpose of obtaining evidence for the prosecution of such person. However, this section is inapplicable if a public servant or his agent merely affords to such person the opportunity or facility for committing an offense in furtherance of criminal purpose which such person has originated.

Historical Note

Enacted: M.C.C. 1973, § 94-3-111, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 7-12

Prior Law: None

Annotator's Note

This section has been taken directly from the Illinois source. It should be noted that if the officer only affords the opportunity to commit the offense after the offender himself originated the criminal purpose, entrapment has not occurred.

Criminal Law Commission Comment

The defense of entrapment generally follows the rule stated by the majority in the Sorrells case. (See "The Doctrine of Entrapment and Its Application in Texas," 9 Sw. L. J. 456 (1955); Note, 28 N.Y.U. L. Rev. 1180 (1953) recognizing three principal elements: (1) The idea of committing an offense originates, not with the suspect, but with the enforcement authorities, who (2) actively encourage the suspect to commit the offense, (3) for the purpose of obtaining evidence for his prosecution.)

Most of the cases in which entrapment has been alleged involved a course of conduct, resulting apparently in repeated offenses of the same type or in a continuing offense, such as violation of the Medical Practice Act, illegal sale of liquor or narcotics or explosives, larceny, and ticket scalping.

Library References

Criminal Law Key No. 37
C.J.S. Criminal Law, § 45

Law Review Commentaries

Comment. Administration of the affirmative trap and the doctrine of entrapment: Device and defense. 31 U. Chi. L. Rev. 137 (1963)

Comment. The defense of entrapment. 3 DePaul L. Rev. 100 (1953)

Comment. Due process of law and the entrapment defense. 1964 U. Ill. L. F. 821 (1964)

Comment. The doctrine of entrapment and its application in Texas. 9 Sw. L. J. 456 (1955)

Connelly. The proposed criminal codes: A prosecutor's point of view. 68 Nw. L. Rev. 825, 842 (1973)

Groot. The serpent beguiled me and I (without scienter) did eat--Denial of crime and the entrapment defense. 1973 U. Ill. L. F. 254 (1973)

Note. Lie detectors--Industrial use of the polygraph. 13 DePaul L. Rev. 287 (1963)

Note. Criminal law--Defense of entrapment. 28 N.Y.U. L. Rev. 1180 (1953)

Ranney. The entrapment defense: What hath the Model Penal Code wrought? 16 Duq. L. Rev. 157 (1977).

Notes of Decisions

In General

Entrapment is a valid defense for those instances in which police officers inspire, incite, persuade, or lure a defendant to commit a crime which he otherwise had no intention of perpetrating. People v. Toler , 24 Ill.2d 100, 185 N.E.2d 874, 875 (1962); People v. Gassaway, 65 Ill. App.2d 244, 212 N.E.2d 689 (1965); People v. McSmith, 178 N.E.2d 641, 23 Ill.2d 87 (1962); People v. Lewis, 26 Ill.2d 542, 187 N.E.2d 700 (1963). But, the law of entrapment distinguishes between trap for the unwary criminal and a trap set to ensnare the innocent and law abiding into committing a crime. People v. Gonzales, 125 Ill. App.2d 225, 260 N.E.2d 234, 237 (1970); People v. Jackson, 116 Ill. App.2d 304, 253 N.E.2d 527, 531 (1969).

"Entrapment" exists where officers of the law have conceived and planned the commission of a criminal activity and thus have incited, induced, instigated or lured the accused in the commission of an offense which he had no prior intention of committing except for the persuasion of the entrapper. People v. Wright, 27 Ill.2d 557, 190 N.E.2d 318 (1963); People v. Lewis, 26 Ill.2d 542, 187 N.E.2d 700 (1963); People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641 (1962); People v. Strong, 21 Ill.2d 320, 172 N.E.2d 765 (1961); People v. Cazaux, 119 Ill. App.2d 11, 254 N.E.2d 797, 799 (1969); People v. Gassaway, 65 Ill. App.2d 244, 212 N.E.2d 689, 692 (1965); People v. Cash, 26 Ill.2d 595, 188 N.E.2d 20, cert. den. 374 U.S. 813 (1968); People v. Hall, 25 Ill.2d 297, 185 N.E.2d 143, 145 (1962); United States v. Millpax, Inc., 313 F.2d 152, 156 (7th Cir. 1963). Thus, entrapment exists only when criminal intent originates in the mind of the entrapping officer and the accused otherwise had no criminal intent. People v. Dollen, 2 Ill. App.3d 567, 275

N.E.2d 446, 449 (1971); People v. Clay, 32 Ill.2d 608, 210 N.E.2d 221, 222 (1965). But, there is no entrapment where law enforcement officers merely provide an opportunity for the commission of a crime by one who is already so predisposed and in such cases it is proper for the police to use artifices to catch criminals. People v. McCloskey, 2 Ill. App.3d 892, 270 N.E.2d 126, supp. 274 N.E.2d 358 (1971); People v. Johnson, 66 Ill. App.2d 465, 214 N.E.2d 354 (1966); People v. Morgan, 98 Ill. App.2d 435, 240 N.E.2d 286 (1968); People v. Clay, 32 Ill.2d 608, 210 N.E.2d 221 (1965); People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641 (1962). An appeal to sympathy and friendship, without the necessary elements of culpability, does not constitute entrapment. People v. Washington, 81 Ill. App.2d 162, 225 N.E.2d 673 (1967), cert. den. 390 U.S. 991 (1968); People v. Hatch, 49 Ill. App.2d 177, 199 N.E.2d 81, 85 (1964); People v. Luna, 69 Ill. App.2d 291, 216 N.E.2d 473 (1966), rev'd. on other grounds 37 Ill.2d 299, 226 N.E.2d 586 (1967).

For application of the general principles stated above, attention is directed to the following additional cases: narcotics--People v. Hall, 25 Ill.2d 297, 185 N.E.2d 143, 145 (1962); People v. Brown, 95 Ill. App.2d 66, 238 N.E.2d 102, 104 (1968); People v. Toler, 26 Ill.2d 100, 185 N.E.2d 874, 875 (1962); People v. Wells, 25 Ill.2d 146, 182 N.E.2d 689 (1962); unlicensed professional practice--People ex rel. Ill. State Dental Soc. v. Taylor, 131 Ill. App.2d 492, 268 N.E.2d 463 (1971); gambling--People v. Hornstein, 64 Ill. App.2d 319, 211 N.E.2d 756 (1965); unauthorized sale of liquor--Roberts v. Illinois Liquor Control Commission, 58 Ill. App.2d 171, 206 N.E.2d 799, 803 (1965).

Elements of Entrapment

In order to establish entrapment the defendant must show (1) that the criminal intent originated in the mind of the informant (2) absence of a criminal intent originating in the mind of the defendant, and (3) that the defendant was lured into committing a crime he had no intention of committing. The defendant as a matter of law established these elements by showing (1) that a police informant developed a close friendship with the defendant, (2) that the informant used this friendship to induce the defendant to get him small amounts of drugs, (3) that the informant planned the "big buy"--the involvement in which the defendant was convicted of, (4) that the defendant was lured into this scheme by the informant's promise to use the proceeds to finance a trip to Utah where the Defendant would be provided a job, and (5) that there was no evidence that this defendant had ever been involved with drugs other than at the initiative of the informant. State v. Grenfell, 172 Mont. 345, 564 P.2d 171 (1977).

Intent as Negating Entrapment

The defense of entrapment is not available to one who has the intention and design to commit a criminal offense and who does commit the offense merely because a law officer, for the purpose of securing evidence, has afforded such a person the opportunity to commit the act. People v. Gassaway, 65 Ill. App.2d 244, 212 N.E.2d 689 (1965); People v. Gonzales, 125 Ill. App.2d 225, 260 N.E.2d 234 (1970); People v. Johnson, 56 Ill. App.2d 465, 214 N.E.2d 354 (1966); People v. Outten, 13 Ill.2d 21, 147 N.E.2d 284 (1958); People v. Wells, 25 Ill.2d 146, 182 N.E.2d 689 (1962); People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641, 642 (1962).

Denial of Offense

The defense of entrapment is incompatible with a claim that the defendant did not commit the acts with which he is charged. People v. Banks, 103 Ill. App.2d 180,

243 N.E.2d 669, 673 (1968); People v. Morgan, 98 Ill. App.2d 435, 240 N.E.2d 286 (1968); People v. Washington, 81 Ill. App.2d 162, 225 N.E.2d 673 (1967), cert. den. 390 U.S. 991 (1968); People v. Lewis, 80 Ill. App.2d 101, 224 N.E.2d 647 (1967).

Sufficiency and Admissibility of Evidence

In determining whether there has been entrapment of defendant, the court should consider both the conduct of law enforcement officials and evidence regarding the defendant's predisposition and criminal design to commit the crime involved. People v. Lewis, 26 Ill.2d 542, 187 N.E.2d 700, 701 (1963); People v. Gonzales, 125 Ill. App.2d 225, 260 N.E.2d 234, 237 (1970). Thus, in a prosecution for unlawful sale of narcotics, evidence that defendants were ready to make quick sale, negated defense of entrapment. People v. Gonzales, supra. Similarly, evidence that the defendant was able to supply illegal drugs within a matter of hours defeated the defense of entrapment. People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641, 645 (1962). See also State v. Grenfell, 172 Mont. 345, 564 P.2d 171 (1977) in which the Montana court held that the defendant had, as a matter of law, established the defense of entrapment.

Instructions

If any evidence exists in support of entrapment theory, defendant is entitled to instruction thereon. People v. Luna, 69 Ill. App.2d 291, 216 N.E.2d 273 (1966), rev'd. on other grounds 37 Ill.2d 299, 226 N.E.2d 586 (1967). See also, People v. Cash, 26 Ill.2d 595, 188 N.E.2d 20, 21 (1963); People v. Jackson, 116 Ill. App.2d 304, 253 N.E.2d 527, 532 (1969).

Review

Entrapment is an affirmative defense which may not be raised for the first time on appeal. People v. Lewis, 80 Ill. App.2d 101, 224 N.E.2d 647 (1967); People v. Morgan, 98 Ill. App.2d 435, 240 N.E.2d 286 (1968); People v. Johnson, 66 Ill. App.2d 465, 214 N.E.2d 354 (1966); People v. Redding, 28 Ill.2d 305, 192 N.E.2d 341 (1963). See also, U.S. ex rel. Hall v. People of State of Illinois, 329 F.2d 354 (7th Cir.), cert. den. 379 U.S. 891 (1964).

Part 3--Liability for Acts Committed By or For Another

45-2-301. Accountability for conduct of another. A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself or that of another and he is legally accountable for such conduct as provided in section 45-2-302, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-2-106, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 5-1

Prior Law: None

Annotator's Note

This section and the companion section 45-2-302 describe those circumstances when liability may be based upon conduct of another. Both sections are taken with minor changes from the Illinois code.

Criminal Law Commission Comment

This section states the general principle that criminal liability is based on conduct and that the conduct may be that of another person.

Cross References

Definition of "conduct" M.C.A. 1978, § 45-2-101(8)
When accountability exists M.C.A. 1978, § 45-2-302
Testimony of person legally accountable M.C.A. 1978, § 46-16-213

Library References

Crim. Law Key No. 59
C.J.S. Crim. Law, §§ 79, 80

Law Review Commentaries

Comment. A criminal conviction can be sustained on the uncorroborated testimony of an accomplice. 1951 U. Ill. L. F. 312 (1951)

Notes of Decisions

In General

It is the general rule that in order to impose accountability on a defendant for the conduct of another, the state must prove beyond a reasonable doubt that the defendant facilitated commission of the offense by another with the intent that such an offense be committed. People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968); People v. Washington, 121 Ill. App.2d 174, 257 N.E.2d 190, 194 (1970). Whether a person is accountable for the conduct of another and guilty of an offense charged may be proved by circumstantial evidence. People v. Manley, 104 Ill. App.2d 271, 244 N.E.2d 373 (1971).

Indictment and Information

When a person is charged with aiding and abetting in the commission of a crime, proper practice is to charge the defendant under R.C.M. 1947, §§ 94-2-106 through 94-2-108 [now M.C.A. 1978, §§ 45-2-301 through 45-2-303]. State v. Murphy, ____ Mont. ____, 570 P.2d 1103 (1977).

Where, however, the facts of the case indicated that the defendant was not surprised or precluded from knowing the specific charges against him, failure to charge under those sections, although defendant was tried and convicted on "aiding and abetting" theory, was not reversible error. State v. Murphy, ____ Mont. ____, 570 P.2d 1103 (1977).

This section and the following sections, 94-2-107 and 94-2-108 [now M.C.A. 1978, §§ 45-2-302, 45-2-303], were intended basically to continue existing Montana law as declared in former section 94-6423, R.C.M. 1947 and State v. Zadick, 148 Mont.

296, 419 P.2d 749 (1966). State v. Murphy, ____ Mont. ____, 570 P.2d 1103 (1977).

Testimony of Witness - Requirement of Corroboration

Where a witness, even though not charged, is legally accountable for the conduct of the defendant, the witness' testimony must be corroborated according to section 95-3012, R.C.M. 1947 [now M.C.A. 1978, § 46-16-213]; such corroboration can be circumstantial but must tend to connect the defendant with the commission of the crime. State v. Orsborn, 170 Mont. 480, 555 P.2d 509 (1976); State v. Fitzpatrick, ____ Mont. ____, 569 P.2d 383 (1977).

45-2-302. When accountability exists. A person is legally accountable for the conduct of another when:

(1) having a mental state described by the statute defining the offense, he causes another to perform the conduct, regardless of the legal capacity or mental state of the other person;

(2) the statute defining the offense makes him so accountable; or

(3) either before or during the commission of an offense with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees, or attempts to aid such other person in the planning or commission of the offense. However, a person is not so accountable if:

(a) he is a victim of the offense committed, unless the statute defining the offense provides otherwise; or

(b) before the commission of the offense, he terminates his effort to promote or facilitate such commission and does one of the following:

(i) wholly deprives his prior efforts of effectiveness in such commission;

(ii) gives timely warning to the proper law enforcement authorities; or

(iii) otherwise makes proper effort to prevent the commission of the offense.

Historical Note

Enacted: M.C.C. 1973, § 94-2-107, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 5-2

Prior Law: R.C.M. 1947, §§ 94-204, 94-205, 94-206, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

While former sections 94-6424 and 94-6425 allowed an indictment to be brought against an accessory as though he were a principal, older provisions of the Code retained common-law distinctions between persons who aided and abetted in the commission of crimes. This section replaces all prior law regarding accessories. Under this section, any person who assists in the commission of a crime, either before or during the occurrence, other than the victim, is liable as a principal offender. One who aids an offender after a crime has been committed would be punished under Compounding a Felony (M.C.A. 1978, § 45-7-305). It should be noted that a person who aids in the preparation or perpetration of an offense also may be prosecuted for one of the Inchoate Offenses (M.C.A. 1978, §§ 45-4-101 through 45-4-103), but the new section on Multiple Prosecutions (M.C.A. 1978, § 46-11-501) prohibits a conviction for both a principal and an associated inchoate offense. The wording for this section is taken without substantial change from the Illinois source.

Criminal Law Commission Comment

This section is a statement of principles of accessoryship although that term is not employed in the code. It provides a much fuller statement of applicable law in this important field and, in some respects, alters and modifies the old law.

The former statutory provisions R.C.M. 1947, sections 94-6423 and 94-6425 had as their primary purpose the elimination of the elaborate common law distinctions between principals in the first degree, principals in the second degree, and the accessories before the fact. Section 94-2-107 [now M.C.A. 1978, § 45-2-302] accepts the approach of the existing law and endeavors to develop it in full and systematic fashion.

Subsection (2) makes clear a person may be held legally accountable in circumstances not otherwise included in section 94-2-107 [now § 45-2-302], where the particular statute so provides. In such case the particular provision prevails. An example of such a statute might be one imposing vicarious criminal liability on a tavern owner for the act of an employee resulting in sale of liquor to a minor.

Subsection (3) is a comprehensive statement of liability based on counseling, aiding and abetting which includes those situations that, at common law, involve the liability of principals in the second degree and accessories before the fact. Liability under this subsection requires proof of a "purpose to promote or facilitate . . . commission of the substantive offense." Moreover, "conspiracy" between the actor and defendant is not of itself made the basis of accountability for the actor's conduct, although the acts of conspiring may in many cases satisfy the particular requirements of this subsection. (See, e.g., Pinkerton v. United States, 328 US 640, 90 L Ed 1489, 66 S Ct 1180 (1946), Commentary, A.L.I., Model Penal Code Tent, Draft No. 1, 1953, 20-26.)

Subsection (3)(a) states that the person who is a "victim" of the criminal act does not, unless the particular statute so states, share the guilt of the actor. This is true even though the person is a "willing" victim and counseled commission of the crime. Thus, the victim of a blackmail plot who pays over money, even though he "aids" the commission of the crime, or the girl under age of consent in

statutory rape, even though she solicited the criminal act, are not deemed guilty of the substantive offense. Subsection (3)(a) does not prevent the extension of criminal liability to the victim if the particular statute so provides. Thus, if it be decided that a bribe-taker should be treated as guilty of bribery, this can be provided in the bribery section. All that is done in these provisions is to state the rule that persons falling under subsection (3)(a) are not guilty if there is no specific provision to the contrary.

Subsection (3)(b) poses the question: What can a person do who has aided and abetted in a criminal plot, to relieve himself of liability for the substantive crime? It appears desirable to provide some escape route, if for no other reason than to provide an inducement for disclosure of crimes before the occur. The problem here should be distinguished from the question in the law of conspiracy as to what actions are required for a person to dissociate himself from a conspiratorial agreement.

To obtain release from criminal liability the person must terminate his affirmative efforts to facilitate commission of the crime. In addition, he may be relieved if he is able wholly to deprive his contributions to the commission of an offense of their effectiveness. If a timely warning is given the police, the person should be relieved even if through negligence or act of God the police fail to prevent the crime. Finally, a general clause "otherwise makes proper effort to prevent the commission of the offense" is included. This will require interpretation according to the facts of the individual case.

This section should not conflict with the substance of Montana case law that the knowledge that a crime is about to be committed does not make the accused an accomplice (State v. Mercer, 114 M. 142, 152, 133 P.2d 358) and that one who knows a felony has been committed, but does nothing to conceal it or harbor or protect the offender, is not an accessory to the commission of that felony (State v. McComas, 85 M 428, 433, 278 P 993).

Cross References

Accountability for conduct of another M.C.A. 1978, § 45-2-301
Definition of "conduct" M.C.A. 1978, § 45-2-101(8)
Inchoate offenses M.C.A. 1978, §§ 45-4-101 through 45-4-103

Library References

Criminal Law Key No. 59 et seq.
C.J.S. Crim. Law, §§ 79, 80

Law Review Commentaries

Comment. Administration of the affirmative trap and the doctrine of entrapment: Device and defense. 31 U. Chi. L. Rev. 137 (1963)

Comment. Indictment for statutory rape--necessity for alleging age of defendant indicted as accessory. 7 Ill. L. Rev. 187 (1912)

Ellis. Basic aspects of legal incapacity. 1951 U. Ill. L. F. 189 (1951)

Note. Multiple prosecutions for multiple offenses arising from a single criminal act may violate due process. 1965 U. Ill. L. F. 927 (1965)

Notes of Decisions

In General

One is legally accountable for a crime committed by another when he, with the intent to facilitate the commission thereof, effects the commission of the crime by another. People v. Nelson, 33 Ill.2d 48, 210 N.E.2d 212, 214, cert. den. 383 U.S. 918 (1965). In applying this general rule to specific factual circumstances, it has been held that if a defendant knowingly drove a getaway car then he could be held legally responsible as a principal for the crime of robbery. People v. Richardson, 132 Ill. App.2d 712, 270 N.E.2d 568, 570 (1971). However, a defendant who did not strike the complaining witness or make any physical contact but merely watched while another co-defendant struck the complaining witness could not be convicted as a principal in the battery. People v. Bowman, 132 Ill. App.2d 744, 270 N.E.2d 285, 287 (1971). Where a defendant was present when his companions fatally beat another man and did not take part in the beating but did little to restrain his companions, the defendant was not criminally accountable for his companions' actions under this section. State ex rel. Murphy v. McKinnon, 171 Mont. 120, 556 P.2d 906 (1976).

Construction and Application

Under this section it has been held that the fact that one co-defendant who was jointly indicted for a crime and who was found not guilty by the trial court did not render it improper to find the other co-defendant guilty, even though both defendants were identified as having participated in the crime, where evidence as to the two co-defendants was not identical. People v. Jones, 132 Ill. App.2d 623, 270 N.E.2d 288, 290 (1971).

Common Design

When two or more persons have a common design to accomplish an unlawful purpose, the act of one is the act of all and all are guilty of whatever crime is committed, even if circumstances show that one of the participants was not actively involved in assisting in the commission of the offense. People v. Smith, 8 Ill. App.3d 270, 290 N.E.2d 261, 263 (1972); People v. Hubbard, 4 Ill. App.3d 729, 281 N.E.2d 767 (1972); People v. Harris, 105 Ill. App.2d 305, 245 N.E.2d 80, 85 (1969). See also, People v. Walton, 6 Ill. App.3d 17, 284 N.E.2d 508 (1972); People v. Hairston, 46 Ill. App.2d 348, 263 N.E.2d 840 (1970), cert. den. 402 U.S. 972 (1971); People v. Morris, 1 Ill. App.3d 566, 274 N.E.2d 898 (1971); People v. Bracey, 110 Ill. App.2d 329, 249 N.E.2d 224 (1969); People v. Novak, 84 Ill. App.2d 276, 228 N.E.2d 139 (1967); People v. Chavis, 79 Ill. App.2d 10, 223 N.E.2d 196 (1967). Illinois courts have held that the proof of common purpose need not be supported by words of agreement or by direct evidence, but can be drawn from the circumstances surrounding the commission of an act by a group of individuals. People v. Hubbard, 4 Ill. App.3d 729, 281 N.E.2d 767, 770 (1972); People v. Roldan, 100 Ill. App.2d 81, 241 N.E.2d 591 (1968); People v. Norvak, 45 Ill.2d 158, 258 N.E.2d 313 (1970); People v. Williams, 104 Ill. App.2d 329, 244 N.E.2d 347 (1968); People v. Johnson, 35 Ill.2d 624, 221 N.E.2d 662 (1966). In applying these general rules to factual circumstances the Illinois courts have ruled that evidence in a murder prosecution of co-defendants who returned to a tavern with weapons which they then held on the patrons in the tavern while a fatal blow was inflicted was sufficient to show common design among the defendants. People v. Spagnola, 123 Ill. App.2d 171, 260 N.E.2d

20, 27 (1970), cert. den. 402 U.S. 911(1971). Similarly, it was held that evidence that a person voluntarily attached himself to a group which was bent on illegal activities with the knowledge of its design supported an inference that the defendant shared the common purpose and thus sustained a conviction as a principal for the crime committed by the other members of the group in furtherance of the venture. People v. Johnson, 35 Ill.2d 624, 221 N.E.2d 662, 663 (1966).

Mere Presence

More than mere presence at the scene of a crime is necessary to establish criminal repsonsibility. State ex rel. Murphy v. McKinnon, 171 Mont. 120, 556 P.2d 906 (1976). It is a settled rule that mere presence at the scene of a crime or "negative acquiescence" is insufficient to make a defendant accountable for the acts of another. However, one may aid and abet without actively participating in the overt acts and presence at the scene of the crime without disapproving or approving of the commission of the crime is a factor which may be considered with other circumstances in determining whether the defendant aided and abetted in the commission of the offense. People v. Barnes, 2 Ill. App.3d 461, 276 N.E.2d 509, 511 (1971); People v. Woodell, 1 Ill. App.3d 257, 274 N.E.2d 105 (1971); People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200 (1968); People v. Bracken, 68 Ill. App.2d 466, 216 N.E.2d 176 (1966); People v. Richardson, 32 Ill.2d 472, 207 N.E.2d 478 (1965), cert. den. 384 U.S. 1021 (1966); People v. Harris, 105 Ill. App.2d 305, 245 N.E.2d 80, 85 (1969); People v. Washington, 26 Ill.2d 207, 186 N.E.2d 259 (1969); People v. Cole, 30 Ill.2d 375, 196 N.E.2d 691 (1964); People v. Tillman, 130 Ill. App.2d 743, 265 N.E.2d 904, 909 (1971); People v. Washington, 121 Ill. App.2d 174, 257 N.E.2d 190 (1970); People v. Ramirez, 93 Ill. App.2d 404, 236 N.E.2d 284 (1968). While negative acquiescence may be a factor which may be considered in determination of guilt, it is generally held that to prove common design, aiding, abetting, or assisting, the state must show some conduct of an affirmative nature. People v. Williams, 104 Ill. App.2d 329, 244 N.E.2d 347, 351 (1968).

Withdrawal from the Crime

One who encourages the commission of an unlawful act cannot escape responsibility for that act by quietly withdrawing from the scene. To be timely, his withdrawal must be sufficient to give the other co-conspirators reasonable opportunity, if they desire, to follow the withdrawing person's example and refrain from further action before the crime is committed. Trial court must be able to say that the accused had wholly and effectively detached himself from the criminal enterprise. People v. Lacey, 49 Ill. App.2d 301, 200 N.E.2d 11, 14 (1964).

Accountability for Specific Offenses

The cases which are listed below should be examined for their application of the general principles stated above to specific factual circumstances. Homicide: People v. Ramirez, 93 Ill. App.2d 404, 236 N.E.2d 284 (1968); People v. Jordan, 38 Ill.2d 83, 230 N.E.2d 161, (1967); People v. Nelson, 33 Ill.2d 48, 210 N.E.2d 212 (1965), cert. den. 383 U.S. 918 (1966); People v. Robinson, 113 Ill. App.2d 89, 251 N.E.2d 766 (1969); People v. Bracey, 110 Ill. App.2d 329, 249 N.E.2d 224 (1969); People v. Hill, 39 Ill.2d 125, 233 N.E.2d 367, cert. den. 392 U.S. 936(1968); People v. Chavis, 79 Ill. App.2d 10, 223 N.E.2d 196 (1967). Robbery: People v. Williams,

3 Ill. App.3d 1, 279 N.E.2d 100, 103 (1971); People v. Sanders, 129 Ill. App.2d 444, 263 N.E.2d 615 (1970); People v. Knell, 129 Ill. App.2d 9, 262 N.E.2d 291 (1970); People v. Embery, 69 Ill. App.2d 269, 216 N.E.2d 24 (1966). Burglary: People v. Gore, 64 Ill. App.2d 309, 211 N.E.2d 757 (1965). Theft: People v. Hasty, 127 Ill. App.2d 330, 262 N.E.2d 292 (1970). Narcotics sale: People v. Meid, 130 Ill. App.2d 482, 264 N.E.2d 209 (1970); People v. Van Riper, 127 Ill. App.2d 394, 262 N.E.2d 141 (1970).

Solicitation

Under the Illinois code (and under the new Montana Criminal Code) solicitation is a separate and distinct offense. It is punishable and triable as a distinct offense and acquittal of the choate offense and an attempt to commit the choate offense does not operate as a bar to conviction under charges of solicitation. See People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840, 841 (1970).

Punishment as Principals

As provided by this section there is no longer a distinction between accessory before the fact and principal. Both offenders may be punished in the same manner. See People v. Clements, 28 Ill.2d 534, 192 N.E.2d 923, 926 (1963).

Indictment

Since this section eliminates the distinction between accessories and principals an accused may be properly charged as a principal even though he was only an accessory to the crime. People v. Heuton, 2 Ill. App.3d 427, 276 N.E.2d 8, 9 (1971). Inasmuch as this section eliminates any distinction between an act performed by the accused himself and the act of another for which he is legally accountable, an indictment charging two or more persons jointly and individually with a crime has been held not to be invalid for its failure to state whether the defendant was being charged as a principal or as an accessory. People v. Nicholls, 42 Ill.2d 91, 245 N.E.2d 771, 777, cert. den. 396 U.S. 1016 (1969). Where an indictment charges two or more defendants with an offense, dismissal as to one co-defendant does not necessitate dismissal of the charge against the other co-defendant. People v. Bodine, 114 Ill. App.2d 205, 252 N.E.2d 234, 235 (1969); People v. Jones, 132 Ill. App.2d 623, 270 N.E.2d 288, (1971). It has been held that an indictment against an accessory is not required to describe the circumstances of the accessory's contact as they actually occurred. It is sufficient if the accessory is charged with the legal effect of the acts performed by him. People v. Ruscitti, 27 Ill.2d 545, 190 N.E.2d 314 (1963). See also People v. Allen, 132 Ill. App.2d 1015, 270 N.E.2d 54 (1971); People v. Touby, 31 Ill.2d 236, 201 N.E.2d 425 (1964).

Burden of Proof

In order for a person to be held legally accountable for the conduct of another, the state must prove beyond a reasonable doubt: 1) that the defendant solicited, aided, abetted, agreed, or attempted to aid another person in the planning or commission of an offense; 2) that participation took place either before or during commission of the offense; and 3) that it was with the concurrent specific intent to promote or facilitate the commission of an offense. People v. Tillman,

130 Ill. App.2d 743, 265 N.E.2d 904, 909 (1971). Accord, People v. Ramirez, 93 Ill. App.2d 404, 236 N.E.2d 284 (1968); People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968). It is not necessary that the defendant be shown to have participated in each element of the offense, rather it is sufficient if the defendant is shown to have aided, abetted, or assisted in the commission of the crime. People v. Harris, 70 Ill. App.2d 173, 217 N.E.2d 503, 506 (1966).

Sufficiency and Admissibility of Evidence

Evidence that a defendant voluntarily attaches himself to a group which is bent on illegal acts with knowledge of its design will support an inference that he shares in the common purpose and will sustain his conviction as a principal for the crime committed by another in furtherance of the venture. People v. Bracey, 110 Ill. App.2d 329, 249 N.E.2d 224, 228 (1969). Although the proof tending to show that one is an accessory before the fact generally would be of the events occurring before the ultimate commission of the offense, evidence of subsequent acts is competent to be considered as proof of guilt of aiding and abetting. People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200 (1968); People v. Bracken, 68 Ill. App.2d 466, 216 N.E.2d 176 (1966); People v. Kolep, 29 Ill.2d 116, 193 N.E.2d 753 (1963); People v. Smith, 25 Ill.2d 428, 185 N.E.2d 150 (1962). For decisions on the sufficiency or admissibility of certain specific evidence see the following cases: People v. McClelland, 96 Ill. App.2d 410, 238 N.E.2d 597 (1968); People v. Morgan, 20 Ill.2d 437, 170 N.E.2d 529 (1961); People v. Lawrence, 132 Ill. App.2d 513, 270 N.E.2d 510 (1971); People v. Gant, 121 Ill. App.2d 222, 257 N.E.2d 181 (1970); People v. Womack, 73 Ill. App.2d 317, 219 N.E.2d 592, (1966); People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968); People v. Richardson, 132 Ill. App.2d 712, 270 N.E.2d 568 (1971).

Instructions

In a burglary prosecution it was proper to instruct the jury on accountability although there was an issue as to whether the defendant actually entered the store or waited outside while his cohorts burglarized the store. State v. Miner, 169 Mont. 260, 546 P.2d 252 (1976). An instruction that a person is responsible for the conduct of another when he aids and abets another in the commission of a crime should not be submitted to a jury unless instructions on accompanying issues are also given. People v. Hatfield, 5 Ill. App.3d 996, 284 N.E.2d 708, 713 (1972). The giving of an instruction defining an accessory in a case in which the defendant was indicted as a principal was held not to be prejudicial. People v. Weaver, 68 Ill. App.2d 240, 215 N.E.2d 675 (1966). The giving of instructions based upon this section was discussed in the following cases: Homicide--People v. Hexum, 83 Ill. App.2d 192, 226 N.E.2d 877, cert. den. 391 U.S. 907 (1967); People v. Kolep, 29 Ill.2d 116, 193 N.E.2d 753 (1963); People v. Coddington, 123 Ill. App.2d 351, 259 N.E.2d 382 (1970); Robbery--People v. Steptore, 51 Ill.2d 208, 281 N.E.2d 642 (1972); People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385 (1969); Assault--People v. Harris, 132 Ill. App.2d 801, 270 N.E.2d 232 (1971); Burglary--People v. Umphers, 133 Ill. App.2d 853, 272 N.E.2d 278 (1971). See also, People v. Rollins, 119 Ill. App.2d 116, 255 N.E.2d 471 (1970).

Judgment and Sentence

Equality of sentence between two participants in a criminal offense is not required. People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200, 201 (1968).

45-2-303. Separate conviction of person accountable. A person who is legally accountable for the conduct of another which is an element of an offense may be convicted upon proof that the offense was committed and that he was so accountable although the other person claimed to have committed the offense has not been prosecuted or convicted, has been convicted of a different offense, is not amenable to justice, or has been acquitted.

Historical Note

Enacted: M.C.C. 1973, § 94-2-108, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 5-3

Prior Law: R.C.M. 1947, § 94-6425, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Sections 45-2-301 and 45-2-302 of the new Code discuss the general principles of accountability for conduct of others and eliminate distinctions made in the common law and continued under former Montana law between different types of accomplices. Under the new Code any person who aids in the commission of a crime, with the purpose to facilitate the offense, either before or during its occurrence is liable as a principal. This section completes the task of eliminating common law categorizations of parties to crime by allowing the conviction of an accomplice before the conviction of the principal. Additionally, the section ensures that the immunity or incapacity of one co-offender shall not be imputed to another. In effect, this section is merely a recodification of R.C.M. 1947, § 94-6425 and the leading Montana case interpreting the responsibility of co-conspirators, State v. Alton, 139 Mont. 379, 365 P.2d 527 (1961). The only significant change from the prior law is the elimination of references to "principals" and "accessories." The wording for this section was taken directly from the Illinois source.

Criminal Law Commission Comment

Even at common law two persons, both principals in the first degree, could be tried separately and although one was acquitted, the state was not precluded from proceeding to trial and obtaining a conviction against the second. The same result is possible under this code but the classification of principals and accessories is eliminated.

Cross References

Definition of "conduct" M.C.A. 1978, § 45-2-101(8)

Accountability for conduct of another M.C.A. 1978, § 45-2-301
When accountability exists M.C.A. 1978, § 45-2-302

Library References

Crim. Law Key No. 78 et seq.
C.J.S. Crim. Law, §§ 100 et seq.

Notes of Decisions

Acquittal of Principal

The general rule is that acquittal of other parties in the same cause is not grounds to relieve a particular co-defendant of his responsibility. See People v. Spears, 106 Ill. App.2d 430, 245 N.E.2d 544 (1969); People v. Quinn, 96 Ill. App.2d 382, 238 N.E.2d 619 (1968).

Instructions

For cases interpreting instructions based upon this section see People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200 (1968); People v. Rosenfeld, 25 Ill.2d 473, 185 N.E.2d 236 (1962).

45-2-304 through 45-2-310 reserved.

45-2-311. Criminal responsibility of corporations. (1) A corporation may be prosecuted for the commission of an offense if, but only if:

(a) the offense is a misdemeanor and is defined by 45-5-204, 45-6-315, 45-6-317, 45-6-318, 45-6-326, 45-6-327, 45-8-113, 45-8-114, 45-8-212, 45-8-214, or by another statute which clearly indicates a legislative purpose to impose liability on a corporation and an agent of the corporation performs the conduct which is an element of the offense while acting within the scope of his office or employment and in behalf of the corporation, except that any limitation in the defining statute concerning the corporation's accountability for certain agents or under certain circumstances is applicable; or

(b) the commission of the offense is authorized, requested, commanded, or

performed by the board of directors or by a high managerial agent who is acting within the scope of his employment in behalf of the corporation.

(2) A corporation's proof, that the high managerial agent having supervisory responsibility over the conduct which is the subject matter of the offense exercised due diligence to prevent the commission of the offense is a defense to a prosecution for any offense to which subsection (1) (a) refers, other than an offense for which absolute liability is imposed. This subsection is inapplicable if the legislative purpose of the statute defining the offense is inconsistent with the provisions of this subsection.

(3) For the purposes of this section:

(a) "agent" means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation;

(b) "high managerial agent" means an officer of the corporation or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees in a managerial capacity.

Historical Note

Enacted: M.C.C. 1973, § 94-2-112, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 5-4

Prior Law: None

Annotator's Note

The wording for this section is identical to the Illinois source. The meaning of the provision is explained fully in the Committee Comment below.

Criminal Law Commission Comment

Section 94-2-112 [now M.C.A. 1978, § 45-2-311] deals with the criminal responsibility of private corporate bodies.

Subsection (1)(a) deals with the corporate liability for misdemeanor offenses, such other offenses as may be expressly included, and those which clearly indicate a

legislative purpose to impose corporate liability where the offense is defined by a statute not included in the Criminal Code. In dealing with regulatory offenses, the broadest scope of liability is provided. The corporation is made criminally responsible for criminal conduct performed by any corporate employee acting within the scope of his office or employment and in behalf of the corporation. The chief justification for such broad liability in this class of cases is to provide an inducement for high managerial officers in the corporation to supervise the behavior of minor employees in such a way as to avoid criminal conduct on the part of corporate employees. In many of the regulatory offenses, the corporation which violates a criminal statute is not confronted by the threat of tort liability growing out of the same act. Thus, if the corporation is required to file a corporate report and fails to do so, the liability it will suffer may be criminal only. These provisions do not relieve the individual corporate employee from criminal liability for his own act. In many cases, criminal prosecution of the individual will prove more effective in enforcing the regulatory policy of the statute. There may be times, however, in which, while it is clear that someone in the corporate employ has committed the criminal act, it is impossible to identify the particular employee guilty of criminal behavior. In such case, the only sanction available is the imposition of a fine on the corporate body. There may also be cases in which the criminal act is committed by a corporate employee of a foreign corporation residing outside the jurisdiction. In such a case the only feasible course open to the Montana prosecutor would be a criminal action against the corporation.

Since, however, the major purpose of subsection (1)(a) is to encourage diligence on the part of managerial personnel to prevent criminal conduct on the part of corporate employees, it seems appropriate to permit the corporation to defend by proof that the criminal conduct occurred despite the exercise of due diligence on the part of supervisory personnel. Consequently, subsection (2) provides that proof of due diligence is a defense to the criminal charge against the corporation. The burden of proof in this case, is placed upon the corporate defendant. This defense is further qualified by the provision that if the statute in question clearly intends that the defense of due diligence should not be available to the corporation, the particular provision of the statute shall prevail over the language of subsection (2).

Subsection (1)(b) relates to the scope of liability of corporations for criminal offenses of a more serious character. It provides that when a corporation is indicted for a felony such as embezzlement, or involuntary manslaughter, the corporation may not be held liable unless the criminal conduct was performed or participated in by the board of directors or by a high managerial agent. The restriction on the scope of corporate liability in this class of cases is justified by the consideration that before the stigma of serious criminality attaches to a corporate body, the conduct should involve someone close to the center of corporate power. Moreover, in these cases, the argument for the necessity of corporate fines to stimulate diligent supervision of minor employees is considerably less persuasive. This is true because most of the serious felonies also involve the possibility of corporate tort liability and this possibility should provide sufficient inducement for the exercise of proper supervision by managerial officials. The restriction of corporate liability in the case of serious felonies to acts of participating high managerial officials in supported by the case law of some American states and appears to be consistent with the English law on the same point. (E.g., People v. Canadian Fur Trappers Corp., 248 NY 159, 161 NE 455, 59 ALR 372 (1928); Rex v. I.C.R. Haulage Ltd. (1944) 1 K.B. 551; Welsh, "The Criminal Liability of Corporations," 62 L. Q. Rev. 345 (1946).) The definitions of "agent" and "high-managerial agent" de-

fy precise definition because of the infinite variations in the organizational schemes of corporate bodies. The definition here provided, however, is probably more precise than that which has emerged from the case law. (See especially, People v. Canadian Fur Trappers Corp., 248 NY 159, 161 NE 455, 59 ALR 372 (1928).)

Cross References

Definition of "conduct" M.C.A. 1978, § 45-2-101(8)
Accountability for conduct of corporation M.C.A. 1978, § 45-2-312
Summons to a corporation M.C.A. 1978, § 46-6-304

Library References

Corporations Key No. 526
C.J.S. Corporations, §§ 1358 et seq.

Law Review Commentaries

Comment. Corporate criminal liability. 68 Nw. U. L. Rev. 870 (1973)

Comment. Criminal sanctions for corporate illegality. 69 J. Crim. L. & Criminology 40 (1978)

Comment. Director and corporate crime--principal and accessory. 4 U. Chi. L. Rev. 142 (1936)

Elkins. Corporations and the criminal law: An uneasy alliance. 65 Ky. L. J. 73 (1976)

Francis. Criminal responsibility of the corporation. 13 Ill. L. Rev. 305 (1924)

LaFave and Scott. Criminal Law § 33 (1972)

Little. Punishment of a corporation--the Standard Oil case. 3 Ill. L. Rev. 446 (1909)

Note. Criminal liability of corporations for acts of their agents. 60 Harv. L. Rev. 283 (1946)

Note. Developments in the law--corporate crime: Regulating corporate behavior through criminal sanctions. 92 Harv. L. Rev. 1227 (1978)

Note. The criminal liability of corporations. 62 L. Q. Rev. 345 (1946)

2 Wharton's Criminal Law § 111 (C. Tortia Rev., 14th ed. 1979)

Notes of Decisions

In General

The Illinois courts have held that a corporate officer, when so named, may be sued for the acts or omissions of the corporation. People v. King, 5 Ill. App.3d 357, 283 N.E.2d 294 (1972). Individual could not be held criminally accountable for failure of corporation to file state income tax return where complaint charged him individually as defendant without naming him as an officer of the corporation or setting forth any relationship he may have had with the corporation, and complaint was properly dismissed. Id.

Indictment and Information

Where act charged is criminal only when committed in a specific capacity, such capacity must be charged in the indictment. People v. King, 5 Ill. App.3d 357, 283 N.E.2d 294 (1972).

45-2-312. Accountability for conduct of corporation. (1) A person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed to the same extent as if the conduct were performed in his own name or behalf.

(2) An individual who has been convicted of an offense by reason of his legal accountability for the conduct of a corporation is subject to the punishment authorized by law for an individual upon conviction of such offense although only a lesser or different punishment is authorized for the corporation.

Historical Note

Enacted: M.C.C. 1973, § 94-2-113, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 5-5

Prior Law: None

Annotator's Note

The wording for this section was taken directly from the Illinois source. The section complements M.C.A. 1978, § 45-2-311, to which attention is directed for case notes. The purpose of the statute is to prevent an offender from insulating himself from criminal liability by performing criminal acts through a corporation which itself cannot be liable due to the inapplicability of the assigned penalty. Subsection (1) makes it clear that an individual acting for a corporation is fully responsible for his acts, regardless of the responsibility of the corporation. Subsection (2) allows punishment for such criminal acts whether or not the corporation can be punished.

Criminal Law Commission Comments

Section 94-2-113 [now M.C.A. 1978, § 45-2-312] should make clear that an individual acting for a corporation is fully responsible for his own criminal acts and is punishable accordingly.

Cross References

Definition of "conduct" M.C.A. 1978, § 45-2-101(8)
Criminal responsibility of corporations M.C.A. 1978, § 45-2-311

Library References

Corporations Key No. 369
C.J.S. Corporations §§ 931, 932

Law Review Commentaries

Comment. Corporate criminal liability. 68 Nw. U. L. Rev. 870 (1973)

Comment. Criminal sanctions for corporate illegality. 69 J. Crim. L. & Criminology 40 (1978)

Comment. Director and corporate crime--principal and accessory. 4 U. Chi. L. Rev. 142 (1936)

Elkins. Corporations and the criminal law: An uneasy alliance. 65 Ky. L. J. 73 (1976)

Francis. Criminal responsibility of the corporation. 13 Ill. L. Rev. 305 (1924)

LaFave and Scott. Criminal Law § 33 (1972)

Little. Punishment of a corporation--the Standard Oil case. 3 Ill. L. Rev. 446 (1909)

Note. Criminal liability of corporations for acts of their agents. 60 Harv. L. Rev. 283 (1946)

Note. Developments in the law--corporate crime: Regulating corporate behavior through criminal sanctions. 92 Harv. L. Rev. 1227 (1978)

Note. The criminal liability of corporations. 62 L. Q. Rev. 345 (1946)

2 Wharton's Criminal Law § 111 (C. Tortia Rev., 14th ed. 1979)

Notes of Decisions

In General

Officers, directors, or agents of a corporation may be criminally liable for acts done by them in behalf of the corporation. People v. Floom, 52 Ill. App.3d 971, 368 N.E.2d 410 (1977). Corporate officer, named as such, may be sued for the acts or omissions of the corporation. People v. King, 5 Ill. App.3d 357, 283 N.E.2d 294 (1972).

Indictment and Information

Where act charged is criminal only when committed in a specific capacity, such capacity must be charged in the indictment. People v. King, 5 Ill. App.3d 357, 283 N.E.2d 294 (1972). Individual could not be held criminally accountable for failure of corporation to file state income tax return where complaint charged him individually as defendant without naming him as an officer of the corporation or setting forth any relationship he may have had with the corporation, and complaint was properly dismissed. Id.

Chapter III: JUSTIFIABLE USE OF FORCE

Part 1--When Force Justified

45-3-101. Definitions. (1) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

(2) "Force likely to cause death or serious bodily harm" within the meaning of this chapter includes but is not limited to:

(a) the firing of a firearm in the direction of a person, even though no purpose exists to kill or inflict serious bodily harm; and

(b) the firing of a firearm at a vehicle in which a person is riding.

Historical Note

Enacted: M.C.C. 1973, § 94-3-101, Sec. 1, Ch. 513, Laws of Montana, 1973

Source: Ill. C.C. 1961, Title 38, §§ 2-8, 7-8

Prior Law: None

Annotator's Note

This section defines terms used in this chapter which delineate the extent of force which may be used in self-defense, defense of property, and defense of others. Subsection (1) defining forcible felony comes from § 2-8 of the Illinois source. The term is also defined in M.C.A. 1978, § 45-2-101(16). Under the section in this chapter on Use of Force by Aggressor (M.C.A. 1978, § 45-3-105), a person who is committing a forcible felony, such as assault, kidnapping, homicide, etc., has no right to use force to defend himself. Subsection (2) is substantially similar to section 7-8 of the Illinois Code. Under the provision of this chapter, a person may use deadly force only if he reasonably believes that such force is necessary to prevent imminent death or bodily harm, or to prevent the commission of a forcible felony as defined above.

Criminal Law Commission Comment

This section is intended to make clear the status of the practice of firing in the direction of any person. In some circumstances a peace officer may be authorized to use deadly force. While firing into the air without endangering an offender's safety is permissible, firing so close to him that his safety is endangered is the use of deadly force, which can be justified only in the circumstances in which the officer is authorized to use deadly force. (See Perkins, "The Law

of Arrest," 25 Iowa L. Rev. 201 at 270, 288, 289 (1940); Note, "Use of Deadly Force in Preventing Escape of Fleeing Minor Felon," 34 N.C. L. Rev. 122 (1955).)

Cross References

Definition of "forcible felony" M.C.A. 1978, § 45-2-101(16)
Justifiable use of force, M.C.A. 1978, Title 45, Chapter 3

Library References

Arrest Key No. 68
Assault and Battery Key No. 64
Homicide Key No. 105
C.J.S. Arrest, §§ 11 et seq.
C.J.S. Assault and Battery, § 97
C.J.S. Homicide, §§ 102, 137

Law Review Commentaries

Aspen. Arrest and arrest alternatives: Recent trends. 1966 U. Ill. L. F. 241, 247 ff. (1966)

Comment. Felony murder in Illinois. 1974 U. Ill. L. F. 685 (1974)

Note. Policeman's use of deadly force in Illinois. 48 Chi.-Kent L. Rev. 252 (1971)

Note. Use of deadly force in preventing escape of fleeing minor felon. 34 N.C. L. Rev. 122 (1955)

Perkins. The law of arrest. 25 Iowa L. Rev. 201 (1940)

Notes of Decisions

Threat of Physical Force or Violence

It has been held that there was a "threat of physical force and violence" within the meaning of this section defining forcible felony where the defendant advised the victim that he and another had been hired to kill the victim, but if given a sum of money they would leave the city, regardless of the conditional character of the threat. People v. Rhodes, 38 Ill. App.2d 389, 231 N.E.2d 400 (1967). It was unimportant that defendant did not anticipate precise sequence of events that followed upon his entry into apartment of murder victim, i.e., that she would jump to her death, and as long as his unlawful acts precipitated those events, he was responsible for the consequences. People v. Smith, 56 Ill.2d 328, 307 N.E.2d 353 (1974).

45-3-102. Use of force in defense of person. A person is justified in the use of force or threat to use force against another when and to the extent that he

reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself or another or to prevent the commission of a forcible felony.

Historical Note

Enacted: M.C.C. 1973, § 94-3-102, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 7-1

Prior Law: R.C.M. 1947, §§ 94-2512, 94-2513, 94-5002, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The wording for this section on self-defense and defense of others is substantially similar to the Illinois source. However, the phrase "threat to use force" has been added by the Criminal Law Commission to allow a person to commit acts which otherwise would be assaults in defense of person. The clause "when and to the extent he reasonably believes" pertains to the proper occasion for the use of force which is a question of fact for the jury. "Is necessary to defend himself or another" refers to the proper amount of force which may be used and remain justified--again a question to be determined by the jury. As indicated in the Commission Comment below "imminent use of unlawful force" refers to those situations where the means of accomplishing the unlawful act are near at hand with the ability to inflict the threatened act.

Criminal Law Commission Comment

The law of self-defense has been interpreted in a large number of judicial decisions, agreeing in principle though differing somewhat in defining the borderlines such as the minimum situation in which the use of deadly force may be authorized. (The history of self-defense is traced in Perkins, "Self-Defense Re-examined," 1 U.C.L.A. L. Rev. 133 at 137 to 142 (1954).) This section presents the general rule as to defense of person contemplating the simplest and probably most common situation--that in which a person who has done nothing to provoke the use of force against himself is confronted immediately with unlawful force under such circumstances that he believes that he must use force to defend himself, and his belief is reasonable. This statement contains several propositions:

(1) The person must not be the aggressor (the situation considered in section 94-3-105) [now § 45-3-105];

(2) The danger of harm must be a present one, not merely threatened at a future time, or without the present ability of carrying out the threat;

(3) The force threatened must be unlawful--either criminal or tortious;

(4) A person must actually believe that the danger exists, that his use of force is necessary to avert the danger, and that the kind and amount of force which he uses is necessary; and

(5) His belief, in each of the aspects described, is reasonable even if it is mistaken. The privilege extends to the protection not only of the person using the force, but of other individuals unlawfully threatened with harm; and in determining whether the use of force is necessary, a person need not consider whether the danger might be avoided if he were to give up some legal right or privilege. If a person under these circumstances uses only nondeadly force for protection, no further legal restriction should be necessary. (See Perkins, supra, at pages 133 to 137.)

The privilege of using force likely to cause death or serious bodily harm (often called deadly force) is limited to cases in which the force imminently threatened apparently will cause death or serious bodily harm, or in which a violent offense is being committed which in its nature involves serious risk of serious bodily harm such as rape, robbery, burglary, arson or kidnapping.

This section codifies prior Montana law in which the section is intended to test the right of self-defense as measured by what a reasonable person would have done under like or the same circumstances. (State v. Houk, 34 M 418, 423, 87 P 175.) A person attacked can act upon appearances and might justifiably kill his attacker, though not in actual peril if the circumstances are such that a reasonable man would be justified in acting the same way. Further, a person attacked with apparent murderous intent need not retreat and seek a place of safety before using deadly force on his attacker. (State v. Merk, 53 M 454, 460, 164 P 655.) However, whether the circumstances attending a homicide claimed to have been committed in self-defense, are such as to justify a defendant's fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering serious bodily harm at the hands of the deceased, is a question of fact for the jury; bare fear of an assault does not justify the killing. (State v. Harkins, 85 M 585, 602, 281 P 551.)

Cross References

Definition of "forcible felony" and of "force likely to cause death or serious bodily harm" M.C.A. 1978, § 45-3-101

Law Review Commentaries

Beale. Retreat from a murderous assault. 16 Harv. L. Rev. 567 (1903)

Comment. Homicide--self-defense--instruction. 19 Ill. L. Rev. 692 (1925)

Comment. Justifiable homicide--killing a supposed felon. 26 Ill. L. Rev. 587 (1932)

LaFave & Scott. Criminal Law, §§ 53-54 (1972)

Note. Justification: The impact of the Model Penal Code on statutory reform. 75 Colum. L. Rev. 914 (1975)

Perkins. Self-defense re-examined. 1 U.C.L.A. L. Rev. 133 (1953)

Notes of Decisions

In General

A person is justified in using force against another if and to the extent that he reasonably believes that such conduct is necessary to defend himself against another person's use of unlawful force. It is not necessary that blood be first drawn before the right of self-defense arises. People v. Speed, 52 Ill.2d 141, 284 N.E.2d 636, 639 (1972); People v. Fort, 119 Ill. App.2d 350, 256 N.E.2d 63 (1970). The necessity for using force in defense of oneself or another and the amount of force necessary to repel the attack is a question of fact for the jury. State v. Larson, ____ Mont. ____, 574 P.2d 266 (1978); State v. Fuger, ____ Mont. ____, 554 P.2d 1338 (1976). It has been held that a trespasser who is carrying a gun without a permit did not lose his right of self-defense to use such a weapon when he was confronted by imminent danger of death and great bodily harm. People v. Dillard, 5 Ill. App.3d 896, 284 N.E.2d 490, 494 (1972). But, see M.C.A. 1978, § 45-3-105, on use of force by aggressor.

Construction and Application

This section which describes those situations where force may be justified under the theory which is commonly known as self-defense has been held to have no application where the alleged aggressor is not the party who has suffered harm at the hands of the accused. People v. Benson, 132 Ill. App.2d 786, 270 N.E.2d 181 (1971). A person who comes to the aid of the victim of a battery has the right to use deadly force if the assailants attack him and if the other requirements of self-defense have been met. People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749, 754 (1965). See also People v. Bowman, 132 Ill. App.2d 806, 270 N.E.2d 285 (1971).

Elements of Self-Defense

The elements justifying use of force in self-defense are: 1) that the force is threatened against the person; 2) that the person threatened is not the aggressor; 3) that the danger of harm is imminent; 4) that force threatened is unlawful; 5) that the person threatened must actually believe that danger exists; 6) that the use of force is necessary to avert danger; 7) that the kind and amount of force which he uses is necessary; and 8) that such beliefs are reasonable. People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150, 154 (1968); People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749 (1965).

Duty to Retreat

The general rule is that if one is not the first assailant and is in a place he has a lawful right to be and is put in apparent danger of his life or of suffering great bodily harm, he need not attempt to escape but may lawfully stand his ground and use any reasonable force in self-defense even to the taking of his assailant's life. People v. Taylor, 3 Ill. App.3d 734, 279 N.E.2d 143 (1972); People v. Martinez, 4 Ill. App.3d 1072, 283 N.E.2d 268 (1972); People v. Millet 60 Ill. App.2d 22, 208 N.E.2d 670 (1965); People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749 (1965). The right to defend one's self does not permit pursuit and injuring of aggressor after aggressor abandons quarrel.

Nature of Self-defense

Self-defense relates to the use of force which a person reasonably believes necessary to defend or to protect himself. By its very nature self-defense relates to knowingly and intentionally using force to deter another and not to accidental use of force. People v. Joyner, 50 Ill.2d 302, 278 N.E.2d 756, 760 (1972). It is a general rule that the right of self-defense does not permit the use of force in retaliation or revenge. People v. Welsch, 110 Ill. App.2d 450, 249 N.E.2d 714 (1969); People v. Peery, 81 Ill. App.2d 372, 225 N.E.2d 730 (1967); People v. Thornton, 26 Ill.2d 218, 186 N.E.2d 239 (1963); People v. Dulakis, 45 Ill. App.2d 128, 195 N.E.2d 402 (1964); People v. McBride, 130 Ill. App.2d 201, 264 N.E.2d 446, 450 (1970). A peace officer is held to the same standard as a private person with respect to killing in self-defense. Schnepf v. Grubb, 125 Ill. App.2d 432, 261 N.E.2d 47, 49 (1970).

Reasonable Belief

The law allows a defender who has reasonable ground to believe himself in danger of suffering bodily harm to protect himself by use of reasonable force. People v. Hill, 116 Ill. App.2d 157, 253 N.E.2d 617, 619 (1969). Thus, a killing is justified if the person had reasonable ground to believe himself in danger of losing his life or of suffering great bodily harm even though the danger was apparent only and not real. People v. Lockett, 85 Ill. App.2d 410, 229 N.E.2d 150 (1968). A belief that circumstances necessitated the use of deadly force is reasonable even if the defendant is mistaken. People v. Williams, 56 Ill.2d 159, 205 N.E.2d 749, 753 (1965). The rules stated in the Illinois decisions above have long been a part of Montana law. See, for example, State v. Daw, 99 Mont. 232, 43 P.2d 240 (1935).

The Use of Deadly Force

As provided by this section, one may use force against another when and to the extent that he reasonably believes that force is necessary to defend himself against another's imminent use of unlawful force. He may use such force as is likely to cause death or great bodily harm to another if and only if he reasonably believes it is necessary to prevent imminent death or great bodily harm to himself or to another. People v. Knox, 116 Ill. App.2d 427, 252 N.E.2d 549, 554 (1969); People v. Fort, 119 Ill. App.2d 350, 256 N.E.2d 63 (1970); People v. Williams, 95 Ill. App.2d 421, 237 N.E.2d 740 (1968); People v. Knox, 94 Ill. App.2d 36, 236 N.E.2d 384 (1968); People v. Lockett, 85 Ill. App.2d 410, 229 N.E.2d 386 (1967); People v. Pirovolos, 116 Ill. App.2d 73, 253 N.E.2d 481 (1969), supplemented 126 Ill. App.2d 361, 261 N.E.2d 701 (1970); People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749 (1965). Because it is the appearance of danger rather than actual danger, whether such danger of great bodily harm is actual or apparent so as to justify killing in self-defense, does not depend upon the assailant's use of a deadly weapon or actually having one in his possession. Schnepf v. Grubb, 125 Ill. App.2d 432, 261 N.E.2d 47 (1970); People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968). A recent decision has held that a shotgun is per se a deadly weapon and the use of such a weapon allows a victim to use deadly force in self-defense. Ewurs v. Pakenham, 8 Ill. App.3d 733, 290 N.E.2d 319, 321 (1972).

45-3-103. Use of force in defense of occupied structure. A person is justi-

fied in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon an occupied structure. However, he is justified in the use of force likely to cause death or serious bodily harm only if:

(1) the entry is made or attempted in violent, riotous, or tumultuous manner and he reasonably believes that such force is necessary to prevent an assault upon or offer of personal violence to him or another then in the occupied structure; or

(2) he reasonably believes that such force is necessary to prevent the commission of a forcible felony in the occupied structure.

Historical Note

Enacted: M.C.C. 1973, § 94-3-103, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 7-2

Prior Law: R.C.M. 1947, §§ 94-2513, 94-5002, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section defines the extent to which force may be used to defend an occupied structure. Since the definition of occupied structure is broad (see, M.C.A. 1978, § 45-2-101(34)) the privilege granted by this section extends to virtually any vehicle or building suited for human habitation whether or not occupied. Under this section, a person is allowed to use non-deadly force to protect a dwelling from unlawful entry. This privilege to protect unoccupied structures is covered by M.C.A. 1978, § 45-3-104.

Subsections (1) and (2) continue the privilege to use deadly force to protect an occupied structure when the intruder enters with violence as provided under former law R.C.M. 1947, § 94-2513(2). Because the clause "offer of personal violence" extends to forces which are not likely to inflict great bodily harm the privilege to use deadly force in defense of dwellings is broad. However, justified use of deadly force does not include killing or severely injuring a person merely because that person trespasses when his presence is without violence. The wording for this section is substantially the same as the Illinois source.

Illinois case law indicates that the entry must be unlawful before this section is applicable, thus excluding the possibility of justification under this section where the victim enters lawfully but subsequently engages in unlawful conduct

for which the occupant of the dwelling expels the victim. See People v. Brown, 19 Ill. App.3d 757, 312 N.E.2d 789 (1974), in which the court held that a defense under this section is untenable where the evidence discloses a lawful entry by the victim, and People v. Chapman, 49 Ill. App.3d 553, 364 N.E.2d 577 (1977), in which this section was held inapplicable where the victim was not an unlawful intruder (victim shared apartment with defendant) even if the defendant acted to prevent the commission of a forcible felony by the victim in defendant's home. This interpretation of the statute renders this section somewhat more restrictive than R.C.M. 1947, § 94-605(3) under former law. R.C.M. 1947, § 94-605(3) provided that the use or attempt or offer to use force or violence upon or towards another was not unlawful when committed in preventing or attempting to prevent a trespass or other unlawful interference with real or personal property in his possession, if the force or violence used was not more than sufficient to prevent the offense. That section was interpreted to allow the occupant of a dwelling to use force to expel one who entered the dwelling with the permission of the occupant but who then became a "trespasser" and whose privilege to remain was subsequently withdrawn. State v. Nickerson, 126 Mont. 157, 247 P.2d 188 (1952). The present statute does not use the word, "trespass," (which would cover the withdrawn privilege situation), and only allows the use of force or threat of force in defense of an occupied structure where such conduct reasonably seems necessary to "prevent or terminate such other's unlawful entry into or attack upon an occupied structure." This section may, therefore, require an amendment to cover the situation in which the visitor's entry was lawful but his privilege to remain has been withdrawn.

Criminal Law Commission Comment

This aspect of justification seems to be rather well-settled: a person may prevent or repel with force another's unlawful entry into a dwelling, whether the dwelling is occupied by the person using such force or by someone else, and whether the trespasser uses force or enters without force; but the use of deadly force is limited to instances of violent or forcible felonies and violent entries with apparent threat of personal violence to someone in the occupied structure. The reasonable-belief and no-retreat principles apply.

Cross References

Definition of "conduct" M.C.A. 1978, § 45-2-101(8)
Definition of "occupied structure" M.C.A. 1978, § 45-2-101(34)
Definition of "enter or remain unlawfully" M.C.A. 1978, § 45-6-201
Criminal trespass to property M.C.A. 1978, § 45-6-203

Library References

Assault and Battery Key No. 69
Homicide Key No. 98
C.J.S. Assault and Battery, §§ 94 et seq.
C.J.S. Homicide, § 94

Law Review Commentaries

Comment. People v. Abrams: Public invitation to attend a party; waiver of a citizen's right to privacy against intrusion by undercover agents. 66 Nw. U. L. Rev. 805 (1972)

Notes of Decisions

In General

This section, which provides that a person is justified in using force to prevent or terminate another's unlawful entry into or attack upon a dwelling, is for the benefit of not only the tenant or occupant of the dwelling but for guests as well. People v. Stombaugh, 52 Ill.2d 130, 284 N.E.2d 640 (1972). See also People v. Daulikis, 45 Ill. App.2d 128, 195 N.E.2d 402 (1964). Defendant's assertion of defense to homicide prosecution based on this section held untenable where the evidence discloses a lawful entry by the homicide victim. People v. Brown, 19 Ill. App.3d 757, 312 N.E.2d 789 (1974). Where the entry is lawful and victim is not an intruder (here: victim shared apartment with defendant)--this section does not provide a defense even where defendant acted to prevent the commission of a forcible felony by the victim in defendant's home. People v. Chapman, 49 Ill. App.3d 553, 364 N.E.2d 577 (1977).

Instructions

The defendant has the responsiblity of tendering instructions which are based upon this section. People v. Davis, 74 Ill. App.2d 450, 221 N.E.2d 63, 66 (1966). An instruction on defense of dwelling is inappropriate where the evidence indicates that the defendant was acting in defense of himself and not of a dwelling. People v. Stombaugh, 52 Ill.2d 130, 284 N.E.2d 640 (1972).

45-3-104. Use of force in defense of other property. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is neces ary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than an occupied structure) or personal property lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.

Historical Note

Enacted: M.C.C. 1973, § 94-3-104, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 7-3

Prior Law: R.C.M. 1947, § 94-5002, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section defining the extent of force which may be used to defend unoccupied structures, land, and personal property must be read in conjunction with sections 45-6-201 and 45-6-203 which set out the offenses of Criminal Trespass. Under section 45-6-201, a person is privileged to enter land unless he is given personal notice or posting that he is a trespasser. Section 45-6-203 enlarges the category of persons criminally liable for knowing trespasses to anyone who knowingly enters or remains unlawfully on the premises of another. Under former law, criminal trespass generally extended only to those who engaged in some prohibited act after entering upon the premises. When taken together, these sections clearly indicate that the landowner has no right to use or threaten force against an unknowing trespasser. After a person has been notified that he is trespassing he must leave or be found guilty of a misdemeanor, regardless of whether he does some unlawful act on the property. By making the knowing trespasser a misdemeanant, the property owner can call for official aid in expelling the trespasser rather than using self-help. While the new Code seeks to prevent violent confrontations between trespassers and property owners, this section does not preclude the landowner from using force to expel a knowing trespasser if law enforcement help is not available. It should be noted that deadly force may only be used to prevent the commission of a forcible felony (M.C.A. 1978, § 45-2-101(16)). The wording for this section is substantially similar to the Illinois source.

Criminal Law Commission Comment

The general principles of justification concerning the defense of person and occupied structure are applicable to a limited extent to the defense of real property other than an occupied structure, and personal property lawfully in the person's possession (or the possession of certain other persons): he may use force which he reasonably believes to be necessary to protect the property, but he may not use deadly force except to prevent the commission of a forcible felony.

The right of a person to use force in preventing a trespass upon or interference with another person's property is limited to property in the possession of a member of the immediate family or household of the person using the preventive force, or is property the person using the preventive force has a legal duty to protect. The right of a private person to arrest one who commits or attempts a criminal offense in his presence supplements the right to use force in the defense of other property. See R.C.M. 1947, section 95-611 [now M.C.A. 1978, §§ 46-6-502, 46-6-503].

Cross References

Definition of "forcible felony" M.C.A. 1978, §§ 45-2-101(16), 45-3-101(1)
Use of force in defense of person M.C.A. 1978, § 45-3-102
Use of force in defense of occupied structure M.C.A. 1978, § 45-3-103
Definition of "enter or remain unlawfully" M.C.A. 1978, § 45-6-201
Criminal trespass to property M.C.A. 1978, § 45-6-203
Arrest by a private person M.C.A. 1978, §§ 45-6-501 through 45-6-504

Library References

Assault and Battery Key No. 69
Homicide Key No. 124
C.J.S. Assault and Battery, §§ 94 et seq.
C.J.S. Homicide, §§ 110, 111

Law Review Commentaries

Comment. People v. Abrams. 66 Nw. U. L. Rev. 805 (1972)

Note. Justification: The impact of the Model Penal Code on statutory reform. 75 Colum. L. Rev. 914 (1975)

Tiffany & Anderson. Legislating the necessity defense in criminal law. 52 Den. L. J. 839 (1975)

Notes of Decisions

In General

The owner of property or his representative has the right under this section to use reasonable force to terminate a trespass. But, in the absence of preventing a forcible felony, neither the owner nor his representative is entitled to use such force as was intended or likely to cause death or great bodily harm. People v. Dillard, 5 Ill. App.3d 896, 284 N.E.2d 490 (1972). The fact that a person has a mistaken belief as to his authority to enter land of another does not alter his status as a trespasser nor terminate the landowner's right to use force in deterring the trespass. People v. Raber, 130 Ill. App.2d 813, 264 N.E.2d 274, 275 (1970).

Burden of Proof

As is the general rule in Illinois with regard to all affirmative defenses, where the defendant raises an issue of justification as an affirmative defense by presenting some evidence upon it, the state must sustain the burden of proving guilt beyond a reasonable doubt as to that issue together with all other elements of the offense. People v. Raber, 130 Ill. App.2d 813, 264 N.E.2d 274, 275 (1970).

Instructions

The defendant has the responsibility of tendering instructions based upon this section which necessarily bear favorably upon some aspect of his defense. People v. Davis, 74 Ill. App.2d 450, 221 N.E.2d 63, 66 (1966). A defendant's instruction based upon this section, however, was held to be inappropriate where it appeared that the defendant was using force in making a citizen's arrest rather than in defense of his property. People v. Fort, 133 Ill. App.2d 694, 273 N.E.2d 439, 448 (1971).

45-3-105. Use of force by aggressor. The justification described in 45-3-102 through 45-3-104 is not available to a person who:

(1) is attempting to commit, committing, or escaping after the commission of a forcible felony; or

(2) purposely or knowingly provokes the use of force against himself, unless:

(a) such force is so great that he reasonably believes that he is in immi-

nent danger of death or serious bodily harm and that he has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or serious bodily harm to the assailant; or

(b) in good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force but the assailant continues or resumes the use of force.

Historical Note

Enacted: M.C.C. 1973, § 94-3-105, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 7-4

Prior Law: None

Annotator's Note

This subsection is primarily the same as the parent Illinois source. The application of the section is discussed fully in the comment below.

Criminal Law Commission Comment

Each of the preceding sections of this chapter has assumed that the person using force in defense has not committed an unlawful act which has inspired the use or threat of force against him, and has not otherwise provoked such force. This section concerns the much more limited right which a person has to defend himself, when he has committed an unlawful act or otherwise provoked the use of force. A person has no right of defense if he is attempting or committing a forcible felony, or is escaping after committing it; or if he has deliberately provoked the use of force against himself. Only a completed withdrawal, followed by a new encounter initiated by the other person, will reinstate a right of defense. (See Perkins, "Self-Defense Re-Examined," 1 U.C.L.A. L. Rev. 133 at 147 (1954).) However, if a person voluntarily engages in a fight or in some other manner, by words or actions provokes the use of force against himself which apparently will not involve the use of deadly force, but unexpectedly is threatened with deadly force, he has a qualified right to protect himself by using deadly force. First, however, the original provocateur must use any method which is reasonably available to avoid the use of deadly force including a "retreat to the wall."

Subsections (2)(a) and (b) outline the cases in which the aggressor's right of self-defense is reinstated. The first is that which obtains when the aggressor, not using deadly force, is suddenly confronted with deadly force and has retreated, as he reasonably believes, to the practical limit but nevertheless reasonably believes that he must use deadly force to prevent death or serious bodily harm to himself.

The second case is that in which the aggressor in good faith withdraws from the conflict and effectively communicates to the victim his intention to withdraw, but the victim continues or resumes the conflict. The relation between the participants should be regarded as reversed, the initial aggressor becoming the victim.

Section (2)(b) applies only to the use of nondeadly force in self-defense. (See State v. Merk, 53 M 454, 460, 164 P 655.)

Cross References

Definition of "forcible felony" M.C.A. 1978, §§ 45-2-101(16), 45-3-101(1)
Definition of "force likely to cause death or serious bodily harm" M.C.A. 1978, § 45-3-101(2)

Library References

Assault and Battery Key No. 67
Homicide Key No. 112 (1) et seq.
C.J.S. Assault and Battery, § 92
C.J.S. Homicide, § 117

Notes of Decisions

In General

As provided by this section, an aggressor may not prevail in a prosecution for battery by asserting self-defense even though victim may have struck first blow. People v. Bowman, 132 Ill. App.2d 744, 270 N.E.2d 285, 287 (1971).

Sufficiency and Admissibility of Evidence

Even if the victim were an aggressor in an earlier quarrel with defendant, this does not in itself prove that he was an aggressor just prior to a subsequent quarrel. People v. Wilson, 3 Ill. App.3d 481, 278 N.E.2d 473, 476 (1972). But, where evidence indicates that defendant first fought with victim, then left to arm himself, such evidence supports the determination that the claim of self-defense is not justified. People v. Hill, 116 Ill. App.2d 157, 253 N.E.2d 617, 618 (1969). Similarly, evidence which indicates prior aggressive behavior of defendant toward his alleged victim is admissible to determine the defendant's attitude and aggressiveness toward the victim. People v. Smythe, 132 Ill. App.2d 685, 270 N.E.2d 431, 434 (1971).

Instructions

An instruction that defense of self-defense is not available to a person who initially provokes the use of force against himself except under special circumstances is not error. People v. McBride, 130 Ill. App.2d 201, 264 N.E.2d 446, 450 (1970); People v. Day, 2 Ill. App.3d 811, 277 N.E.2d 745 (1972).

45-3-106. Use of force to prevent escape. (1) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.

(2) A guard or other peace officer is justified in the use of force, including force likely to cause death or serious bodily harm which he reasonably

believes to be necessary to prevent the escape from a correctional institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

Historical Note

Enacted: M.C.C. 1973, § 94-3-106, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 7-9

Prior Law R.C.M. 1947, §§ 94-605, 94-2512, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

While this section on use of force to prevent escape is identical to the Illinois source, when interpreted by the courts the laws may be significantly different. This section defines the amount of force which may be used to prevent escape in terms of the amount of force necessary in making an arrest, which is set forth in M.C.A. 1978, § 46-6-104, and is different from the comparable Illinois statute.

Criminal Law Commission Comment

As attempted escape by a person in custody after arrest and before being placed in confinement, or in a place of confinement, requires the authorization of force necessary to recapture him. This section concerns the use of deadly force to prevent escape and not the use of force which is justifiable in making the original arrest.

The usual statement seems to be that a person lawfully arrested or confined may be killed if that is necessary to prevent escape; and no distinction is drawn between a felon and any other offender.

Recapture must be evaluated in the same manner as if it were an original arrest, and whether deadly force may be used to prevent an escape does not depend upon whether such force might have been authorized at the time of the original arrest. If the offense for which the person was arrested was not a forcible felony, but the offender was armed with a deadly weapon, deadly force might have been used to effect the arrest. If the offender was arrested and disarmed and later attempted to escape unarmed and without threatening death or serious bodily harm to anyone, deadly force to prevent his escape is not authorized. Conversely, if the offender was not armed or otherwise dangerous when arrested, but in attempting to escape he commits a forcible felony, or seizes an officer's gun and threatens to shoot anyone who opposes his escape, deadly force may be used to prevent the escape.

Subsection (2) concerns escape from a place of confinement, as distinguished from personal custody after arrest. Here, other persons are likely to be in the same position of legal restraint as the one attempting to escape and may be encouraged by a successful escape to make a similar attempt either immediately or at a later time. Also, a guard or other person in charge of prisoners cannot be expected to know the history of each prisoner and whether his offense was a forcible felony

or whether he is likely to endanger the lives of others if his escape is successful. In addition, the sudden and unexpected nature of an escape from confinement leaves the guard no time to investigate into the person's possession of a deadly weapon. In view of the often desperate nature of an escape of this kind, the prisoner can be expected to use any deadly force which he finds available. Consequently, a less restrictive rule as to the use of deadly force to prevent escape seems logical with respect to a guard, as compared with the rule concerning a personal custodian after the arrest but before the confinement of an offender or suspect.

Cross References

Definition of "correctional institution" M.C.A. 1978, § 45-2-101(10)
Resisting arrest M.C.A. 1978, § 45-7-301
Escape M.C.A. 1978, § 45-7-306
Stop and frisk M.C.A. 1978, §§ 46-5-401, 46-5-402
Method of arrest M.C.A. 1978, § 46-6-104

Library References

Assault and Battery Key No. 64
Homicide Key No. 105
C.J.S. Assault and Battery, § 97
C.J.S. Homicide, §§ 102, 137

45-3-107. Use of force by parent, guardian, or teacher. A parent or an authorized agent of any parent or a guardian, master, or teacher is justified in the use of such force as is reasonable and necessary to restrain or correct his child, ward, apprentice, or pupil.

Historical Note

Enacted: M.C.C. 1973, § 94-3-107, Sec. 1, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, § 94-605(4), repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Prior Law: R.C.M. 1947, §§ 94-605(4), 94-2511 repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Under former law, assault was said to be justified and homicide excusable if done in lawfully correcting a child. This section which is a rewording of former section 94-605(4) makes the use of "reasonable and necessary force" a justification

in the form of an affirmative defense. But the correction of a child which results in the child's death is no longer excused. The leading Montana case on the subject is State v. Straight, cited below.

Criminal Law Commission Comment

This is a rewording of former section 94-605(4). However "reasonable and necessary" was substituted for "reasonable in manner and moderate in degree."

Cross References

Homicide M.C.A. 1978, §§ 45-5-101 through 45-5-105
Assault M.C.A. 1978, §§ 45-5-201 through 45-5-204

Library References

Assault and Battery Key No. 63 et seq.
Homicide Key No. 101, 125
C.J.S. Assault and Battery, §§ 86 et seq.
C.J.S. Homicide, §§ 1, 97-99, 102, 106 et seq.

Law Review Commentaries

Annot. Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis. 89 A.L.R.2d 396 (1963)

LaFave & Scott. Criminal Law § 52 (1972)

Levy. Criminal liability for the punishment of children: An evaluation of means and ends. 43 J. Crim. L. & Criminology 719 (1953)

Notes of Decisions

In General

Where a parent uses force to correct his child, it is up to the jury to determine from the facts and circumstances of each individual case whether the manner of punishment is reasonable and the degree moderate. State v. Straight, 136 Mont. 255, 347 P.2d 482, 490 (1959).

45-3-108. Use of force in resisting arrest. A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful.

Historical Note

Enacted: M.C.C. 1973, § 94-3-108, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 7-7

Prior Law: None

Annotator's Note

The purpose of this section on use of force in resisting arrest is to change the common-law rule that an illegal arrest could be resisted lawfully. That rule encouraged resistance and breaches of the peace. This section requires submission to arrest. If the arrest is illegal (a determination which few citizens can make while being arrested), the arrestee should pursue civil and criminal remedies rather than resort to self-help. In applying this section a number of caveats are in order: First, the section has no application to persons fleeing from a possible arrest or from a stop under the new Stop and Frisk statute (M.C.A. 1978, §§ 46-5-401, 46-5-402). Second, the arresting officer must identify himself to the arrestee. If the arrestee does not know that the person making the arrest is authorized to do so, he may justifiably defend himself. Third, the section has been interpreted by the Illinois courts as not preventing an arrestee from protecting himself from unlawful and excessive force by the arresting officer. The wording for this section is identical to the Illinois source.

Criminal Law Commission Comment

Section 94-3-108 [now M.C.A. 1978, § 45-3-108] states a corollary to the justification accorded to an officer in using force to make an arrest. Even if the arrest is unlawful, the person arrested is not privileged to resist the arrest with force. A resort to force invites the officer to use greater force to accomplish the arrest. The public interest in discouraging violence and insisting upon the use of peaceable methods for obtaining release from unlawful arrest clearly outweighs the right of self-help or any momentary individual satisfaction. (This was the view of the Uniform Arrest Act, ¶ 6: see Warner, "The Uniform Arrest Act," 28 Va. L. Rev. 316 at 330, 331 (1942).) A partial recognition of the inadvisability of sanctioning resistance in the case of an unlawful arrest appears in the old rule that a person who kills an officer attempting an unlawful arrest is not justified, but is guilty of manslaughter rather than murder, in the absence of express malice. (1 Wharton's Criminal Law (12th ed.) ¶¶ 542 and 853; 1 Bishop on Criminal Law (9th ed.) ¶ 868 and 1 Bishop's New Criminal Procedure (3rd ed.) ¶ 162.)

Cross References

Use of force in defense of person M.C.A. 1978, § 45-3-102
Resisting arrest M.C.A. 1978, § 45-7-301
Method of arrest M.C.A. 1978, § 46-6-104
Manner of arrest without a warrant M.C.A. 1978, § 46-6-106

Library References

Assault and Battery Key No. 67
Homicide Key No. 116
Obstructing Justice Key No. 8
C.J.S. Assault and Battery, § 92
C.J.S. Homicide, § 137
C.J.S. Obstructing Justice, § 16

Law Review Commentaries

Waite. Some inadequacies in the law of arrest. 29 Mich. L. Rev. 448 (1931)
Warner. The Uniform Arrest Act. 28 Va. L. Rev. 316 (1942)

Notes of Decisions

In General

When a person is known to be a policeman in the performance of his lawful duties, it is the duty of persons being arrested by him to submit peacefully. People v. Gnatz, 8 Ill. App.3d 396, 290 N.E.2d 392, 395 (1972). Even if a probable cause for arrest is lacking, the arrestee has no right to resist. People v. Suriwha, 2 Ill. App.3d 384, 276 N.E.2d 490, 496 (1971). See also, People v. Carroll, 133 Ill. App.2d 78, 272 N.E.2d 822 (1971); People v. Franks, 108 Ill. App.2d 438, 247 N.E.2d 811 (1969); People v. Fort, 91 Ill. App.2d 212, 234 N.E.2d 384 (1968), cert den. 393 U.S. 1014 (1969); People v. Shinn, 5 Ill. App.3d 468, 283 N.E.2d 502 (1972).

Burden of Proof

To sustain a charge of resisting arrest, the prosecution must show that the defendant knowingly resisted performance of an authorized act by a person known to the defendant to be a peace officer acting within his official capacity. People v. Royer, 101 Ill. App.2d 44, 242 N.E.2d 288, 290 (1968).

Instructions

Refusal of an instruction on use of force in making arrest is proper where such an instruction is not accompanied by an instruction on use of force in defense of person. People v. Shinn, 5 Ill. App.3d 468, 283 N.E.2d 502 (1972).

45-3-109. Execution of death sentence. A public servant who in the exercise of his official duty puts a person to death pursuant to a sentence of a court of competent jurisdiction is justified if he acts in accordance with the sentence pronounced and the law prescribing the procedure for execution of a death sentence.

Historical Note

Enacted: M.C.C. 1973, § 94-3-109, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 7-10

Prior Law: R.C.M. 1947, § 94-2512, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section preserves the former Montana provision listed above. The wording is identical to the Illinois source.

Criminal Law Commission Comment

This section states an obvious aspect of justification for homicide. It is included for the sake of completeness, and because it is one of the more commonly described statutory instances of justification. Section 94-3-109 [now M.C.A. 1978, § 45-3-109] is intended to state the essentials of the prior provision in language similar to that of the other sections of this chapter. However, in view of the deliberate nature of the homicide, the explicit legal instructions concerning the execution and the much more relaxed time element involved in an execution as compared with self-defense, arrest, or escape, no need exists for recognizing a reasonable but mistaken belief of the executioner as to his authority for or method of performing his duty.

Cross References

Execution of death M.C.A. 1978, § 46-19-103
Death penalty M.C.A. 1978, §§ 46-18-301 through 46-18-310

Library References

Homicide Key No. 104
C.J.S. Homicide, §§ 106, 137

Law Review Commentaries

Beale. Justification for injury. 41 Harv. L. Rev. 553 (1928)

Comment. Congressional rebirth of the death penalty: Guiding the jury past Furman v. Georgia. 68 Nw. U. L. Rev. 893 (1973)

Connelly. The proposed federal criminal codes: A prosecutor's point of view. 68 Nw. U. L. Rev. 826, 835 (1973)

45-3-110 through 45-3-114 reserved.

45-3-115. Affirmative defense. A defense of justifiable use of force based on the provisions of this part is an affirmative defense.

Historical Note

Enacted: M.C.C. 1973, § 94-3-112, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 7-14

Prior Law: None

Annotator's Note

Montana law requires that the prosecution prove the defendant guilty of each element of the offense charged beyond all reasonable doubt (M.C.A. 1978, § 46-16-601). But, the prosecution is not required to negate in the first instance all possible defenses which might be raised by the defendant. After the prosecution has developed a prima facie case, the defense has the burden of going forward with evidence to raise doubt as to the defendant's guilt. The amount of evidence which the defendant must submit in raising an affirmative defense is not stated in this section. Relatively recent Montana case law makes it clear that the legislature can determine the amount of evidence required to raise a particular affirmative defense, whether only a "reasonable doubt" or a "preponderance of the evidence." The statutory burden imposed under the former insanity defense statute (former M.C.A. 1978, § 46-14-201(1), repealed, Laws of Montana 1979) was a "preponderance of the evidence. State v. McKenzie, ____ Mont. ____, ____ P.2d ____, 37 St. Rptr. ____ (February 26, 1980). Where the legislature is silent, the court can, and in some instances has, determined the extent of the defendant's burden of going forward with the evidence in establishing an affirmative defense. The defendant need only raise a reasonable doubt where the affirmative defense offered is self-defense (State v. Grady, 166 Mont. 168, 531 P.2d 681 (1975)), but must establish the defense by a preponderance of the evidence where the defense is diminished capacity (State v. McKenzie, ____ Mont. ____, ____ P.2d ____, 37 St. Rptr. ____(February 26, 1980), reasonable belief of age (State v. Smith, ____ Mont. ____, 576 P.2d 1110 (1978)) or justification (i.e. compulsion) (State v. Stuit, ____ Mont. ____, 576 P.2d 264 (1978)). There does not seem to be any federal constitutional problem in establishing a burden greater than a "reasonable doubt" since the U.S. Supreme Court has indicated that a state need not allow any affirmative defenses at all. Patterson v. New York, 432 U.S. 197 (1977). And, where it chooses to allow such defenses, the state may regulate the burden of producing evidence and the burden of persuasion as long as it does not thereby shift to the defendant its own burden of proof as to each of the elements of the offense beyond a reasonable doubt. Id. The Supreme Court has even held that an Oregon statute, which required the defendant to prove the defense of insanity beyond a reasonable doubt, was not violative of due process. Leland v. Oregon, 343 U.S. 790 (1952).

Criminal Law Commission Comment

A defense based upon any of the provisions of this chapter is an affirmative defense, and if not put in issue by the prosecution's evidence, the defendant, to raise it as an issue, must present some evidence thereon.

Cross References

Defendant presumed innocent--reasonable doubt M.C.A. 1978, § 46-16-601

Library References

Assault and Battery Key No. 82
Criminal Law Key No. 330
Homicide Key No. 151(3)
C.J.S. Assault and Battery, § 114
C.J.S. Crim. Law, § 573
C.J.S. Homicide, § 195

Notes of Decisions

Burden of Proof

The burden which must be met by a defendant in presenting an affirmative defense varies according to the defense being raised. Although the burden of persuasion remains on the state, in order to avail himself of the affirmative defense of self-defense, the defendant has the burden of producing sufficient evidence on the issue to raise a reasonable doubt of his guilt. State v. Grady, 166 Mont. 168, 531 P.2d 681 (1975). The defense of justification (or compulsion) is an affirmative defense which must be proved by the defendant by a preponderance of the evidence. State v. Stuit, ____ Mont. ____, 576 P.2d 264 (1978). The defense of reasonable belief of age (affirmative defense to charge of sexual intercourse without consent on a minor) must be proved by defendant by a preponderance of the evidence and not merely to raise a reasonable doubt. State v. Smith, ____ Mont. ____, 576 P.2d 1110 (1978). The affirmative defense of insanity must be proved by a preponderance of the evidence in accordance with the statute which allowed the defense [former M.C.A. 1978, § 46-14-201, repealed, Laws of Montana 1979]. State v. McKenzie, ___ Mont. ___, ___ P.2d ___, 37 St. Rptr. ___ (February 26, 1980). The defense of diminished capacity must also be proved by a preponderance of the evidence. Id.

When Defense is Raised

Self-defense was held not to be placed at issue until raised by direct testimony of defendant during trial. State v. Logan, 156 Mont. 48, 65, 473 P.2d 833 (1970).

Sufficiency and Admissibility of Evidence

Statements and testimony indicating defendant's predisposition and other circumstances surrounding the use of force in self-defense are admissible and relevant in establishing the validity of such an affirmative defense. See, for example, People v. Sylvester, 70 Ill. App.2d 200, 217 N.E.2d 110, 111 (1966); People v. Herron, 125 Ill. App.2d 18, 260 N.E.2d 428, 430 (1970); People v. Honey, 69 Ill. App.2d 429, 217 N.E.2d 371, 373 (1966).

45-4-101. Solicitation. (1) A person commits the offense of solicitation when, with the purpose that an offense be committed, he commands, encourages, or facilitates the commission of that offense.

(2) A person convicted of solicitation shall be punished not to exceed the maximum provided for the offense solicited.

Historical Note

Enacted: M.C.C. 1973, § 94-4-101, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 8-1

Prior Law: None

Annotator's Note

The purpose of this section is to render criminal conduct evidencing a criminal design or purpose which falls short of either conspiracy or attempt. The significant change from the Illinois source is the substitution of "facilitates" for "requests" as an alternative element in the offense. The effect of this change would appear to be a broadening of the types of conduct which are included in the offense of solicitation. Solicitation remains distinct from attempt in that it punishes conduct which because of lack of proximity in time cannot be punished as an attempt. It is also distinct from conspiracy in that solicitation renders criminal both attempting to enlist co-conspirators and an agreement to commit an offense even when no overt act has taken place. The offense of solicitation is complete when the commanding, encouraging or facilitating the commission of the principal offense occurs and the defendant can be convicted of solicitation even if the contemplated offense never occurs or his solicitation is rejected by the person solicited and the scheme goes no further. In fact, as a practical matter, the solicitation almost has to be unsuccessful if the defendant is to be convicted of solicitation, because, if the contemplated offense is carried out, the solicitor will probably be charged as a principal in the substantive offense under M.C.A. 1978, § 45-2-302(3) (When Accountability Exists) and, if he is convicted of the substantive offense, Montana's double jeopardy statute, M.C.A. 1978, § 46-11-502, will generally bar an additional conviction for the solicitation to commit the substantive offense because it bars conviction for more than one offense arising out of the same transaction if one ". . . consists only of a conspiracy or other form of preparation to commit the other." It should also be noted that since this section completely defines the offense, the general definition of solicitation (§ 45-2-101(56)) is inapplicable.

Criminal Law Commission Comment

Solicitation is not a separate statutory offense under the old code although

R.C.M. 1947, section 94-204 provided that any person counseling, advising or encouraging children under fourteen years, lunatics, or idiots, to commit any offense shall be prosecuted and punished the same as if he had committed the offense. It seems desirable to include solicitation as an offense in the traditional triad of inchoate offenses as other states have done. In all cases the actor must have the requisite "purpose" of "promoting or facilitating" commission of an offense.

Subsection (2) provides the same maximum penalty for solicitation as may be imposed for the principal offense solicited.

Cross References

Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Definition of "purpose" M.C.A. 1978, § 45-2-101(52)

Law Review Commentaries

Comment. Administration of the affirmative trap and the doctrine of entrapment: Device and defense. 31 U. Chi. L. Rev. 137 (1963)

Comment. Criminal law: Concurrent and consecutive sentencing. 1973 U. Ill. L. F. 423 (1973)

Library References

Criminal Law Key No. 45
C.J.S. Criminal Law, §§ 73, 78

Notes of Decisions

Construction and Application

Under this section solicitation is a separate and distinct crime, punishable and chargeable as such. Thus, acquittal of charges of murder and attempted murder were ruled not to operate as a bar to later conviction under charges of solicitation. People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840 (1970) cert. den. 402 U.S. 972 (1971).

Double Jeopardy

Because solicitation is a separate offense, double jeopardy concepts cannot be employed to relieve a defendant who is acquitted on charges of a principal offense of consequences arising from his conviction of solicitation. People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840 (1970) cert. den. 402 U.S. 972 (1971). (Note, however, that Montana's double jeopardy statute on this point is more restrictive than federal constitutional requirements and would preclude prosecution for both solicitation and the principal offense, see M.C.A. 1978, § 46-11-502(2). The defendant may be charged with both and convicted of either, but conviction of one requires discharge of the other.)

Venue

Where the acts constituting the crime of solicitation to commit perjury were committed in Missoula County but related to a pending criminal prosecution in Powell County, venue would properly lie in either county. However, since charges were initially brought in Powell County, a proper county, there was no basis for changing venue. State v. Bretz, 169 Mont. 505, 548 P.2d 949 (1976).

45-4-102. Conspiracy. (1) A person commits the offense of conspiracy when, with the purpose that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement has been committed by him or by a coconspirator.

(2) It shall not be a defense to conspiracy that the person or persons with whom the accused has conspired:

(a) has not been prosecuted or convicted;

(b) has been convicted of a different offense;

(c) is not amenable to justice;

(d) has been acquitted; or

(e) lacked the capacity to commit the offense.

(3) A person convicted of the offense of cons iracy shall be punished not to exceed the maximum sentence provided for the offense which is the object of the conspiracy.

Historical Note

Enacted: M.C.C. 1973, § 94-4-102, Sec. 1, Ch. 513, Laws of Montana 1973.

Source: Ill. C.C. 1961, Title 38, § 8-2; R.C.M. 1947, §§ 94-1101, 94-7211

Prior Law: R.C.M. 1947, § 94-1101, 94-7211, repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

This section is drawn almost verbatim from the Illinois statute defining conspiracy and represents an expansion of prior law to include combination for the commission of any offense. The purpose of this section is to render criminal any combination which has the purpose of committing an offense and which has proceeded so far that an action in furtherance of the commission of the offense has been taken by one member of the combination. Section (1) also eliminates the old rule which excepts from the conspiracy statutes crimes which by their very nature require more than one person for their commission. Section (2) retains the current rule that legal incapacity or other procedural bar to the prosecution of a co-conspirator will not provide a defense (see State v. Alton, 139 Mont. 479, 365 P.2d 527 (1961)) and eliminates the technical defense that requires the acquittal of a conspirator following a finding that his co-conspirators are not guilty of conspiracy.

Criminal Law Commission Comment

Section 94-4-102 [now M.C.A. 1978, § 45-4-102] provides for several changes in the law of conspiracy in Montana.

The purpose element in conspiracy has often proved elusive and difficult to identify because it is easily confused with the purpose element involved in the principal offense which is the object of the conspiracy. However, the very nature of the offense requires a purpose separate and distinct from the purpose required in a prosecution for the principal offense which is the object of the conspiracy. Since an agreement (by words, acts or understanding) is required, there must be (1) a purpose to agree, and the agreement must be accomplished with (2) a purpose that the offense which is the object of the agreement be committed. Statutes in other jurisdictions have attempted to spell out in more detail, and in various terminology, the two-fold nature of the purpose required. The commission felt that if the inchoate nature of conspiracy is kept in mind, the provision as drafted should be sufficiently clear. In addition, since the object of the conspiracy has been limited to criminal activity, there seems to be no compelling reason to express a statutory requirement of "corrupt motive" or "evil purpose."

Currently, acquittal of all conspirators but one absolves that one, since, theoretically, there must be at least two guilty parties to a conspiracy. However, this rationale is rejected as being too technical and overlooking the realities of trials which involve differences in juries, contingent availability of witnesses, the varying ability of different prosecutors and defense attorneys, etc. If the defendant obtains a full and fair trial what happened to another defendant at another time and place in another trial before a different judge and jury should not be a bar to a conviction.

Subsection (1) provides a defense if the accused would not be guilty of an offense if the conduct which is the object of the conspiracy is performed. Subdivision (2)(e) goes further and says that it is not a defense for the accused to say that his co-conspirator would not be guilty of an offense if the conduct which is the object of the conspiracy were to be performed. Subdivision (2)(e) intended to deny to an accused who has no legal incapacity or immunity in relation to the principal offense, any rights, benefits, advantages, or defenses which the law may have conferred upon a co-conspirator. This probably involves no change in the general rule of law which denies to an accused the legal disabilities of an accomplice, but probably (in conjunction with subdivision (2)(d)) involves a change in the present law of conspiracy where there are only two conspirators and the co-conspirator has been acquitted because he lacks the capacity, due to some legal disability, to commit conspiracy.

One other important change should be noted: under subsection (1) conspiracy is committed when (with the required purpose) there is an agreement to commit any offense; this eliminates the possible application of the so-called "Wharton Rule" in conspiracy, which says that if the object of the agreement is a crime which (by its very nature) requires two or more persons to commit it, then the agreement does not amount to conspiracy because no greater danger is presented by the plurality of actors in the conspiracy than would be presented to the community in the commission of the principal offense. The commission felt that the Wharton Rule fails to take into account the preventive aspect of prosecuting conspiracies, that is, to discourage the more dangerous criminal activity of several persons by punishing the preliminary agreement to engage in such activity. That the criminal activity is of

such nature as to inevitably require more than one person in its accomplishment seems the more reason to abrogate the Wharton Rule.

The problem of the extent of the conspiracy, as to multiple parties, multiple objects, or duration of the agreement has been a constant source of litigation, especially in the federal courts. An immense variety of factual situations are possible in this area, each with its own special considerations. Attempts to cover one or more of the possible fact situations by statute merely leads to the necessity of trying to cover more, so that the statutory provisions become so detailed as to risk non-coverage of fact situations through exclusion.

Cross References

Definition of "acts" M.C.A. 1978, § 45-2-101(1)
Definition of "offense" M.C.A. 1978, § 45-2-101(35)
Definiti n of "purpose" M.C.A. 1978, § 45-2-101 52)
Liability for acts committed by or for another M.C.A. 1978, §§ 45-2-301 through 45-2-312
Admissibility of statements of co-conspirator, Rule 801(d)(2)(E), Montana Rules of Evidence

Law Review Commentaries

Comment. Criminal conspiracy. 68 Nw. U. L. Rev. 851 (1973)

Comment. Criminal law: Concurrent and consecutive sentencing. 1973 U. Ill. L. F. 423 (1973)

LaFave & Scott. Criminal Law §§ 61-62 (1972)

Marcus. Criminal conspiracy: The state of mind crime--intent, proving intent, and anti-federal intent. 1976 U. Ill. L. F. 627 (1976)

Note. Conspiracy statutes and the right to refrain from engaging in labor activities. 50 Nw. U. L. Rev. 231 (1955).

Note. Conspiracy: Statutory reforms since the Model Penal Code. 75 Colum. L. Rev. 1122 (1975)

Note. Criminal conspiracy under the new Pennsylvania Crimes Code. 78 Dix. L. Rev. 159 (1973)

Note. Criminal law--criminal conspiracy--"Wharton's Rule" as exception from charge of criminal conspiracy. 8 U. Chi. L. Rev. 138 (1940)

Note. Criminal law--"infamous crimes" in Illinois today. 14 DePaul L. Rev. 138 (1965)

Note. Developments in the law--criminal conspiracy. 72 Harv. L. Rev. 920 (1959)

Note. Double jeopardy: A problem under dual sovereignty. 53 Nw U. L. Rev. 521 (1958).

White. The inchoate crimes provisions of the new Pennsylvania penal code. 35 U. Pitt. L. Rev. 235 (1973)

Library References

Conspiracy Key No. 23 et seq.
C.J.S. Conspiracy §§ 34, 35, 47, 54, 59, 60, 62
Am. Jur.2d Conspiracy §§ 1 et seq.

Notes of Decisions

In General

"Conspiracy" has been defined as the confederacy of two or more persons to

accomplish an unlawful purpose. People v. Brinn, 32 Ill.2d 232, 204 N.E.2d 724, cert. den. 382 U.S. 827 (1965). A person commits "conspiracy" when, with the intent that the principal offense be committed, he agrees with another to commit that offense and he or a co-conspirator commits an act in furtherance of the conspiracy. People v. Hoffmann, 124 Ill. App.2d 192, 260 N.E.2d 351 (1970). To constitute conspiracy the state must show criminal intent between two or more persons to accomplish an unlawful result. Worden v. State Police Merit Bd., 30 Ill. App.2d 323, 174 N.E.2d 407 (1961). Although intent to commit conspiracy is a matter of fact and cannot be implied as a matter of law, criminal intent may be shown by circumstantial evidence. People v. Perry, 23 Ill.2d 147, 177 N.E.2d 323 (1961) cert. den. 369 U.S. 868 (1962). Common design is the essence of a conspiracy. But, it is not necessary to prove such design by direct evidence of an agreement between the co-conspirators. The state need only show that conspirators pursued a course tending toward accomplishment of the offense upon which the complaint is based. People v. Perry, supra. See also, People v. Gates, 29 Ill.2d 586, 195 N.E.2d 161 (1964); People v. Edwards, 74 Ill. App.2d 225, 219 N.E.2d 382 (1966). Of course, the crime of conspiracy does not require that the contemplated offense actually be completed, and since conspiracy is a separate and distinct crime, persons who conspire to commit unlawful acts may be convicted notwithstanding the fact that the contemplated offense was actually completed, since conspiracy to commit a crime does not merge into the principal crime itself. People v. DeStefano, 85 Ill. App.2d 274, 229 N.E.2d 325 (1967) cert. den. 390 U.S. 997 (1968); People v. Brouilette, 92 Ill. App.2d 168, 236 N.E.2d 12 (1968). See also, People v. Hansen, 28 Ill.2d 322, 192 N.E.2d 359 (1963). However, under Montana's double jeopardy statute on this point, conviction for both the principal offense and the conspiracy to convict it is precluded. A defendant may be charged with both and convicted of either, but conviction of one requires discharge of the other. M.C.A. 1978, § 46-11-502(2).

Persons Liable

Once a conspiracy is entered into, each co-conspirator then becomes liable for the acts of his other co-conspirators done in furtherance of the object of the conspiracy. People v. Olivier, 3 Ill. App.3d 872, 279 N.E.2d 363 (1972); People v. McGuire, 29 Ill. App.2d 117, 172 N.E.2d 523 (1961); People v. Kroll, 4 Ill. App.3d 203, 280 N.E.2d 528 (1972); People v. Hall, 38 Ill.2d 308, 231 N.E.2d 416 (1967).

Indictment and Information

An indictment for conspiracy need not allege all of the elements of the substantive offense which is the object of the conspiracy. People v. Williams, 52 Ill.2d 455, 288 N.E.2d 406 (1972). The indictment need only designate the felony intended to be committed by such description as will apprise the defendant of the exact charge upon which he will be tried. People v. Peppas, 24 Ill.2d 483, 182 N.E.2d 228 (1962). Accord, People v. Radford, 81 Ill. App.2d 417, 226 N.E.2d 472 (1967).

Limitations

Every act in furtherance of a conspiratorial agreement is a renewal of the conspiracy, and the statute of limitations begins to run from the date of the commission of the last overt act. People v. Isaacs, 37 Ill.2d 205, 226 N.E.2d 38 (1967).

Proof of Conspiracy

Direct evidence of an agreement between conspirators is unnecessary to prove

a common design. The state need only show the conspirators pursued a course tending toward accomplishment of the object of the conspiracy. People v. Graham, 1 Ill. App.3d 749, 274 N.E.2d 370 (1971). The proof of acts in furtherance of a common design may be drawn from circumstances surrounding the commission of the act by the group and need not be supported by evidence of an express agreement between the parties. People v. Richardson, 132 Ill. App.2d 712, 270 N.E.2d 568 (1971); People v. Chandler, 78 Ill. App.2d 397, 223 N.E.2d 259 (1966); People v. Edwards, 74 Ill. App.2d 225, 219 N.E.2d 382 (1966). The state need prove only one overt act in carrying out a conspiracy to support a conviction of conspiracy. People People v. Kroll, 4 Ill. App.3d 203, 280 N.E.2d 528 (1972). See also, People v. Sarelli, 34 Ill. App.2d 380, 180 N.E.2d 722 (1962).

Admissibility and Sufficiency of Evidence

Because it is difficult to acquire direct evidence with regard to a conspiracy, it has been held that great latitude should be granted to the trial court in assessing the admissibility of circumstantial evidence when such evidence is offered to establish factors pointing towards involvement in a conspiratorial agreement. People v. Bravos, 114 Ill. App.2d 298, 252 N.E.2d 776 (1969), cert. den. 397 U.S. 919 (1970). Thus, it has been held that evidence taken from one co-conspirator is admissible against his co-conspirators. People v. Babitsch, 82 Ill. App.2d 299, 226 N.E.2d 469 (1967). Similarly, it is permissible to prove conspiracy by showing common actions of two defendants. People v. Savage, 84 Ill. App.2d 73, 228 N.E.2d 215 (1967). However, a conspiracy cannot be shown by evidence of a mere relationship or transaction between the parties. People v. Gates, 29 Ill.2d 586, 195 N.E.2d 161 (1964). And only such declarations as may fairly be said to be in furtherance of the conspiracy are admissible as declarations of the co-conspirator. People v. Hal, 25 Ill.2d 577, 185 N.E.2d 680 (1962). See also, People v. Olivier, 3 Ill. App.3d 872, 279 N.E.2d 363 (1972); People v. Trigg, 97 Ill. App.2d 291, 240 N.E.2d 130 (1968); People v. Edwards, 74 Ill. App.2d 225, 219 N.E.2d 382 (1966).

Duration of Conspiracy

Conspiracy to rob held still viable one week after the robbery occurred because evidence revealed the on-going cooperation of the conspirators in an effort to accomplish their criminal goal in dividing up the proceeds and concealing the evidence of the crime. The transcript was, according to the court, replete with evidence of a conspiracy that extended for weeks after the statement incriminating defendant was made on the night of the crime by one of defendant's co-conspirators. State v. Fitzpatrick, ____ Mont. ____, ____ P.2d ____, 37 St. Rptr. 194,200 (1980).

Co-Conspirators--Effect of Acquittal

A co-conspirator may be found guilty of a crime committed by his fellow conspirator whether or not the fellow conspirator is dead or alive, competent or incompetent at the time of his trial. State v. Alton, 139 Mont. 479, 365 P.2d 527 (1961).

Questions for Jury

Whether or not certain conduct constitutes a conspiracy is generally a question of fact for the jury to consider. People v. Gallegos, 80 Ill. App.2d 105, 224 N.E.2d 631 (1967). See also, People v. Brinn, 32 Ill. 2d 232, 204 N.E.2d 724, cert. den. 382 U.S. 827 (1965).

Venue

Where the acts constituting the crime of conspiracy to commit perjury were committed in Missoula but were related to a pending criminal prosecution in Powell County, venue would properly lie in either county. However, since charges were initially brought in Powell County, a proper county, there was no basis for changing venue. State v. Bretz, 169 Mont. 505, 548 P.2d 949 (1976).

45-4-103. Attempt. (1) A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.

(2) It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(3) A person convicted of the offense of attempt shall be punished not to exceed the maximum provided for the offense attempted.

(4) A person shall not be liable under this section if, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, he avoided the commission of the offense attempted by abandoning his criminal effort.

(5) Proof of the completed offense does not bar conviction for the attempt.

Historical Note

Enacted: M.C.C. 1973, § 94-4-103 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, § 94-4710

Prior Law: R.C.M. 1947, §§ 94-4710, 94-4711 repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

The purpose of this section is to punish conduct which, while not representing a completed offense, is undertaken with the purpose of committing a specific offense. It should be noted, however, that in accordance with present law even though the evidence shows the crime was completed, a conviction for attempt is proper (State v. Benson, 91 Mont. 21, 25, 5 P.2d 223 (1931)) and that attempt is an "included offense" for purposes of the "Double Jeopardy" statute.

To convict, there must be a showing of (1) a purpose to commit a specific offense and (2) any act toward the commission of that offense. The term "any act" was used to avoid the fine distinctions under former law between "acts of preparation" and "acts of perpetration" and simply provide that any act that showed definitely that the crime was going forward would be enough to prove

attempt. In State v. Radi, 168 Mont. 320, 542 P.2d 1206 (1975), the Montana Court pointed out, without comment, that the charge of attempted burglary would lie where a person has done any act toward the commission of the burglary and the requisite specific purpose is also shown. But, in State v. Ribera, ____ Mont. ____, 597 P.2d 1164 (1979), the court relied on State v. Rains, 53 Mont. 424, 164 P. 540 (1917) as precedent and seemed to require a much more unequivocal and specific act, i.e. an overt act which reaches "far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." Ribera, 597 P.2d at 1170. So, although the original intent of the "any act" provision was to allow any act whatsoever toward the commission of the offense to be sufficient coupled with the criminal purpose, the court requires that act to be unequivocal, amounting to "some appreciable fragment of the crime." Ribera, 597 P.2d at 1170.

Section (2) establishes the general rule that factual or legal impossibility provides no defense to attempt and supercedes the current Montana rule enunciated in State v. Porter, 125 Mont. 503, 242 P.2d 503 (1952).

Section (4) continues present law and indicates that a complete and voluntary renunciation which avoids the commission of the offense will be a defense to attempt.

Criminal Law Commission Comment

As under prior law, it is not necessary that the attempt fail in order to sustain a conviction under this section. It is important to note that the "double jeopardy" statute applies and the attempt is an "included offense" if the attempt is successful.

One charged with an attempt to commit a crime may properly be convicted even though the evidence shows that the crime was completed. (State v. Benson, 91 M 21 25, 5 P 2d 223.)

Subsection (1) requires a purpose to commit a specific offense and an act toward the commission of that offense.

Subsection (2) is intended to codify the general rule that a factual or legal impossibility (as distinguished from an inherent impossibility) is no defense to attempt. The phrase "misapprehension of the circumstances" is intended to include both factual and legal circumstances. An example of inherent impossibility would be an attempt to kill by witchcraft and is not intended to be excluded as a defense. However, factual impossibility (attempting to pick an empty pocket), or legal impossibility (attempting to receive stolen goods which are not stolen) would be no defense.

This attempt statute is designed to cover all special attempt provisions in the old code, such as "attempted arson," "attempted burglary," etc.

Cross References

Definition of "purpose" M.C.A. 1978, § 45-2-101(52)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)

Library References

Criminal Law Key No. 44, § 1208 (7)
C.J.S. Criminal Law, §§ 73, 75-77, 1987

Notes of Decisions

In General

To support a conviction for attempt there must be proof of a "purpose to commit a specific offense." In applying this rule, the Montana Supreme Court has held that evidence that the defendant had solicited the commission of the offense six days before its commission, was too remote to supply the basis for an inference of the specific intent required. State v. Hanson, 49 Mont. 361, 368, 141 P. 669 (1914). One charged with an attempt to commit a crime may be convicted even though the evidence shows that the crime has been completed. State v. Benson, 91 Mont. 21, 5 P.2d 223 (1931). To amount to an attempt, an overt act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation, there must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter. State v. Ribera, ___ Mont. ___, 597 P.2d 1164, 1170 (1979).

Sufficiency of Evidence

Defendant's extraordinary sidetrip to city together with acts of approaching students and making verbal offers to sell drugs held sufficient to constitute the crime of attempted sale of dangerous drugs. State v. Ribera, ____ Mont. ____, 597 P.2d 1164, 1170 (1979).

Abandonment

The fact that the defendant left the scene of an attempted break-in before police arrived and was apprehended two blocks from scene gave rise to possible inference of voluntary abandonment, but was not conclusive evidence as a matter of law. State v. Radi, 168 Mont. 320, 542 P.2d 1206 (1975).

Juveniles

Attempt is not an offense which can be transferred from juvenile court to adult criminal court. In the matter of Stapelkemper, 172 Mont. 192, 562 P.2d 815 (1977).

Chapter 5: OFFENSES AGAINST THE PERSON

Part 1--Homicide

45-5-101. Criminal homicide. (1) A person commits the offense of criminal homicide if he purposely, knowingly, or negligently causes the death of another human being.

(2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide.

Historical Note

Enacted: M.C.C. 1973, § 94-5-101, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 210.1

Prior Law: R.C.M. 1947, § 94-2501, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The sections covering Criminal Homicide replace the traditional crimes of murder in the first and second degree and voluntary and involuntary manslaughter. Under former law, these offenses had become encumbered with interpretations and words of art which had caused constant difficulty for the courts. Consequently, the Criminal Law Commission has avoided any reference to former terminology and has adopted an entirely new approach to Homicide. The wording for subsection (1) of this section which lists the mental states required for culpability has been taken directly from the Model Penal Code. See M.C.A. 1978, § 45-2-101 for definitions of these mental states. Subsection (2), setting forth the offenses which constitute Criminal Homicide, has been patterened after the Model Penal Code. However, a major change in this section and the following sections from the source material is the elimination in the Montana Code of the traditional names for the Homicide offenses.

Criminal Law Commission Comment

The criminal homicide section represents a complete departure from the old law, and the traditionally difficult concept of "malice aforethought." In an effort to eliminate this unsatisfactory terminology, the varying degrees of criminal homicide are differentiated by use of terms "deliberate homicide," "mitigated deliberate homicide" and "negligent homicide." This serves two purposes. First, these terms are more descriptive of the conduct proscribed. Second, judges, jurors

and attorneys will not be misled as to the weight of prior law construing instructions on murder, manslaughter, etc.

The language used attempts to isolate the character of the offender's conduct and to differentiate the offenses according to the differing elements of that conduct. It is clear, for example, that causing death purposely, knowingly or negligently must, in the absence of justification, establish criminality. The section also purposes the abandonment of the traditional distinction between first and second-degree murder, deriving from the Pennsylvania reform of 1794, under which the determinants of capital or potentially capital murder are deliberate and premeditated purpose to kill, or specific felony-murders. The section in this regard includes the following features: (1) the exclusion from the capital class of certain murders where a clear ground of mitigation is established; (2) a specification of aggravating circumstances, at least one of which must be established before a capital sentence is possible; (3) a final determination by the court as to the existence of mitigating circumstances.

There is no requirement that death must occur within any stated period of time. Time will be limited only by the need to prove a causal relation between conduct and the resulting death. (See section 94-2-105 [now M.C.A. 1978, § 45-2-201].)

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "negligently" M.C.A. 1978, § 45-2-101(31)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Causal relationship between conduct and result M.C.A. 1978, § 45-2-201

Library References

Homicide Key No. 7
C.J.S. Homicide, § 13

Law Review Commentaries

Comment. Criminal homicide. Model Penal Code, Tentative Draft No. 9, § 201.1, p. 25 (May 8, 1959)

Michael & Wechsler. A rationale of the law of homicide. 37 Colum. L. Rev. 1261 (1937)

45-5-102. Deliberate homicide. (1) Except as provided in 45-5-103(1), criminal homicide constitutes deliberate homicide if:

(a) it is committed purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in

the commission of, an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape, or any other felony which involves the use or threat of physical force or violence against any individual.

(2) A person convicted of the offense of deliberate homicide shall be punished by death or life imprisonment as provided in 46-18-301 through 46-18-310 or by imprisonment in the state prison for a term of not less than 10 years or more than 100 years, except as provided in 46-18-222.

Historical Note

Enacted: M.C.C. 1973, § 94-5-102, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 11, Ch. 338, Laws of Montana 1977; Sec. 4, Ch. 584, Laws of Montana 1977; Sec. 1, Ch. 322, Laws of Montana 1979.

Source: New

Prior Law: R.C.M. 1947, §§ 94-2501, 94-2502, 94-2503, 94-2504, 94-2505, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Deliberate Homicide encompasses the former offenses of first degree and second degree murder. Under former law, murder was defined as the unlawful killing of a human being with malice aforethought. First degree murder required the element of premeditation; while second degree murder was any other type of murder without premeditation. The new Code eliminates all references to malice, employing instead the more precisely defined mental states of "knowingly" and "purposely." "Purposely," as defined in M.C.A. 1978, § 45-2-101(52), is the most culpable mental state and implies an objective or design to engage in certain conduct, although not particularly toward some ultimate result. "Knowingly," (M.C.A. 1978, §45-2-101(27)), refers to a state of mind in which a person acts, while not toward a certain objective, at least with full knowledge of relevant facts and circumstances. Together, these terms replace the concepts of malice and intent. Premeditation, the distinguishing factor between first degree and second degree murder, has presented a continuing definitional problem for the courts. Many states require that the offender have had some time to think and reflect about the nature of his forthcoming act before premeditation can be said to have occurred. Montana, in State v. Palen, 119 Mont. 600, 17 P.2d 862 (1947), held that premeditation and deliberation can be formed in an instant; thus, in effect, eliminating the traditional distinction between first degree and second degree murder. See 12 Mont. L. Rev. 72 (1951). Under the new Code, premeditation is no longer an element of homicide, nor is there any delineation between degrees of murder. Subsection (b) of

this section sets forth the felony-murder rule that broadens that rule (see R.C.M. 1947, § 94-2503, repealed, Sec. 32, Ch. 513, Laws of Montana 1973) by including within those acts in which deliberation is presumed all forcible felonies not specifically enumerated. Attention is directed toward the definition of "felony" in M.C.A. 1978, § 45-2-101(15) which allows classification of offenses by potential sentence for trial purposes. This section was amended twice in 1977, once by Chapter 338 and once by Chapter 584. The first amendment substituted "death or life imprisonment as provided in section 95-2206.6 through section 95-2206.15" in subsection (2) for "death as provided in section 94-5-105." These procedures are an effort to satisfy both the electorate of Montana who voted to retain the death penalty and the most recent decisions of the United States Supreme Court on that subject. The second Amendment substituted "for a term of not less than 2 years or more than 100 years except as provided in section 95-2206.18" at the end of subsection (2) for "for any term not to exceed one hundred (100) years" enacting a minimum mandatory sentence of not less than two years. The 1979 amendment raised the mandatory minimum sentence from two to ten years.

Criminal Law Commission Comment

Section 94-5-102 [now M.C.A. 1978, § 45-5-102] relates only to conduct which is done deliberately; that is, purposely or knowingly. The enumerated offenses in subsection (b) broaden the old law dealing with felony-murders, R.C.M. 1947, section 94-2503, to include any felony which involves force or violence against an individual. Since such offenses are usually coincident with an extremely high homicidal risk, a homicide which occurs during their commission can be considered a deliberate homicide. The section is intended to encompass most homicides traditionally designated as second-degree murder. Subsection (2) changes the punishment, providing that a person "shall be punished by death . . . or by imprisonment . . . for any term not to exceed one hundred (100) years," thus seeking to expand the sentencing latitude of the judge.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Causal relationship between conduct and result M.C.A. 1978, § 45-2-201
Definition of "felony" M.C.A. 1978, § 45-2-101(15)
Robbery M.C.A. 1978, § 45-5-401
Sexual intercourse without consent M.C.A. 1978, § 45-5-503
Arson M.C.A. 1978, § 45-6-103
Burglary M.C.A. 1978, § 45-6-204
Kidnapping M.C.A. 1978, §§ 45-5-301 through 45-5-304
Escape M.C.A. 1978, § 45-7-306
Burden of the state in homicide trial M.C.A. 1978, § 46-16-203

Library References

Homicide Key Nos. 7, 8, 12, 13
C.J.S. Homicide, §§ 1, et seq.

Notes of Decisions

Constitutionality

Because it permits imposition of the death penalty only for a narrowly defined class of murders and kidnappings and permits the sentencing judge to consider mitigating circumstances before imposition of sentence, and because any case in which the death penalty is imposed is appealable to the supreme court or the sentence review division (section 95-2501 et seq.) [now § 46-18-901 et seq.], this section is constitutional under the standards of Jurek v. Texas, 428 U.S. 262, (1976). State v. McKenzie, 171 Mont. 278, 557 P.2d 1023 (1977).

Information and Indictment

An information charging deliberate homicide should indicate whether the charge is made under subdivision (1), "purposely or knowingly," or subdivision (2), the felony-murder rule. If charges are made under both subdivisions, they should be made in separate counts. State ex rel. McKenzie v. District Court, 165 Mont. 54, 525 P.2d 1211 (1974). Aggravating circumstances which affect the possible sentence available upon conviction need not be set out in separate counts in the information. Id. It is unnecessary to allege in the information the means of producing death or what the related felony was (where felony-murder is alleged). Id. While obtaining leave to file an information is not a mere perfunctory matter statements in an affidavit alleging (1) that the defendant set a fire which caused the death three persons, (2) that the defendant had admitted setting the fire and (3) that the fire department had determined that the fire was deliberately set, were sufficient to establish probably cause to prosecute. State v. Hallam, ____ Mont. ____, 575 P.2d 55 (1978). Affidavit in support of motion for leave to file information direct which alleged only that defendant had entered a bar with a companion, that the companion had beaten the bar owner to death, that during such beating defendant had failed to restrain his companion, and that defendant had at least once said to the victim that "he had this coming," was insufficient to establish probable cause to believe that defendant had committed deliberate homicide, and leave to file the information should not have been granted. State ex rel. Murphy v. McKinnon, 171 Mont. 120, 556 P.2d 906 (1976).

Instructions

The Montana Criminal Code of 1973 replaced the former terms relating to "mens rea," such as "willfully," "deliberately," and "intentionally" with the terms "knowingly" and "purposely," both of which are carefully defined in § 94-2-101 [now M.C.A. 1978, § 45-2-101]. Instructions defining "knowingly" and "purposely" are all that is required (citing Montana Criminal Code, 1973, Annotated). State v. Sharbono, ____ Mont. ____, 563 P.2d 61 (1977). Where evidence established that the defendant first wounded the victim then walked towards the victim shooting him twice more before inflicting the fatal shot at point blank range, there was sufficient evidence to establish deliberate homicide and an instruction on mitigated deliberate homicide was unnecessary. State v. Buckley, 171 Mont. 238, 557 P.2d 283 (1976). Defendant was not entitled to an instruction on mitigated deliberate homicide where his only defense was that he had nothing to do with the killing and no evidence of mitigation was presented. State v. Baugh, ____ Mont. ____, 571 P.2d 779 (1977).

Guilty Pleas

Where there was evidence of mitigating factors, a judge, before accepting a plea of guilty of deliberate homicide, should have informed the defendant of the possibility of being found guilty at trial of mitigated deliberate homicide. State v. Azure, ____ Mont. ____, 573 P.2d 179 (1977).

Felony Murder

Where defendant committed a robbery immediately after being involved with another in the beating death of the owner of the establishment robbed, but no causal connection between the homicide and the robbery was shown, the felony-murder rule did not apply. State ex rel. Murphy v. McKinnon, 171 Mont. 120, 556 P.2d 906 (1976).

45-5-103. Mitigated deliberate homicide. (1) Criminal homicide constitutes mitigated deliberate homicide when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation.

(2) A person convicted of mitigated deliberate homicide shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years, except as provided in 46-18-222.

Historical Note

Enacted: M.C.C. 1973, § 94-5-103, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 5, Ch. 584, Laws of Montana 1977

Source: New and M.P.C. 1962, § 210.3

Prior Law: R.C.M. 1947, § 94-2507(1) repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section replaces the former offense of voluntary manslaughter. Traditionally, voluntary manslaughter has been defined as the unlawful killing of a human being without malice upon sudden quarrel or in the heat of passion. The crime customarily applied to cases in which the actor killed intentionally but

because he did so in the heat of passion could not be said to have deliberated his act. This section continues the coverage of former law by finding guilt for Mitigated Deliberate Homicide where the actor has killed knowingly or purposely (defined in M.C.A. 1978, § 45-2-101) but in which mitigating circumstances in the form of extreme emotional distress can be shown. The section follows former law additionally by providing both a lesser included offense for deliberate homicide when mitigating evidence is presented by the defense and a principal offense when the prosecution has conclusive evidence of mitigation before the trial. The section seeks, however, to avoid many of the definitional problems which pervaded the traditional approach to manslaughter by eliminating the terms "malice," "heat of passion," "sudden provocation," and by changing the title of the offense. It should be noted that the factor of mitigation is not an element which the prosecution must prove but is a defense which the defendant must raise. The wording for this section has been adapted from the Model Penal Code.

The 1977 amendment substituted "a term of not less than two years or more than forty years except as provided in 95-2206.18" in subsection (2) for "any term not to exceed forty (40) years" thus imposing a mandatory minimum sentence for the commission of the offense.

Criminal Law Commission Comment

Section 94-5-103 [now M.C.A. 1978, § 45-5-103] specifies the circumstances under which the punishment for deliberate homicide is mitigated.

Cross References

Criminal homicide M.C.A. 1978, § 45-5-101
Deliberate homicide M.C.A. 1978, § 45-5-102

Library References

Homicide Key no. 31
C.J.S. Homicide, §§ 37, 39, 40, 43, 44

Law Review Commentaries

Comment. Manslaughter. Model Penal Code, Tent. Draft No. 9, § 201.3, p. 40 (May 8, 1959)

Notes of Decisions

Guilty Pleas

Where there was evidence of mitigating factors, a judge, before accepting a plea of guilty of deliberate homicide, should have informed the defendant of the possibility of being found guilty at trial of mitigated deliberate homicide. State v. Azure, ____ Mont. ____, 573 P.2d 179 (1977).

Instructions

Where the evidence established that the defendant first wounded the victim then walked toward the victim shooting him twice more before inflicting the fatal shot at point blank range, there was sufficient evidence to establish deliberate homicide and an instruction on mitigated deliberate homicide was unnecessary. State v. Buckley, 171 Mont. 238, 557 P.2d 283 (1976). Defendant was not entitled to an instruction on mitigated deliberate homicide where his only defense was that he had nothing to do with the killing and no evidence of mitigation was presented. State v. Baugh, ____ Mont. ____, 571 P.2d 779 (1977).

45-5-104. Negligent homicide. (1) Criminal homicide constitutes negligent homicide when it is committed negligently.

(2) A person convicted of negligent homicide shall be imprisoned in the state prison for any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-5-104, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 210.4

Prior Law: R.C.M. 1947, § 94-2507(2), repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Negligent Homicide replaces the offense of Involuntary Manslaughter which was defined as the unlawful killing of a human being without malice, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. In interpreting this statute, many states including Montana required that for criminal liability to be imposed, the act must have been malum in se, bad in itself, rather than merely malum prohibitum. Montana solved the problem of determining when an act was malum in se by requiring the showing of criminal negligence in all cases. See State v. Powell, 114 Mont. 571, 138 P.2d 949 (1943); State v. Pankow, 134 Mont. 519, 333 P.2d 1017 (1959); State v. Bosch, 125 Mont. 566, 242 P.2d 477 (1952). It may be concluded, therefore, that this section is a condification of the approach taken by the Montana courts which equated involuntary manslaughter with criminal negligence. Of course, this section avoids the tortuous and confusing language of the former law and provides a simpler solution to such negligent homicides as motor vehicles deaths, hunting mishaps and death which results from professional malpractice. Negligence, as defined in § 45-2-101(31), requires that for culpability the homicidal risk be of such a nature and degree that to disregard it involves a "gross deviation" from the standard of conduct that a reasonable person would observe in the actor's situation. Clearly, if the evidence does not make out a case for criminal negligence,

there is no reason for creating criminal liability for an event which is an unfortunate accident. By providing broad language, the section obviates the necessity of having numerous statutes to handle the different types of negligent homicides which occur. The language for this section is substantially similar to the Model Penal Code and as with the other sections on Criminal Homicide has been drafted in a manner designed to avoid all earlier distinctions and interpretations.

Criminal Law Commission Comment

Section 94-5-104 [now M.C.A. 1978, § 45-5-104] is addressed to homicides caused by negligence as defined in section 94-2-101(32) [now M.C.A. 1978, § 45-2-101(31)]. The negligence applicable to criminal homicide requires that the homicidal risk be of such a nature and degree that to disregard it involves a "gross deviation" from the standard of conduct that a reasonable person would observe in the actor's situation.

This code provision is especially relevant to vehicular homicides, since it is inevitable that they will predominate in number. In this country, however, it has been very difficult to convict the negligent motorist of a criminal homicide. Several states have attempted with varying success to deal with the problem by enacting special legislation, but such legislation should not be necessary in Montana with proper application of this provision. Clearly, if the evidence does not make out a case of negligence, as negligence is herein defined, there is no reason for creating criminal liability for homicide, as distinguished from any other traffic offense. However, because of the diverse facts surrounding negligent homicides the sentencing judge is given freedom to sentence the act either as a misdemeanor or a felony. See section 94-1-105 [now M.C.A. 1978, § 45-1-201].

Cross References

Definition of "negligently" M.C.A. 1978, § 45-2-101(31)

Library References

Homicide Key No. 34
C.J.S. Homicide, §§ 55 et seq.

Law Review Commentaries

Comment. Negligent homicide. Model Penal Code, Tent. Draft No. 9, § 201.4, p. 49 (May 8, 1959)

45-5-105. Aiding or soliciting suicide. (1) A person who purposely aids or solicits another to commit suicide, but such suicide does not occur, commits the offense of aiding or soliciting suicide.

(2) A person convicted of the offense of aiding or soliciting a suicide shall be imprisoned in the state prison for any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-5-106, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-35-215, repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section makes it a felony to aid or solicit a suicide attempt which does not result in the death of the victim. Under the new sections on Causal Relationship Between Conduct and Result, M.C.A. 1978, § 45-2-201, and Accountability, M.C.A. 1978, § 45-2-302(1), a person may be convicted of Criminal Homicide, M.C.A. 1978, § 45-5-101, for causing another to commit suicide--notwithstanding the consent of the victim. The reason for making aiding or soliciting suicide a separate offense is that such an act indicates a dangerous disregard for human life.

Criminal Law Commission Comment

If the conduct of the offender made him the agent of the death, the offense is criminal homicide notwithstanding the consent or even the solicitations of the victim. See sections 94-5-101 through 94-5-105 [now M.C.A. 1978, §§ 45-5-101 through 45-5-104].

Rather than relying on aiding or soliciting an attempted homicide, this section sets forthe the specific formula to make such acts punishable. The rationale behind the felony sentence fr the substantive offense of aiding or soliciting suicide is that the act typifies a very low regard for human life.

Cross References

Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Causal relationship between conduct and result M.C.A. 1978, § 45-2-201
When accountability exists M.C.A. 1978, § 45-2-302
Criminal homicide M.C.A. 1978, § 45-5-101

Library References

Suicide Key No. 3
C.J.S. Suicide, § 3
C.J.S. Homicide, § 150

45-5-201. Assault. (1) A person commits the offense of assault if he:

(a) purposely or knowingly causes bodily injury to another;

(b) negligently causes bodily injury to another with a weapon;

(c) purposely or knowingly makes physical contact of an insulting or provoking nature with any individual; or

(d) purposely or knowingly causes reasonable apprehension of bodily injury in another. The purpose to cause reasonable apprehension or the knowledge that reasonable apprehension would be cause shall be presumed in any case in which a person knowingly points s firearm at or in the direction of another, whether or not the offender believes the firearm to be loaded.

(2) Except as provided in subsection (3), a person convicted of assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

(3) If the victim is less than 14 years old and the offender is 18 or more years old, the offender, upon conviction under subsection (1)(a), shall be imprisoned in the state prison for a term not to exceed 5 years.

Historical Note

Enacted: M.C.C. 1973, § 94-5-201, by Sec. 1, Ch. 513, Laws of Montana 1973.

Amended: Sec. 1, Ch. 261, Laws of Montana 1979

Source: M.P.C. 1962, § 211.1

Prior Law: R.C.M. 1947, § 94-603, repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This is the simple assault section of the new criminal code. As such it replaces the prior law of simple assault contained in R.C.M. 1947, § 94-603. This section represents a change from prior law in that it specifically enumerates the elements of the offense rather than relying on a common law definition of assault limited only by the exclusion of conduct assigned to the more serious forms of

assault.

This provision differs from prior law in a number of substantive particulars. Actual physical contact or "battery" is required as an element of the offense except under subsection (d) and the apprehension which constitutes an element of the offense under that subsection is an apprehension of bodily injury, not mere apprehension of physical contact. Similarly, state of mind is made an explicit element of the offense with knowledge or purpose required under subsections (a), (c) and (d) and negligence required under subsection (b). Another significant change is the addition of the presumption that knowingly pointing a firearm at another is either with the purpose of creating reasonable apprehension of bodily injury or with the knowledge that reasonable apprehension of bodily injury will result.

The 1979 amendment added subsection (3) which provides for felony, rather than misdemeanor, punishment where the assault is inflicted by an adult upon a child. This subsection, in combination with § 45-5-201(1)(c), will reach types of sexual assaults upon children by adults that might not be actionable under the Sexual Assault section, M.C.A. 1978, § 45-5-502. An actual withholding by the victim of consent to the sexual conduct is required to convict under § 45-5-502. The age of a child, from which lack of consent is implied in other sex offenses, is not sufficient under the Sexual Assault statute. Since young children do not always find it easy to withhold consent from an adult, there can be cases where the requisite lack of consent cannot be proved although the sexual contact is obvious. In such a case, the defendant may be charged under § 45-5-201(1)(c), which only requires a showing of physical contact of an insulting or provoking nature, and he would be subject to the increased penalty of § 45-5-201(3).

Criminal Law Commission Comment

This section codifies what is generally known as "simple assault." The section makes several changes in the old assault law. The primary change is that it sets forth the elements of the offense of assault specifically rather than assigning to the offense conduct not covered by other more serious assault provisions. Another change is that the offense must be committed purposely, knowingly or negligently, thus maintaining the intent element consistent with the other proposed statutes dealing with offenses against the person. It should be noted that "battery," i.e., actual bodily injury or contact of some kind, is an essential element of the offense of assault in all instances except those arising under subdivision (1)(d). The type of apprehension required as an element of the offense under subdivision (1)(d) is apprehension of bodily injury, and not apprehension of mere physical contact. (See section 94-2-101(5) [now M.C.A. 1978, § 45-2-101(5)], bodily injury.)

Cross References

Definition of "bodily injury" M.C.A. 1978, § 45-2-101(5)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "negligently" M.C.A. 1978, § 45-2-101(31)
Definition of "weapon" M.C.A. 1978, § 45-2-101(65)

Library References

Assault and Battery Key No. 47 et seq.
C.J.S. Assault and Battery, §§ 57-72.

Law Review Commentaries

Comment. Bodily injury. Model Penal Code, Tent. Draft No. 9, § 201.10, p. 81 (May 8, 1959)

Notes of Decisions

In General

The offense defined in this section may be, under a proper state of facts, a lesser included offense in the crime of Aggravated Assault defined in section 94-5-202 [now M.C.A. 1978, § 45-5-202]. State v. Bouslaugh, ____ Mont. ____, 576 P.2d 261 (1978).

45-5-202. Aggravated assault. (1) A person commits the offense of aggravated assault if he purposely or knowingly causes:

(a) serious bodily injury to another;

(b) bodily injury to another with a weapon;

(c) reasonable apprehension of serious bodily injury in another by use of a weapon; or

(d) bodily injury to a peace officer.

(2) A person convicted of aggravated assault shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years, except as provided in 46-18-222.

Historical Note

Enacted: M.C.C. 1973, § 94-5-202 by Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 6, Ch. 584, Laws of Montana 1977

Source: M.P.C. 1962, Sec. 211.1(2)

Prior Law: R.C.M. 1947, § 94-601 and R.C.M. 1947, § 94-602 repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

This section of the new criminal code deals with the more serious forms of assault. As such it replaces the old crimes of First Degree Assault (R.C.M. 1947, § 94-601) and Second Degree Assault (R.C.M. 1947, § 94-602). This section requires that the acts be done with purpose or knowledge. In all but subsection (1)(c) an actual physical contact or "battery" is a required element and in subsection (1)(c) the required element is a reasonable apprehension of serious bodily injury caused by use of a weapon. The aggravating factor which distinguishes each of these from simple assault is, respectively, the infliction of serious bodily injury as

opposed to mere bodily injury, the use of a weapon to inflict the bodily injury, or the fact that the bodily injury is inflicted on a peace officer. In subsection (1)(c) the aggravating factor is that the apprehension is of serious bodily injury rather than mere bodily injury and that the apprehension is caused by the use of a weapon. It should be noted in this context that the use of any weapon, a length of pipe as well as the more obvious firearm, is sufficient aggravation to invoke the heavier penalties of this section if bodily injury or a reasonable apprehension of serious bodily injury results.

The 1977 amendment substituted "a term of not less than two years or more than twenty years except as provided in 95-2206.18" in subsection (2) for "any term not to exceed twenty (20) years" thus providing for a mandatory minimum sentence for commission of this offense.

Criminal Law Commission Comment

This section covers assaults committed under circumstances of aggravation. The elements of assault generally must be present in addition to the aggravating factor of causing serious bodily injury (see section 94-2-101(54) [now M.C.A. 1978, § 45-2-101(53)]) with purpose or knowledge. It should be noted that the crime of battery is merged within the assault provision by direct reference to physical contact, bodily injury and serious bodily injury in section 94-5-201(a) and (b) and (c) [now 45-5-201(a) and (b) and (c)] and section 94-5-202(a) and (b) [now 45-2-202(a) and (b)]. Classical assault in a tort sense is included in section 94-5-201(d) and 94-5-202(c).

Cross References

Definition of "bodily injury" M.C.A. 1978, § 45-2-101(5)
Definition of "serious bodily injury" M.C.A. 1978, § 45-2-101(53)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "weapon" M.C.A. 1978, § 45-2-101(65)

Library References

Assault and Battery Key No. 47 et seq.
Homicide, Key No. 84
C.J.S. Assault and Battery, §§ 57-72
C.J.S. Homicide, §§ 73, 74, 84, 85

Law Review Commentaries

Comment. Bodily injury. Model Penal Code, Tent. Draft No. 9, § 201.10, p. 81 (May 8, 1959)

Notes of Decisions

Information

Where a single offense of Aggravated Assault is charged under 94-5-202(1)(b)

[now 45-5-202(1)(b)], which involves the use of more than one possible weapon, it is not necessary to charge the use of each weapon in a separate count. The offense may be charged in a single count, specifying the use of each weapon in the alternative thereby adequately informing the defendant of the charges against him. State ex rel. McKenzie v. District Court, 165 Mont. 54, 525 P.2d 1211 (1974).

Amendment of Information

The crimes defined in subsections (1)(a) and (1)(c) of this section are different in nature, so amendment of the information from subsection (1)(a) of this section to subsection (1)(c) was one of substance and should not have been allowed after the defendant had pled. State v. Brown, 172 Mont. 41, 560 P.2d 533 (1976).

Instructions

It was reversible error to refuse an instruction on simple assault where the defendant introduced credible evidence that the discharge of his gun was accidental or negligent. State v. Bouslaugh, ____ Mont. ____, 576 P.2d 261 (1978).

Sentence

Where defendant was convicted of beating his two year old foster child, the trial court did not abuse its discretion in sentencing him to fifteen years, even though a psychiatrist testified that the defendant was suffering from a treatable neurosis at the time of the beating, had undergone treatment and was no longer a threat to anyone, and even though the court had relied on information concerning the victim's condition which was later contested in defendant's petition to the sentence review division. State v. Mann, 169 Mont. 306, 546 P.2d 515 (1976).

Substantial Risk of Death

The question of whether the victim of an offense under this section incurred a "substantial risk of death" as a result of his injuries is one of fact to be determined by the jury and does not depend on whether the victim ultimately lives or dies. State v. Fuger, 170 Mont. 442, 554 P.2d 1338 (1976).

Weapon

Where no evidence was presented concerning the size, weight or shape of the projectile which struck the victim, nor of the velocity at which the slingshot was was capable of propelling the projectile, and where it only inflicted a bruise on the jaw of the victim and where no hospitalization was required or bones broken, the evidence was insufficient as a matter of law to prove that the assault was committed with a weapon capable of being used to produce death or serious bodily injury. State v. Deshner, ____ Mont. ____, 573 P.2d 172, 174 (1977).

45-5-203. Intimidation. (1) A person commits the offense of intimidation when, with the purpose to cause another to perform or to omit the performance of

any act, he communicates to another a threat to perform without lawful authority any of the following acts:

(a) inflict physical harm on the person threatened or any other person or on property;

(b) subject any person to physical confinement or restraint;

(c) commit any criminal offense;

(d) accuse any person of an offense;

(e) expose any person to hatred, contempt, or ridicule; or

(f) take action as a public official against anyone or anything, withhold official action, or cause such action or withholding.

(2) A person commits the offense of intimidation if he knowingly communicates a threat or false report of a pending fire, explosion, or disaster which would endanger life or property.

(3) A person convicted of the offense of intimidation shall be imprisoned in the state prison for any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-5-203 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 12-6

Prior Law: None

Annotator's Note

Subsection (1) of this section is drawn almost verbatim from Ill. C.C. 1961, Title 38, § 12-6, while subsection (2) is new.

Subsection (1) defines and prohibits as intimidation a wide range of acts and conduct. To constitute the offense of intimidation under subsection (1) there must be the purpose to cause another to perform "or omit the performance" of any act and the threat must be "communicated" with that purpose. Further, it is also required that act threatened, if performed, would be "without lawful authority." This section is anticipatory in that it contemplates apprehension of the malefactor before the harm threatened occurs. If the threatened harm has occurred, it would seem that

intimidation is not necessarily a lesser included offense, thus the offender could be subject to both the penalty for intimidation and the penalty for the actual offense.

Subsection (2) deals with the problem of terroristic threats. To constitute an offense under this subsection there must be a "knowing" communication of a threat or false report of fire, explosion, or disaster. This subsection differs from subsection (1) in that there need be no showing of attempt to influence the acts of another, mere knowing communication of a threat or false report is sufficient to complete the offense. Accordingly this subsection reaches such diverse acts as turning in a false fire alarm or threatening to bomb an airliner or public building.

It should be noted the statutory definition of "threat" (§ 45-2-101(62)) is inapplicable to this section since the term as there defined includes various communications that are substantive elements of this offense. Because of the range of conduct dealt with by these two subsections the maximum sentence is relatively harsh to provide adequate punishment for the more severe forms of conduct covered, but since there is no minimum the judge is able to fix the penalty to suit the crime.

Criminal Law Commission Comment

Intimidation requires a specific purpose to cause another to perform "or to omit" the performance of any act (such as testifying), and the threat must be "communicated" with that purpose. It is also required that the act threatened, if performed, would be "without lawful authority." The section anticipates, therefore, that the accused is apprehended and prosecuted for intimidation before the harm threatened is performed. If the substantive harm occurs, the accused is subject to prosecution and punishment for the more serious offense, or both intimidation and such offense. This section is all inclusive and includes public officials acting without authority.

The maximum penalty is relatively harsh, but since there is no minimum sentence the judge is able to fix the penalty to suit the crime.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)

Library References

Threats Key No. 1 et seq.
C.J.S. Threats and Unlawful Communication §§ 1 et seq.

Law Review Commentaries

Note. Boycott: A specific definition limits applicability of a per se rule. 71 Nw. U. L. Rev. 818 (1977)

Notes of Decisions

Constitutionality

In ruling on the constitutionality of this section, a three-judge U.S. district court has held that sub-section (1)(c) making it an offense to threaten to commit any "criminal offense" is an overbroad restriction on freedom of speech and is invalid. The remainder of this statute was held not to deny substantive due process and was therefore upheld as valid. Landry v. Daley, 280 F. Supp. 938 (D.C. 1968), probable jurisdiction noted 89 S.Ct. 442, 393 U.S. 974, appeal dismissed, 393 U.S. 220, reversed on other grounds (1971).

45-5-204. Mistreating prisoners. (1) A person commits the offense of mistreating prisoners if, being responsible for the care or custody of a prisoner, he purposely or knowingly:

(a) assaults or otherwise injures a prisoner;

(b) intimidates, threatens, endangers, or withholds reasonable necessities from the prisoner with the purpose to obtain a confession from him or for any other purpose; or

(c) violates any civil right of a prisoner.

(2) A person convicted of the offense of mistreating prisoners shall be removed from office or employment and imprisoned in the state prison for a term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-8-113 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-3917 and 94-3918, repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

While including all conduct that was prohibited by prior law, this section is both more concise and more comprehensive. Prior law, § 94-3917, R.C.M. 1947, condemned "wilful inhumanity or oppression" toward prisoners. While those terms are undoubtedly included within the law's terms "assault," "otherwise injures," "intimidates," "threatens," "endangers" and "withholds reasonable necessities," they may not have been as inclusive and were in any event so unclear as to offer no real indication as to exactly what conduct was prohibited. By increasing the clarity of the terms describing the conduct prohibited the new section should both more effectively deter the objectionable conduct and provide for a surer application of sanctions in the event of a violation.

Criminal Law Commission Comment

This section replaces R.C.M. 1947, sections 94-3917, "Inhumanity to prisoners," and 94-3918, "Confessions obtained by duress or inhuman practices." The purpose of this section is to provide more concise terminology for offenses against prisoners. Thus, the terms assault, intimidation, threat, endanger and withhold are clearer and more meaningful than "inhumanity" or "inhuman practices."

The maximum punishment provided in the provision is ten (10) years and removal from office. The severe punishment is based on two premises: (1) the relatively helpless circumstances of a prisoner subjected to such treatment, and (2) the policy that a sentence to imprisonment should be rehabilitative in nature. Clearly, little rehabilitation or reorientation to social norms can be accomplished when those responsible for the custody and care of prisoners mistreat them.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "threat" M.C.A. 1978, § 45-2-101(62)

Library References

Officers Key No. 66, 121
C.J.S. Officers, § 133
Sheriffs and Constables Key No. 13, 153
C.J.S. Sheriffs and Constables, §§ 10, 18, 26, 209

Part 3--Kidnapping

45-5-301. Unlawful restraint. (1) A person commits the offense of unlawful

restraint if he knowingly or purposely and without lawful authority restrains another so as to interfere substantially with his liberty.

(2) A person convicted of the offense of unlawful restraint shall be fined not to exceed $500 or imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-5-301, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New and M.P.C. 1962, § 212.3

Prior Law: R.C.M. 1947, § 94-3576, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Under this part of Chapter 5, the kidnapping related offenses are arranged in a hierarchy with overlapping provisions to allow a comprehensive treatment of these crimes. Unlawful restraint is the lowest form of interference with the liberty of another. Under this section, which replaces the former crime of False Imprisonment, any intentional interference with another's freedom of movement without lawful authority, even a temporary detention, by which the victim is deprived of his liberty is prohibited. Because false imprisonment is more commonly thought of as a tort, the offense has been renamed. Additional changes from the former law include the use of the mental states "knowingly" and "purposely" (M.C.A. 1978, § 45-2-101) for a previously undefined mental state and a reduction in penalty. The phrase "without lawful authority" is included to prevent peace officers from being punished for performing their official duties. The language for this section has been adopted in part from the Model Penal Code.

Criminal Law Commission Comment

This section is intended to deal with the problem of false imprisonment; however, unlawful restraint is a more accurate name for the offense which embodies restraining another without authority of law. The principal distinctions between this section and the old code provision of R.C.M. 1947, section 94-3576 are the inclusion of the requirements of knowledge and purpose, and the substantial reduction in penalty.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

False Imprisonment Key No. 43
C.J.S. False Imprisonment § 71

Law Review Commentaries

Comment. False imprisonment. Model Penal Code, Tent. Draft No. 11, § 212.3, p. 22 (April 27, 1960)

45-5-302. Kidnapping. (1) A person commits the offense of kidnapping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation or by using or threatening to use physical force.

(2) A person convicted of the offense of kidnapping shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years, except as provided in 46-18-222.

Historical Note

Enacted: M.C.C. 1973, § 94-5-302, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 7, Ch. 584, Laws of Montana 1977

Source: New

Prior Law: R.C.M. 1947, §§ 94-2601, 94-2602, 94-2603, 94-2604, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

In drafting this section on kidnapping, the Criminal Law Commission examined the approaches which have been taken by other jurisdictions. Most codes, such as the Illinois Criminal Code and the Model Penal Code, contain several categories of kidnapping-related offenses each pertaining to carefully detailed statements of the circumstances required for each offense. Such a detailed approach, however, leads to difficulty in treating cases in which classic kidnapping has not occurred, but in which the abduction has certainly been criminal in nature. Consequently the offenses of Kidnapping and Unlawful Restraint have been given broad definitions designed to encompass any conceivable type of abduction or unlawful detention. Where the character of the conduct is thought too ambiguous or less culpable, leniency may be expressed in the imposition of sentence, which is given a broad range under the new Code.

One problem that this section and the following provision on Aggravated Kidnapping seek to solve is the treatment of prisoners who hold hostages during escape or for coercive purposes. Because former law required the victim to be "secretly confined" before a kidnapping charge was possible, the courts were forced to use tortuous logic to apply the kidnapping statute to such conduct. The legislature reacted by passing R.C.M. 1947, § 94-2604 providing a separate crime for such conduct. The final clause of subsection (1), therefore, covers such "hostage" situations where the victim is openly held by providing criminal liability whenever force or threat of force has occurred. It should be noted that there is an overlap between this subsection and subsection (a) of the provision on aggravated kidnapping to allow the punishment of offenders who use hostages under different types of factual situations and degrees of culpability. The clause "holding him in a place of isolation" in this section on kidnapping conforms with prior law by providing that a showing of actual violence or threat of injury is not required when the victim has been isolated. See State v. Walker, 139 Mont. 276, 362 P.2d 548, 550 (1961). Attention is directed to the difference between kidnapping which requires either isolation or use of forceful restraint and Unlawful Restraint (M.C.A. 1978, § 45-5-301) which is a lesser offense requiring only unlawful detention.

The 1977 amendment has imposed a mandatory minimum sentence of not less than two years.

Criminal Law Commission Comment

Both the Illinois Criminal Code and the Model Penal Code kidnapping provisions are marked by great detail in defining the offense. Under the Illinois Code, kidnapping may be either simple (misdemeanor or felony) or aggravated (felony), and there is a third offense entitled unlawful restraint (misdemeanor). The Model Penal Code contemplates offenses called kidnapping, felonious restraint, false imprisonment, and interference with custody. A detailed statement of the circumstances required for each offense is given in each provision.

It is possible that such a detailed treatment of the kidnapping provisions will lead to difficulties in interpreting ambiguous conduct and relating it to the stated offenses. Too often conduct which seems criminal escapes the precise language of the statutes. The commission concluded that a carte blanche approach whereby the offenses of kidnapping and unlawful restraint are given broad definition was warranted. Any leniency justified by the character of such ambiguous conduct could best be considered and given effect in the sentence imposed. If this approach is utilized the range of punishment that may be imposed should be substantial.

It should be noted that subsection (1) conforms with current Montana law, that a showing of actual physical violence or threat of personal injury are not required to prove the force necessary to establish the crime. (State v. Walker, 139 M 276, 362 P 2d 548, 550.)

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

Criminal Law Key No. 112(1)
Kidnapping Key No. 1
C.J.S. Kidnapping § 2
C.J.S. Crim. Law § 177

Law Review Commentaries

Note. A rationale of the law of kidnapping. 53 Colum. L. Rev. 540 (1953)
Parker. Aspects of merger in the law of kidnapping. 55 Cornell L. Rev. 527 (1970)

45-5-303. Aggravated kidnapping. (1) A person commits the offense of aggravated kidnapping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation or by using or threatening to use physical force, with any of the following purposes:

(a) to hold for ransom or reward or as a shield or hostage;

(b) to facilitate commission of any felony or flight thereafter;

(c) to inflict bodily injury on or to terrorize the victim or another;

(d) to interfere with the performance of any governmental or political function; or

(e) to hold another in a condition of involuntary servitude.

(2) Except as provided in 46-18-222, a person convicted of the offense of aggravated kidnapping shall be punished by death or life imprisonment as provided in 46-18-301 through 46-18-310 or be imprisoned in the state prison for a term of not less than 2 years or more than 100 years, unless he has voluntarily released the victim alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-5-303, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 12, Ch. 338, Laws of Montana 1977; Sec. 8, Ch. 584, Laws of Montana 1977

Source: M.P.C. 1962, § 212.1

Prior Law: R.C.M. 1947, § 94-2601 et seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Aggravated Kidnapping enumerates those situations when the crime of kidnapping may be punished by lengthy prison sentences or by death. The crimes of Kidnapping and Unlawful Restraint, supra, are the lesser included offenses within the Kidnapping hierarchy and provide flexibility in punishing behavior which is often factually diverse and difficult to categorize. This section covers both the classic form of kidnapping wherein the victim is abducted and held for ransom as well as the increasingly common situation where a person is held against his will to coerce the accomplishment of some illegal act.

Subsection (2) seeks to maximize the kidnapper's incentive to return the victim alive by providing a much more lenient sentence if the victim is released alive, in a safe place, and not suffering from serious bodily injury. If these conditions are not met the maximum penalty may be imposed--death if the victim has been killed or up to 100 years imprisonment if death has not occurred.

This section was amended twice in 1977. The first amendment substituted "death or life imprisonment as provided in 95-2206.6 through 95-2206.15" in subsection (2) for "death as provided in section 94-5-304." The second 1977 amendment inserted "except as provided in 95-2206.18" at the beginning of subsection (2); substituted "a term of not less than two years or more than" in the middle and at the end of subsection (2) for "any term not to exceed," thereby enacting a mandatory minimum sentence of two years imprisonment.

Criminal Law Commission Comment

This section is derived almost exclusively from the Model Penal Code, section 212.1, and is generally intended to answer the question of when the crime of kidnapping should be punished by death. The section proposes to maximize the kidnapper's incentive to return the victim alive, by making the capital penalty apply only when the victim is not released, alive, in a safe place and not suffering from serious bodily injury.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Unlawful restraint M.C.A. 1978, § 45-5-301
Kidnapping M.C.A. 1978, § 45-5-302

Library References

Criminal Law Key No. 112(1)
Kidnapping Key No. 1
C.J.S. Kidnapping § 2
C.J.S. Crim. Law § 177

Law Review Commentaries

Comment. Kidnapping. Model Penal Code, Tent. Draft No. 11, § 212.1, p. 11 (April 27, 1960)

Notes of Decisions

Constitutionality

Subsection (2) does not unconstitutionally delegate the right to make findings of fact to the judge, since the determination goes solely to the question of punishment. State v. Stewart, ____ Mont. ____, 573 P.2d 1138 (1977).

Information and Indictment

It was not necessary to charge the defendant with ten separate counts of kidnapping, specifying weapons used and the related felony, where a single count based on subdivision (1)(b), specifying the felonies of aggravated assault and sexual intercourse without consent, or a single count based on the statutory language of subdivision (1)(c) would fulfill the notice requirement of the statute. State ex rel. McKenzie v. District Court, 165 Mont. 54, 525 P.2d 1211 (1974).

Release of Victim in Safe Place

Defendant was properly sentenced to 100 years, rather than a maximum of 10 years under 94-5-303(2) [now 45-5-303(2)], because he did not release the victim unharmed and in a safe place when the defendant abandoned the kidnapping scheme but left the victim with his cohorts who subsequently killed the victim. State v. Stewart, ____ Mont. ____, 573 P.2d 1138 (1977).

45-5-304. Custodial interference. (1) A person commits the offense of custodial interference if, knowing that he has no legal right to do so, he takes, entices, or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another person or institution.

(2) A person convicted of the offense of custodial interference shall be imprisoned in the state prison for any term not to exceed 10 years.

(3) A person who has not left the state does not commit an offense under this section if he voluntarily returns such person to lawful custody prior to arraignment. A person who has left the state does not commit an offense under this section if he voluntarily returns such person to lawful custody prior to arrest.

Historical Note

Enacted: M.C.C. 1973, § 94-5-305, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 274, Laws of Montana 1979

Source: New

Prior Law: R.C.M. 1947, § 94-2603, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Custodial Interference provides criminal liability for the abduction of a child or incompetent person in the custody of an institution or person where the offender has knowledge that he has no legal right to have custody of the person. Both the situation in which two parents are fighting for custody of a child and the situation where an individual committed to an institution is taken are covered by this provision. The clause "knowing that he has no legal right to do so" is equivalent to a general mental state of "knowingly" as provided in M.C.A. 1978, § 45-2-101(27). Former subsection (2) allowed the conduct to be excused if the person taken was returned before trial for the offense commenced. The 1979 amendment removed that provision from subsection (2) and added subsection (3) which provides that a person does not commit the offense of custodial interference if he returns the individual taken to lawful custody prior to arraignment or, in the case of a person who has left the state, prior to arrest.

Criminal Law Commission Comment

Violation of lawful custody, especially of children, requires special legislation notwithstanding its similarity in some respects to kidnapping. The interest protected is not freedom from physical danger or terrorization by abduction, since that is adequately covered by sections 94-5-302 and 94-5-303 [now §§ 45-5-302, 45-5-303], but rather the maintenance of parental custody against all unlawful interruption, even when the child is a willing, undeceived participant in the attack on the parental interest. The problem is further distinguishable from kidnapping by the fact that the offender will often be a parent or other person favorably disposed toward the child. One should be especially cautious in providing penal

sanctions applicable to estranged parents struggling over the custody of their children, since such situations are better regulated by custody orders enforced through contempt proceedings. Despite these distinctive aspects of child-stealing and the existence of special provisions on the subject in most jurisdictions, the problem is frequently covered by kidnapping and the penalties and exceptions do not adequately reflect the special circumstances.

Cross References

Kidnapping M.C.A. 1978, § 45-5-302
Aggravated kidnapping M.C.A. 1978, § 45-5-303
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Library References

Parent and child, Key No. 18
C.J.S. Parent and child § 178

Law Review Commentaries

Comment. Violation of custody. Model Penal Code, Tent. Draft No. 11, § 212.4, p.23 (April 27, 1960)

Note. A rationale of the law of kidnapping. 53 Colum. L. Rev. 540, 551 (1953)

Note. The problem of parental kidnapping. 10 Wyo. L. J. 225 (1956)

Part 4--Robbery

45-5-401. Robbery. (1) A person commits the offense of robbery if in the course of committing a theft he:

(a) inflicts bodily injury upon another;

(b) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or

(c) commits or threatens immediately to commit any felony other than theft.

(2) A person convicted of the offense of robbery shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years, except as provided in 46-18-222.

(3) "In the course of committing a theft" as used in this section includes

acts which occur in an attempt to commit or in the commission of theft or in flight after the attempt or commission.

Historical Note

Enacted: M.C.C. 1973, § 94-5-401 by Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 9, Ch. 584, Laws of Montana 1977

Source: M.P.C. 1962, § 222.1

Prior Law: R.C.M. 1947, § 94-4301 to 94-4303, repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The crime of robbery has always been treated as a "hybrid" offense against both person and property. Under the common law as previously codified in Montana, the crime required establishment of a number of rather technical elements constituting an offense against property in addition to the man-endangering element of force or putting in fear. These elements were a "felonious taking," a taking with intent to steal of personal property in the possession of another, and the taking from the person or his immediate presence. The new section replaces these elements with the inclusive term "in the course of committing a theft" which is broadly defined by subsection (3) to include "acts which occur in an attempt to commit or the commission of theft, or in flight after the attempt or commission." This provision effectively eliminates the prior law's requirements that the offender succeed in taking the property, that the property be in the possession of the person robbed and that it be taken from his person or immediate presence. All that is required as an offense against property under the new code is that there be a theft or attempt to commit theft. The effect of these changes is to make the gravamen of robbery more clearly the threat to the person.

Prior law made the threat to the person element of robbery hinge on either the actual application of force or a putting in fear. The new code has retained both of these elements, although in a somewhat changed form. The new law requires that there be the infliction of bodily injury, or a threat to inflict bodily injury, or a knowing placing in fear of bodily injury, or the commission or threat of commission of any felony other than theft. These elements are in large measure objective since, with the exception of knowingly placing in fear, none depend on the victim's state of mind, rather all depend solely on the acts of the offender. The commission or threat to commit any other felony is an expansion of prior law and reflects the continued concern with the aggravating factors which justify the classification of robbery as a separate offense. This section includes armed robbery and encompasses the use of a toy or unloaded gun to threaten serious injury.

The 1977 amendment substituted "a term of not less than two years or more than forty years except as provided in 95-2206.18" in subsection (2) for "any term not to exceed forty (40) years," thus enacting a mandatory two-year minimum sentence.

Criminal Law Commission Comment

With some verbal changes the Montana draft on robbery parallels that of the Model Penal Code, section 222.1.

Common-law robbery was theft of property from the person or in the presence of the victim by force or by putting him in fear either of immediate bodily injury or of certain other grievous harms. The above draft does not explicitly include the traditional basis for classifying robbery as taking property from the person or in the presence of a person, but approaches the crime as one of immediate danger to the person and relies on the condition of violence or threatened violence to distinguish the crime from ordinary theft. The gist of the offense is taking by force or threat of force.

The above provision would apply where property was not taken from the person or from his presence. For example, an offender might threaten to shoot the victim in order to compel him to telephone directions for the disposition of property located elsewhere. Further, it is immaterial whether property is or is not obtained. This seems compatible with the theory of treating robbery as an offense against the person rather than against property. Hence, a completed robbery may occur even though the crime is interrupted before the accused obtained the goods, or if the victim had no property to hand over. The section includes armed robbery. Further, subdivision (1)(b) encompasses the use of a toy or unloaded gun, since such a device can be employed to threaten serious injury and may be effective to create fear of such injury.

Cross References

Definition of "bodily injury" M.C.A. 1978, § 45-2-101(5)
Definition of "felony" M.C.A. 1978, § 45-2-101(15)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Theft M.C.A. 1978, § 45-6-301
Definition of "threat" M.C.A. 1978, § 45-2-101(62)

Library References

Robbery Key Nos. 1, 7, 30
C.J.S. Robbery, §§ 1 et seq., 10, 51 et seq.

Law Review Commentaries

Comment. Robbery. Model Penal Code, Tent. Draft No. 11, § 221.1, p. 68 (April 27, 1960)

Note. A rationale of the law of aggravated theft. 54 Colum. L. Rev. 84 (1954)

Notes of Decisions

Mental State

The mental state required to commit the offense defined in subdivision (1)(b)

of this section is "knowingly" or "purposely" and the jury need not consider "intent" as well, since knowingly and purposely replace the older terms "intentionally" and "feloniously." State v. Klein, 169 Mont. 350, 547 P.2d 75 (1976).

Part 5--Sexual Crimes

45-5-501. Definition. As used in 45-5-503 and 45-5-505, the term "without consent" means:

(1) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone; or

(2) the victim is incapable of consent because he is:

(a) mentally defective or incapacitated;

(b) physically helpless; or

(c) less than 16 years old.

Historical Note

Enacted: M.C.C. 1973, § 94-5-501, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 2, Ch. 405, Laws of Montana 1975; Sec. 15, Ch. 359, Laws of Montana 1977

Source: New and N.Y. Pen. L. 1965, § 130.05

Prior Law: None

Annotator's Note

The 1975 amendment designated the former section as subsection (1) and added as subsection (2) the current section. The 1977 amendment deleted former subsection (1) which read "in this part unless a different meaning plainly is required the definitions given in Chapter 2 of 94-2-101 apply" and renumbered the section accordingly.

It is an element of every sexual offense except for deviate sexual conduct that the sexual act be committed without consent. This definition details when consent will be lacking. It should be noted, however, that this definition does not apply to § 45-5-502 on sexual assault, where the same term, "without consent," is used, but with its ordinary meaning, i.e. that the conduct was, in fact, not agreed to by the victim. Since young children do not always find it easy to withhold consent from an adult, there can be cases under § 45-5-502 where the requisite lack of consent cannot be proved although the sexual contact is obvious. That problem was alleviated to a great extent by the enactment of § 45-5-502(5) in 1979

which makes actual consent ineffective where the victim is less than 14 years old and the offender is three or more years older. Any offenses involving juveniles not covered by § 45-5-502(5) can be prosecuted under § 45-5-201(1)(c) (assault by contact of an insulting or provoking nature) in which the mental state or consent of the victim is not an issue. Subsection (1) covers forcible complusion. Subsection (2) covers those instances when, regardless of acquiescence, the victim is deemed incapable of consent. The terms mentally defective, mentally incapacitated and physically helpless refer to varying degrees of incapacity as defined in section 45-2-101(28), (29), and (45), M.C.A. 1978, respectively. A person who has not reached the age of sixteen is legally incapable of consenting to a sexual act. The wording for this definition while based on New York source has been changed considerably. Consent as a defense is covered in M.C.A. 1978, § 45-2-211.

Cross References

Definition of "mentally defective" M.C.A. 1978, § 45-2-101(28)
Definition of "mentally incapacitated" M.C.A. 1978, § 45-2-101(29)
Definition of "physically helpless" M.C.A. 1978, § 45-2-101(45)
Definition of "sexual contact" M.C.A. 1978, § 45-2-101(54)
Definition of "sexual intercourse" M.C.A. 1978, § 45-2-101(55)
Consent as a defense M.C.A. 1978, § 45-2-211
Sexual intercourse without consent M.C.A. 1978, § 45-5-503
Deviate sexual conduct M.C.A. 1978, § 45-5-505
Sexual Abuse of Children M.C.A. 1978, § 45-6-625

Library References

Rape Key Nos. 9 et seq.
Sodomy Key No. 3
C.J.S. Rape § 11
C.J.S. Sodomy § 2

Law Review Commentaries

Note. Forcible and statutory rape: An exploration of the operation and objectives of the consent standard. 62 Yale L. J. 55 (1952)

Note. The proposed Penal Law of New York. 64 Colum. L. Rev. 1469, 1543 (1964).

Ploscowe. Age of consent. 32 Brooklyn L. Rev. 274 (1966)

Ploscowe. Lack of consent in sex cases. 32 Brooklyn L. Rev. 276 (1966)

Potter. Sex offenses. 28 Me. L. Rev. 65 (1976)

Notes of Decisions

This definition and those contained in sections 94-2-101(14) [now M.C.A. 1978, § 45-2-101(14)] (deviate sexual relations), 94-2-101(54) [now M.C.A. 1978, § 45-2-101(54)] (sexual contact), 94-2-101(55) [now M.C.A. 1978, § 45-2-101(55)] (sexual intercourse) when read into section 94-5-505 [now M.C.A. 1978, § 45-5-505] (prohibiting deviate sexual conduct) are sufficient to protect section 94-5-505 [now 45-5-505] from the contention that it is unconstitutional for vagueness. State v. Ballew, 166 Mont. 270, 532 P.2d 407 (1975).

45-5-502. Sexual assault. (1) A person who knowingly subjects another not

his spouse to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years.

(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.

(5) Consent is ineffective under this section if the victim is less than 14 years old and the offender is 3 or more years older than the victim.

Historical Note

Enacted: M.C.C. 1973, § 94-5-502, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 687, Laws of Montana 1979

Source: M.P.C. 1962, § 213.4

Prior Law: None

Annotator's Note

This section provides sanctions for nonconsensual sexual contact which falls short of sexual intercourse. There is no counterpart under the old law. The section deals with acts of sexual aggression which do not involve the element of "penetration" which is covered by M.C.A. 1978, § 45-5-503. The central terms are defined: sexual intercourse, § 45-2-101(55); sexual contact, § 45-2-101(54).

Subsection (1) describes the substantive offense and provides that it must be done "knowingly," defined at § 45-2-101(27). This requirement eliminates the possibility of prosecution for inadvertent or accidental touching. It should be noted that the definition of "without consent" contained in 45-5-501 does not apply to this section. As used in this section, the phrase "without consent" has its normal grammatical meaning. The legislative intent was to prohibit any sexual contact to which the victim did not give an informed consent which he or she was legally capable of giving. The 1979 amendment added subsection (5) making consent ineffective where the victim is less than 14 years old and the offender is three or more years older. There may still be some cases involving juveniles which would not be covered even by this subsection although it appears that a majority of situations would be. In those instances not covered by subsection (5), section 45-5-201(1)(c) (assault by contact of an insulting or provoking nature) should apply, and the mental state

or consent of the victim is not an issue. The combination of this section and § 45-5-201(1)(c) should cover all of the conduct formerly prohibited as "Lewd and Lascivious Conduct" where the victim is a minor.

The definition of "sexual contact," supra, imposes the requirement of a physical touching. Further, such touching must be done with the purpose of sexual arousal or gratification. "Purpose" is defined at M.C.A. 1978, § 45-2-101(52).

Subsection (2) provides that sexual assault shall be a misdemeanor in the absence of any of the aggravating circumstances enumerated in subsection (3).

The much more severe maximum penalty in subsection (3) is reserved for cases of infliction of "bodily injury," defined at § 45-2-101(5) and for cases where a person exploits a juvenile three or more years younger than himself. This age differential protects any person less than sixteen years old from exploitation by anyone over eighteen years old whether or not force is used. If the offender is between the ages of sixteen and eighteen, he will ordinarily be subject to youth court jurisdiction. Thus, this subsection applies to the adult over eighteen who is three or more years older than the under sixteen year old victim.

Subsection (4) extends the applicability of the more severe penalty of subsection (3) by broadly defining the time period during which the infliction of bodily injury will cause that penalty to apply. Thus the offender may be subject to the more severe penalty whether or not the assault is completed by a touching and even if the bodily injury is inflicted subsequent to he commission of the offense or the attempt.

Criminal Law Commission Comment

This section is a substantial change from the old law. It carries out the rationale behind section 213.4 of the Model Penal Code. This section deals with acts of sexual aggression which do not involve the element of "penetration" found in R.C.M. 1947, former section 94-4103. The range of activity covered extends from unauthorized fondling of a woman's breasts to homosexual manipulation of a boy's genitals. The old law did not differentiate sexual from other assault, except assault in connection with rape or lewd and lascivious acts upon children. The following considerations favor special treatment of indecent assault within the sexual offense category: (1) The individualized treatment of sexual misconduct with children is consistent with current legislation; (2) Societal concern with indecent assault focuses on the outrage, disgust or shame engendered in the victim rather than fear of physical injury; and (3) the gist of the offense being a sexual imposition, although of a lesser degree. The important features of this section require an actual touching and leave for separate consideration cases of indecent exposure, etc. Although contact must be with the victim it need not be contact between the offender and the victim. Thus, subjecting another to sexual contact with a third person is covered. It covers situations of nonconsent only.

There is a maximum penalty of twenty years if the victim is under sixteen years and the defendant is three years or more older, covering the situation where sexual contact takes a deviate form in regard to children. The rationale behind heavy punishment of "lewd acts upon children" or statutory rape is victimization of immaturity. To give effect to the victimization rationale, an age differential in favor of the male is provided. Thus, a youth who had sexual contact with a fifteen year-old girl would have to be eighteen years or older before such act is a criminal event.

Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "sexual contact" M.C.A. 1978, § 45-2-101(54)
Definition of "bodily injury" M.C.A. 1978, § 45-2-101(5)
Sexual abuse of children M.C.A. 1978, § 45-6-625

Library References

Assault and Battery Key No. 96(5)
C.J.S. Assault and Battery, § 75

Law Review Commentaries

Comment. Sexual assault. Model Penal Code, Tent. Draft No. 4, § 207.6, p. 292 (April 25, 1955)
Potter. Sex offenses. 28 Me. L. Rev. 65 (1976)

45-5-503. Sexual intercourse without consent. (1) A person who knowingly has sexual intercourse without consent with a person of the opposite sex not his spouse commits the offense of sexual intercourse without consent.

(2) A person convicted of sexual intercourse without consent shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years, except as provided in 46-18-222.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, he shall be imprisoned in the state prison for any term of not less than 2 years or more than 40 years, except as provided in 46-18-222.

(4) An act "in the course of committing sexual intercourse without consent" shall include an attempt to commit the offense or flight after the attempt or commission.

(5) No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this section, except:

(a) evidence of the victim's past sexual conduct with the offender;

(b) evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution under this section.

(6) If the defendant proposes for any purpose to offer evidence described in subsection (5)(a) or (5)(b), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (5).

(7) Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim.

Historical Note

Enacted: M.C.C. 1973, § 94-5-503, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 2, Laws of Montana 1975; Sec. 1, Ch. 129, Laws of Montana 1975; Sec. 1, Ch. 94, Laws of Montana 1977; Sec. 16, Ch. 359, Laws of Montana 1977; Sec. 10, Ch. 584, Laws of Montana 1977

Source: M.P.C. 1962, § 213.0

Prior Law: R.C.M. 1947, § 94-4101, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The first amendment in 1975 substituted "a person" and "a person not his spouse" in subsection (1) for "a male person" and a "female not his spouse." The second amendment in 1975 added subsections (5) and (6). The first of the 1977 amendments rewrote the last paragraph which read "if the issue of failure to make a timely complaint or immediate outcry is raised, the jury shall be informed that such fact standing alone may not bar conviction." The second 1977 amendment inserted "of the opposite sex" after "with a person" in subsection (1); designated the last two paragraphs as subsections (6) and (7); and made minor stylistic and punctuation changes. The third amendment in 1977 substituted "a term of not less than two years or more than twenty years except as provided in 95-2206.18" at the end of subsection (2) for "any term not to exceed twenty (20) years"; substituted "any term of not less than two years or more than forty years except as provided in 95-2206.18" at the end of subsection (3) for "any term not to exceed forty (40) years"; and made minor stylistic changes.

This section provides for sanctions against a sexual offender who goes beyond touching and accomplishes at least a slight penetration of the vulva, anus, or mouth of the victim. The "slight penetration" requirement of section 94-4103 has been retained by incorporation in the definition of "sexual intercourse," section 45-2-

101(55). Where this act results in injury to the victim or the victim is statutorily incapable of consent, the possible punishment is more severe. See subsection (3). The definition of "without consent," 45-5-501, includes all but one of the situations in which the old offense of rape, R.C.M. 1947, § 94-4101, could be committed. It does not include submission by the victim under the false belief that the actor is the victim's spouse. "Without consent" includes incapacity to give legal consent because the victim is "mentally defective," defined at 45-2-101(28) or "mentally incapacitated," defined at 45-2-101(29). The old code attempted to describe the mental incapacity to give legal consent as "lunacy or other unsound-soundness of mind" and "unconsciousness of the nature of the act" but it did not define these terms. Another change from the old code is that the age limit for statutory rape has been reduced from eighteen to sixteen years. This change is consistent with the realities of a more sexually permissive society.

As originally worded, this section in the 1973 Criminal Code precluded the commission of the offense of sexual intercourse without consent by a female upon a male. This was changed in 1975 by substitution of the neutral term "person" for "male person" and "female." However, this created the possibility that the offense could then be committed by one person upon another of the same sex, an offense intended by the legislature to be covered by deviate sexual conduct, 45-5-505, or sexual assault, 45-5-502, or even simple assault, 45-5-201. This possibility was erased by the 1977 amendment which added "of the opposite sex" to the phrase "with a person."

Prior to the 1975 amendments there existed in Montana by court dictum, rules requiring immediate outcry by the victim and allowing admission of evidence of prior sexual conduct of the prosecutrix. The 1975 amendments were intended to eliminate an improper defense tactic of putting before the trier of fact the victim's sexual history although irrelevant to the alleged rape and also to eliminate the immediate outcry rule.

Subsections (5) and (6) established the general rule that evidence pertaining to the sexual conduct of the victim is not admissible into evidence at trial. The purpose of this rule is to prevent the trial of the charge against the defendant being converted into a trial of the victim. There are only two exceptions to the general rule prohibiting the use of the victim's sexual conduct as evidence, and both go directly to specific conduct which may be at issue in any given case. The first allows the defendant to introduce evidence pertaining to the victim's prior sexual conduct in relation to himself. Thus, if the victim and defendant have been sexually intimate previous to the alleged rape, the defendant may use evidence to this effect.

The second exception covers cases where the victim may claim that certain physical evidence supports her testimony as, for example, where she claims that semen found in her vagina by a physician after an alleged rape supports her claim that she was raped. The defendant may then introduce evidence to show that in fact she had had sexual intercourse with someone else just previous to the time of the alleged rape. The same kind of evidence would be allowed where the victim claimed that a pregnancy or disease had its origin in an alleged rape, and the defense may show specific instances of the victim's sexual activity to explain a different origin.

The 1975 amendment dealing with the immediate outcry rule had little or no positive effect. It did not eliminate the rule, it raised constitutional questions

relating to the defendant's right to have guilt proven beyond a reasonable doubt and it seemingly allowed the trial judge to, in effect, comment on the evidence contrary to the Montana Rules of Evidence. The 1977 addition of subsection (7) eliminated this confusion by rewriting the section so that it clearly removes the common law presumption in Montana that lack of immediate outcry goes to the prosecutrix's credibility. It also removes any constitutional question on guilt proven beyond a reasonable doubt or question as to whether the judge may comment on the weight of the evidence. The manner in which the immediate outcry rule seems to have been used historically is that it allowed the defense to obtain an instruction from the judge to the jury to the effect that the fact that the victim did not immediately report the alleged rape or seek medical attention or the like, casts doubt on the credibility of her entire story and that the jury should weigh all her testimony in view of this presumption. The amended immediate outcry provision is directed specifically toward preventing this sort of instruction and preventing, therefore, the victim's failure to report the alleged rape immediately from being used to attack her credibility.

Criminal Law Commission Comment

The section provides no age limit on the male offender but section 94-2-109 [now M.C.A. 1978, § 45-2-203] and the juvenile law, R.C.M. 1947, Title 10 [now M.C.A. 1978, Title 41 and Title 53, Chapter 6], provide jurisdictional limitations. Deviate forms of sexual intercourse are included by definition (see section 94-2-101(56) [now M.C.A. 1978, § 45-2-101(55)]) since these forms of sexual agression are equally abhorrent. Sexual relations between married people are excluded. The section imposes an increased penalty if bodily injury occurs or there is a three or more year variation between the age of an under sixteen-year-old victim and the actor.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "sexual intercourse" M.C.A. 1978, § 45-2-101(55)
Definition of "without consent" M.C.A. 1978, § 45-5-501
Definition of "mentally defective" M.C.A. 1978, § 45-2-101(28)
Definition of "mentally incapacitated" M.C.A. 1978, § 45-2-101(29)
Sexual abuse of children M.C.A. 1978, § 45-6-625

Library References

Rape Key Nos. 1, 6, 9-13
C.J.S. Rape, §§ 1 et seq.

Law Review Commentaries

Comment. Rape and related offenses. Model Penal Code, Tent. Draft No. 4, § 207.4, p. 241 (April 25, 1955)

Perkins. Non-homicide offenses against the person. 26 Brooklyn L. Rev. 183 (1946)

Potter. Sex offenses. 28 Me. L. Rev. 65 (1976)

Notes of Decisions

Constitutionality

The fact that the former statutes referred to "male persons" who had sexual intercourse with a "female" did not render it unconstitutional because of an arbitrary distinction based solely on sex; since most perpetrators of the act sought to be prosecuted are male and most victims are female, the classification was reasonable, and the fact that its application might result in some inequality was not sufficient grounds to invalidate it. State v. Craig, 169 Mont. 150, 545 P.2d 649 (1976).

Defenses

Defendant has burden of proving by a preponderance of the evidence that he believed the victim was above the age of sixteen. State v. Smith, ____ Mont. ____, 576 P.2d 1110 (1978).

45-5-504. Indecent exposure. (1) A person who, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm commits the offense of indecent exposure.

(2) A person convicted of the offense of indecent exposure shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-504, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 213.5
Prior Law:	R.C.M. 1947, § 94-3603, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Display of one's genitals to anyone under the age of eighteen is also prohibited by the Obscenity statute, M.C.A. 1978, § 45-8-201(d). That offense does not require a purpose of sexual gratification, nor does it require knowledge in the actor of possible affront or alarm, as does this section.

Criminal Law Commission Comment

The special case of genital exposure for sexual gratification has been placed in this article along with other types of sexual aggression. It is not meant to include "indecent" brevity of attire, but rather "lewdness" which requires an awareness of the likelihood of affronting observers and is often a threat or prelude to overt sexual aggression.

Cross References

Obscenity M.C.A. 1978, § 45-8-201
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Causal relationship between conduct and result M.C.A. 1978, § 45-2-201

Library References

Obscenity Key Nos. 3, 6
C.J.S. Obscenity, § 5

Law Review Commentaries

Comment. Indecent exposure and open lewdness. Model Penal Code, Tent. Draft No. 13, §§ 213.4, 251.1 (April 19, 1961)

Potter. Sex offenses. 28 Me. L. Rev. 65 (1976)

45-5-505. Deviate sexual conduct. (1) A person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.

(2) A person convicted of the offense of deviate sexual conduct shall be imprisoned in the state prison for any term not to exceed 10 years.

(3) A person convicted of deviate sexual conduct without consent shall be imprisoned in the state prison for any term not to exceed 20 years.

Historical Note

Enacted: M.C.C. 1973, § 94-5-505, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-4118, repealed, Sec. 1, Ch. 513, Laws of Montana 1973

Annotator's Note

This section prohibits both bestiality and homosexuality. (See the definition of "deviate sexual relations," § 45-2-101(14).)

The common law crime of sodomy, embodied in R.C.M. 1947, § 94-4118, is replaced by this section and is far different from it. At common law sodomy required some penetration. By definition "deviate sexual relations" may consist of a "sexual contact," defined at M.C.A. 1978, § 45-2-101(54). "Sexual contact" requires only a touching and not a penetration. Thus, this section prohibits a broader range of deviate sexual acts between persons of the same sex and between persons and animals than did the old law.

Criminal Law Commission Comment

The section includes both homosexuality and bestiality. There has been a reduction in the penalty because it was felt that the severe penalty was more a product of revulsion than the social harm in fact committed. The Model Penal Code recommends that bestiality be made a misdemeanor. The Illinois Code contains no provision on the subject. Subsection (3) increases the penalty if the human-victim participant in the bestiality or homosexuality acts without consent. To appreciate the meaning and scope of "without consent" see sections 94-2-101(68) and 94-5-506(3) [now M.C.A. 1978, §§ 45-5-501 and 45-5-506(3)].

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "deviate sexual relations" M.C.A. 1978, § 45-2-101(14)
Definition of "without consent" M.C.A. 1978, § 45-5-501
Definition of "sexual contact" M.C.A. 1978, § 45-2-101(54)
Sexual abuse of children M.C.A. 1978, § 45-6-625

Library References

Sodomy Key No. 1
C.J.S. Sodomy, §§ 1 et seq.

Law Review Commentaries

Potter. Sex offenses. 28 Me. L. Rev. 65 (1976)

Notes of Decisions

Constitutionality

In light of the specificity of the definitions in § 94-2-101 [now § 45-2-101] of the terms used in this provision, this section could not be said to be unconstitutionally vague. State v. Ballew, 166 Mont. 270, 532 P.2d 407 (1975).

Instructions

Where there was no specific reason to distrust the testimony of the complaining witness, it was not error to refuse an instruction that the witness' testimony should be viewed with caution since a sex offense is easily charged and difficult to disprove. State v. Ballew, 166 Mont. 270, 532 P.2d 407 (1975).

45-5-506. Provisions generally applicable to sexual crimes. (1) When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that he reasonably believed the child to be above that age. Such belief shall not be deemed reasonable if the child is less than 14 years old.

(2) Whenever the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as husband and wife regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart whether under a decree of judicial separation or otherwise. Where the definition of an offense excludes conduct with a spouse, this shall not preclude conviction of a spouse in a sexual act which he or she causes another person, not within the exclusion, to perform.

(3) In a prosecution under the preceding sections on sexual crimes (45-5-502 through 45-5-504) in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally incapacitated, it is a defense to such prosecution that the victim was a voluntary social companion of the defendant and the intoxicating substance was voluntarily and knowingly taken.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-506, Sec. 1, Ch. 513, Laws of Montana 1973
Amended:	Sec. 17, Ch. 359, Laws of Montana 1977; Sec. 3, Ch. 407, Laws of Montana 1979
Source:	The source of subparts (1) and (2) is M.P.C. 1962, § 213.6. Subpart (3) is new.
Prior Law:	None

Annotator's Note

Subsection (1) represents a complete turnabout from prior law in Montana and elsewhere as to the effect of mistake of age upon liability for "statutory rape." The prevailing view has been that it has no effect and that there is absolute liability for carnal knowledge of the under-age girl. This is the case even where both her appearance and her positive statement indicated she was older than the age specified in the statute. State v. Duncan, 82 Mont. 170, 266 P. 400 (1928). The view adopted by this subsection is that an honest and reasonable belief in the existence of circumstances which, if true, would make the act an innocent one is a good defense. This view has been accepted by at least one court. People v. Hernandez, 39 Cal. Rptr. 361, 393 P.2d 673 (1964). There is still absolute liability if the child is less than fourteen (14) years.

The 1977 amendment substituted "exclusion" in the first sentence of subsection (2) for "extention"; substituted "husband" in the first sentence of subsection (2) for "man"; and made minor changes in phraseology and punctuation. The 1979 amendment added the words "or otherwise" to subsection (2) following the phrase "under a decree of judicial separation," making prosecution for rape possible where the spouses have been living apart without the benefit of a judicial order.

Criminal Law Commission Comment

This section rejects the concepts of "virtue," "chastity, " or "good repute" as possible defenses in sex crimes but does envision cases of precocious fourteen (14) year old girls and even very young prostitutes who might be the "victimizers," rather than the victims.

Subsection (2) precludes a prosecution for rape where the woman is living with the accused as his wife, regardless of the legal validity of their marital status. Nor is it possible to prosecute where the spouses have been living apart without benefit of a judicial order. There is the possibility of consent in the resumption of sexual relations coupled with the special danger of fabricated accusations. [But see in this regard the 1979 amendment noted above in the Annotator's Note].

Conditions affecting a woman's capacity to "control" herself sexually will not involve criminal liability if her own actions were voluntary in bringing about the result.

Cross References

Sexual assault M.C.A. 1978, § 45-5-502
Sexual intercourse without consent M.C.A. 1978, § 45-5-503
Indecent exposure M.C.A. 1978, § 45-5-505
Definition of "mentally incapacitated" M.C.A. 1978, § 45-2-101(29)
Definition of "without consent" M.C.A. 1978, § 45-5-501
Definition of "knowingly" M.C.A. 1978, § 45-2-101 27)
Definition of "intoxicating substance" M.C.A. 1978, § 45-2-101(24)
Sexual abuse of children M.C.A. 1978, § 45-6-625

Library References

Rape Key Nos. 17 & 52
C.J.S. Rape, § 28

Law Review Commentaries

Comment. Rape and related offenses. Model Penal Code, Tent. Draft No. 4, § 207.4, p. 241 (April 25, 1955)

Potter. Sex offenses. 28 Me. L. Rev. 65 (1976)

Notes of Decisions

Victim under Sixteen

Defendant has the burden of proving by a preponderance of the evidence that he believed the victim was above the age of sixteen. State v. Smith, ____ Mont. ___, 576 P.2d 1110 (1978).

Part 6--Offenses Against the Family

45-5-601. Prostitution. (1) A person commits the offense of prostitution if such person engages in or agrees or offers to engage in sexual intercourse with another person for compensation, whether such compensation is received or to be received or paid or to be paid.

(2) A person convicted of prostitution shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-5-602, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 80, Laws of Montana 1975

Source: New

Prior Law: R.C.M. 1947, §§ 94-3607 and 94-3610, repealed, Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

The 1975 amendment incorporated the text of former subdivision (1)(a) into the body of subsection (1); added "whether such compensation is received or to be received, or paid or to be paid" to subsection (1); deleted former subdivision (1)(b) which read: "loiters in or within view of any public place for the purpose of being hired to engage in sexual intercourse"; and made minor changes in style.

The purpose of this section of the 1973 criminal code as enacted was to control all aspects of prostitution. To that end the 1973 enactment prohibited prostitution carried on publicly or in private and it continued the former law which made criminal any public solicitation for the purpose of prostitution. However, as enacted, the 1973 section raised the question whether compensation had to be actually paid or received before the offense was committed or whether simple tender was sufficient. The 1975 amendment makes clear that the offense of prostitution will be committed when sexual intercourse has been or is to be engaged in for compensation whether or not such compensation has yet been paid or received. Therefore, actual receipt of compensation is not an element of the offense, rather all that is necessary is the intent to give or receive compensation. Furthermore, the language "whether such compensation is received or to be received, or paid or to be paid" indicates that the compensation need not be just monetary but can include anything given as compensation.

The section applies equally to both parties to the transaction, prostitute and customer.

The 1975 amendment also deleted the subdivision making criminal loitering for the purpose of being hired to engage in sexual intercourse. This, however, does not decriminalize open solicitation for the purpose of prostitution. The broadening of the language in subdivision (1) will encompass the crime of solicitation for prostitution since the compensation now need not change hands to render the act criminal.

Criminal Law Commission Comment

The prior law reflects the common-law concern for prostitution--i.e. the public nuisance aspects of open solicitation. The requirement that the solicitation be public seems at odds with the modern conception that prostitution, discreetly or indiscreetly carried on, ought to be controlled. Thus section 94-5-603(1)(a) [now M.C.A. 1978, § 45-5-602(1)(a)] reflects the position that professional prostitution is criminal even if carried on in private. Section 94-5-603(1)(b) [now M.C.A. 1978, § 45-5-602(1)(b)] adopts the idea that prostitution should be controlled when it manifests itself in public solicitation, which may be an annoyance to passers by and an outrage to the moral sensibilities of a large part of the public. The penalty is a misdemeanor, the same as prior law.

Cross References

Definition of "public place" M.C.A. 1978, § 45-2-101(50)
Definition of "sexual intercourse" M.C.A. 1978, § 45-2-101(55)

Library References

Prostitution Key Nos. 1 et seq.
C.J.S. Prostitution §§ 1, 2, 4

Law Review Commentaries

Comment. Prostitution and related offenses. Model Penal Code, Tent. Draft No. 9, § 207.12, p. 169 (May 8, 1959)

45-5-602. Promoting prostitution. (1) A person commits the offense of promoting prostitution if he purposely or knowingly commits any of the following acts:

(a) owns, controls, manages, supervises, resides in, or otherwise keeps, alone or in association with others, a house of prostitution or a prostitution business;

(b) procures an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate;

(c) encourages, induces, or otherwise purposely causes another to become or remain a prostitute;

(d) solicits a person to patronize a prostitute;

(e) procures a prostitute for a patron;

(f) transports a person into or within this state with the purpose to promote that person's engaging in prostitution or procures or pays for transportation with that purpose;

(g) leases or otherwise permits a place controlled by the offender, alone or in association with others, to be regularly used for prostitution or for the procurement of prostitution or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means; or

(h) lives in whole or in part upon the earnings of a person engaging in

prostitution, unless the person is the prostitute's minor child or other legal dependent incapable of self-support.

(2) A person convicted of promoting prostitution shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-5-603, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-3607, 94-3610, 94-3608, 94-4110, 94-4111, 94-4112, 94-4113, 94-4114, 94-4115, and 94-4117, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M.C.A. 1978, §§ 45-5-602 through 45-5-604 were originally enacted as one statute, M.C.C. 1973, § 94-5-603. The one statute was divided into three when enacted as the Montana Codes Annotated 1978. The Criminal Law Commission Comment is therefore relevant to all three statutes.

The purpose of this section is the creation of a single comprehensive offense which includes various aspects of collaboration with, promotion of, or exploitation of prostitutes. In general this section is based on prior law. Subsection (1)(a) is drawn from prior sections 94-3607 and 94-3608. Subsections (1)(b) and (1)(c) replace prior sections 94-4110, 94-4111, 94-4112, 94-4113 and 94-4115 and continue the prior law prohibiting both procuring individuals for houses of prostitution and encouraging or causing prostitution. Subsection (1)(d) replaces and expands 94-3610. Subsection (1)(a) continues the old law contained in 94-4114 and expands it by eliminating the need to show the offender received payment. Subsection (f) is new and deals with the problem of intrastate transportation of women for immoral purposes. Subsection (1)(g) adopts the principle of 94-3608 and makes a landlord criminally responsible for knowingly allowing the use of property for purposes of prostitution. It should be noted that liability is imposed only if the landlord acts purposely or knowingly and that the landlord is not placed under a duty to inquire or made criminally liable for a negligent failure to prevent the prohibited use. Subsection (1)(h) is drawn from 94-4117 and provides punishment for those who derive their livelihood from prostitution with the exception of helpless dependents. These offenses are now uniformly treated as misdemeanors which represents a reduction in some instances.

Criminal Law Commission Comment

This section creates a comprehensive single offense of promoting prostitution,

embracing many different acts of collaboration with or exploiting of prostitutes found in prior law as separate offenses. Many undesirable consequences under prior law were possible: accumulation of sentences based on separate convictions for what are really parts of a single criminal transaction, e.g., procuring, transporting, receiving money; unfair double trials, as where a county attorney proceeds for transporting after losing on a procuring charge.

In general the subsidiary clauses of section 94-5-603 [now M.C.A. 1978, § 45-5-602] are based on prior legislation. Subsection (1)(a) covers R.C.M. 1947, sections 94-3607 and 94-3608. Subsection (1)(b) covers R.C.M. 1947, sections 94-4110, 94-4111, 94-4112, 94-4113 and 94-4114. Subsection (1)(c) also covers the circumstances embraced in R.C.M. 1947, sections 94-4110, 94-4112, and 94-4115. Subsection (1)(d) covers R.C.M. 1947, section 94-3610; subsection (1)(e) covers R.C.M. 1947, section 94-4114. Subsection (1)(f) deals with transportation that promotes prostitution. At the level of interstate and foreign commerce, the federal Mann Act strikes at the organized business of interstate prostitution. This subsection covers local transporting and makes it clear that the transporter must have the purpose to promote, in addition to the knowledge that his action facilitates prostitution. Subsection (1)(g) adopts the principle of prior law, R.C.M. 1947, section 94-3608 making the landlord criminally responsible if he knowingly lets premises for the purpose of prostitution. This subsection is not meant to impose a duty of inquiry or of criminal liability for negligent failure to discover the illicit use of leased premises. Subsection (1)(h) is based on R.C.M. 1947, section 94-4117 which provides for punishment of those who derive their livelihood from the prostitution of others, excepting minor children and dependent adults. Promoting prostitution is a misdemeanor, but a more severe penalty is provided if aggravating circumstances are present. [See M.C.A. 1978, § 45-5-603, Aggravated Promotion of Prostitution].

[The following comment now relates to M.C.A. 1978, § 45-5-604, Evidence in Cases of Promotion].

Special rules of evidence to provide for admission of evidence of repute of alleged houses of prostitution, as well as incriminating testimony against a spouse, are necessary to prove the offense. Abrogation of the common-law privilege of the defendant to bar his spouse from testifying against him has special utility in prosecuting pimps who are not infrequently married to the prostitute.

Cross References

Definition of "house of prostitution" M.C.A. 1978, § 45-2-101(20)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "inmate" M.C.A. 1978, § 45-2-101(23)
Prostitution M.C.A. 1978, § 45-5-502
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "solicits" M.C.A. 1978, § 45-2-101(56)
Evidence in cases of promotion M.C.A. 1978, § 45-5-604

Library References

Prostitution Key Nos. 1, 4
C.J.S. Prostitution §§ 1, 2, 4

Law Review Commentaries

Comment. Prostitution and related offenses. Model Penal Code, Tent. Draft No. 9, § 207.12, p. 169 (May 8, 1959)

45-5-603. Aggravated promotion of prostitution. (1) A person commits the offense of aggravated promotion of prostitution if he purposely or knowingly commits any of the following acts:

(a) compels another to engage in or promote prostitution;

(b) promotes prostitution of a child under the age of 18 years, whether or not he is aware of the child's age;

(c) promotes the prostitution of one's spouse, child, ward, or any person for whose care, protection, or support he is responsible.

(2) A person convicted of aggravated promotion of prostitution shall be imprisoned in the state prison for any term not to exceed 20 years.

Historical Note

Enacted: M.C.C. 1973, § 94-5-603, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 2, Ch. 2, Laws of Montana 1975

Source: New

Prior Law: R.C.M. 1947, §§ 94-3607, 94-3610, 94-3608, 94-4110, 94-4111, 94-4112 94-4113, 94-4114, 94-4115, and 94-4117, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section was first enacted as part of M.C.C. 1973, § 94-5-603 and provides that if the promotion of prostitution occurs with specified aggravating circumstances the offense may be punished as a felony. The aggravating circumstances are use of compulsion in the promotion of prostitution, the prostitution of a child, or the prostitution of any dependant.

The 1975 amendment substituted "one's spouse" for "his wife" in subsection (1)(c).

Criminal Law Commission Comment

See the Comment under M.C.A. 1978, § 45-5-602.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Prostitution M.C.A. 1978, § 45-5-601
Promoting prostitution M.C.A. 1978, § 45-5-602
Evidence in cases of promotion M.C.A. 1978, § 45-5-604

Library References

Prostitution Key Nos. 1, 4
C.J.S. Prostitution §§ 1, 2, 4

Law Review Commentaries

Comment. Prostitution and related offenses. Model Penal Code, Tent. Draft No. 9, § 207.12, p. 169 (May 8, 1959)

45-5-604. Evidence in cases of promotion. (1) On the issue whether a place is a house of prostitution, the following, in addition to all other admissible evidence, shall be admissible:

(a) its general repute;

(b) the repute of the persons who reside in or frequent the place; or

(c) the frequency, timing, and duration of visits by nonresidents.

(2) Testimony of a person against his spouse shall be admissible under 45-5-602, 45-5-603, and this section.

Historical Note

Enacted: M.C.C. 1973, § 94-5-603, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-3607, 94-3610, 94-3608, 94-4110, 94-4111, 94-4112 94-4113, 94-4114, 94-4115, and 94-4117, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section was first enacted as part of M.C.C. 1973, § 94-5-603 and adopts special rules allowing the introduction of evidence regarding general reputation of a place and the incriminating testimony of a spouse on the issue of whether or not a place is a house of prostitution.

Criminal Law Commission Comment

See the Comment under M.C.A. 1978, § 45-5-602.

Cross References

Definition of "house of prostitution" M.C.A. 1978, § 45-2-101(20)
Prostitution M.C.A. 1978, § 45-5-601
Promoting prostitution M.C.A. 1978, § 45-5-602
Aggravated promotion of prostitution M.C.A. 1978, § 45-5-603

Library References

Prostitution Key Nos. 1, 4
C.J.S. Prostitution §§ 1, 2, 4

Law Review Commentaries

Comment. Prostitution and related offenses. Model Penal Code, Tent. Draft No. 9, § 207.12, p. 169 (May 8, 1959)

45-5-605 through 45-5-610 reserved.

45-5-611. Bigamy. (1) A person commits the offense of bigamy if, while married, he knowingly contracts or purports to contract another marriage unless at the time of the subsequent marriage:

(a) the offender believes on reasonable grounds that the prior spouse is dead;

(b) the offender and the prior spouse have been living apart for 5 consecutive years throughout which the prior spouse was not known by the offender to be alive;

(c) a court has entered a judgment purporting to terminate or annul any prior disqualifying marriage and the offender does not know that judgment to be invalid; or

(d) the offender reasonably believes that he is legally eligible to remarry.

(2) A person convicted of bigamy shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-5-604, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 230.1

Prior Law: R.C.M. 1947, §§ 94-701, 94-702, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section replaces R.C.M. 1947, §§ 94-701, 94-702 and 94-703 and continues the prior policy of discouraging plural marriage. On its face the new law is somewhat broader than the prior provisions in that it applies to anyone who "contracts or purports to contract" another marriage while married, while the old law condemned anyone who "married" while having a husband or wife living. The expansion would, however, seem intended to work no substantive change in current Montana law since State v. Crosby, 148 Mont. 307, 420 P.2d 431 (1966) established the Montana rule that a marraige will not be considered void for the purposes of bigamy unless it has been pronounced void, annulled or dissolved by a competent court. Accordingly, under both old and new law an individual could be guilty of bigamy even though his first marriage was a legal nullity or there was some legal impediment (other than his own prior marriage) which rendered the subsequent marriage void.

Subsections (1)(a), (b), (c) and (d) set out the exceptions to the bigamy statute. Section 94-702(1) created a presumption of death after a 5-year absence without any indication that the prior spouse was still alive and 94-702(2) excepted those whose marriage had been dissolved by a court of competent jurisdiction. These exceptions have been continued by the new statute in subsections (1)(b) and (1)(c) respectively. In addition, the new section adds as exceptions subsection (1)(a) which requires a reasonable belief in the death of the prior spouse and subsection (1)(d) which requires a reasonable belief in legal eligibility to remarry. The offense has also been reduced from a felony to a misdemeanor.

Criminal Law Commission Comment

This section has a broader coverage than prior law in that it applies to any one who has "contracted a marriage." It is possible to contract a marriage which is a legal nullity. A man could marry a woman who, unknown to him, is already married to another and could marry again without bothering to divorce the first woman. Or a man could marry successively two women who, by reason of youth or mental defect, are incapable of contracting marriage.

In each case he demonstrates a disposition to plural marriage, unless he comes

within the good faith defense of subsection (1)(c). The concept of marriage in this section includes common-law marriage contracted in a jurisdiction that recognizes this form of marriage. Subsection (1)(a) absolves the defendant in a bigamy case that he believed his spouse to be dead. On policy grounds there is no valid reason to stigmatize or punish remarriage by people who in good faith believe themselves to be widows or widowers.

Subsection (1)(b) creates an exception based on a five-year conclusive presumption of death. Subsections (1)(c) and (d) provide that one who has a reasonable basis for believing himself legally eligible to marry does not commit a criminal offense by a second marriage. Questions of the validity of foreign divorces are so perplexing that lawyers and the courts are often divided on the legal issues. It is well-settled that a single person who marries a divorced person is not liable to punishment if he made a reasonable mistake as to the legal validity of the other's divorce. It seems harsh to subject a defendant, who remarries following an out-of-state divorce, to a criminal bigamy prosecution where a person sophisticated in law might be unsure as to the validity of the foreign divorce. This section is intended to avoid such a result.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Library References

Bigamy Key Nos. 1, 2, 17
C.J.S. Bigamy, §§ 1, 7, 23

Law Review Commentaries

Comment. Bigamy and polygamy. Model Penal Code, Tent. Draft No. 4, § 207.2, p. 220 (April 25, 1955)

45-5-612. Marrying a bigamist. (1) A person commits the offense of marrying a bigamist if he contracts or purports to contract a marriage with another knowing that the other is thereby committing bigamy.

(2) A person convicted of the offense of marrying a bigamist shall be fined not to exceed $500 or be imprisoned in the county jail for any period not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-5-605, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-704, repealed, Sec. 32, Ch. 1, Laws of Montana 1973

Annotator's Note

This section continues prior law by penalizing knowing participation in a bigamous marriage. This section is also apparently expanded in its coverage in that it applies to "contracting or purporting to contract" a marriage instead of the old section's "marries." The punishment has been reduced to a misdemeanor which should provide sufficient deterrent.

Criminal Law Commission Comment

This section also applies to someone who purports to contract a marriage. Like prior law, this section punishes the knowing participation in a bigamous marriage. The punishment has been reduced to a misdemeanor which should provide sufficient deterrent.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Bigamy M.C.A. 1978, § 45-5-611

Library References

Bigamy Key No. 1
C.J.S. Bigamy, §§ 1, 2, 4-6, 8

Law Review Commentaries

Comment. Bigamy and polygamy. Model Penal Code, Tent. Draft No. 4, § 207.2, p. 220 (April 25, 1955)

45-5-613. Incest. (1) A person commits the offense of incest if he knowingly marries or cohabits or has sexual intercourse with an ancestor, a descendant, a brother or sister of the whole or half blood. The relationships referred to herein include blood relationships without regard to legitimacy and relationships of parent and child by adoption.

(2) A person convicted of incest shall be imprisoned in the state prison for

any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-5-606, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New and M.P.C. 1962, § 230.2

Prior Law: R.C.M. 1947, § 94-705, repealed, Sec. 1, Ch. 513, Laws of Montana 1973

Annotator's Note

While this section retains the basic purpose of prior law, it has restricted criminal incest to narrower limits than did the preceding incest statute. The old incest law could be interpreted only by reference to R.C.M. 1947, § 48-105 which indicated within which degrees of consanguinity marriages were incestuous and void. The use of § 48-105 resulted in the inclusion in the old law of marriage, cohabitation and fornication with "parents and children, ancestors and descendants of every degree, and between brothers and sisters of half as well as the whole blood, and between nieces and uncles, and between aunts and nephews, and between first cousins." Under the new law this has been limited so that marriage, cohabitation and sexual intercourse with an "ancestor, a descentant, a brother, or sister of whole or half blood" are considered criminally incestuous. The penalty for incest has been retained at the same level.

The statute, as originally enacted, included the definition of "cohabit," which was apparently deleted by the M.C.A. codifiers, because the word is defined by § 45-2-101(6).

Criminal Law Commission Comment

This section is patterned after the Model Penal Code. The uncle-aunt-nephew-niece cases are excluded from the category of "felonious incest," in view of the severity of the penalty.

The marriage regulations of R.C.M. 1947, section 48-105 circumscribe marriage more strictly than the criminal incest law, but different considerations justify a more limited scope in criminal incest vis a vis a marriage contract. Relations between uncles and under-age nieces would be "sexual intercourse without consent." "Ancestor" and "descendant" include all persons in lineal ascent and descent from one body.

Cross References

Definition of "cohabits" M.C.A. 1978, § 45-2-101(6)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "sexual intercourse" M.C.A. 1978, § 45-2-101(55)

Library References

Incest Key Nos. 1, 5
C.J.S. Bigamy, §§ 1, 3

Law Review Commentaries

Comment. Incest. Model Penal Code, Tent. Draft No. 4, § 207.3, p. 231 (April 25, 1955)

45-5-614 through 45-5-620 reserved.

45-5-621. Nonsupport. (1) A person commits the offense of nonsupport if he fails to provide support which he can provide and which he knows he is legally obliged to provide to a spouse, child, or other dependent.

(2) A person commits the offense of aggravated nonsupport if:

(a) the offender has left the state to avoid the duty of support; or

(b) the offender has been previously convicted of the offense of nonsupport.

(3) A person convicted of nonsupport shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of aggravated nonsupport shall be imprisoned in the state prison for any term not to exceed 10 years.

(4) The court may order, in its discretion, any fine levied or any bond forfeited upon a charge of nonsupport paid to or for the benefit of any person that the defendant has failed to support.

Historical Note

Enacted: M.C.C. 1973, § 94-5-608, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 19, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: R.C.M. 1947, §§ 94-301, 94-304, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section represents a change from prior law in that the criminal offense of non-support is limited to those situations in which the defendant fails to provide support which he knows he is legally obligated to provide. Under old law an accused could be found guilty of non-support without showing that he knew he was legally obligated to provide support.

The sexually neutral term "spouse" has been substituted in the new code for the term "wife" used in the former statute. The purpose of this section remains the same as that of prior law, that is, the section is designed to enforce the support obligation rather than punish the offender. As under prior law there must be a showing that the accused has the ability to provide support. To further the enforcement of the support obligation the court is given the authority in subsection (4) to order any fine or bond forfeited paid to or for the benefit of the persons to whom the accused owed the duty of support.

Another change from prior law is in the penalty for non-support. Under prior law non-support of a wife was a misdemeanor and non-support of children was a felony. Under this section both are misdemeanors unless the aggravating factors listed in subsection (2) are present, in which case non-support of either a wife or child is punishable as a felony.

The 1977 amendment added "or" to the end of subsection (2)(a); substituted "any person" for "person or persons" in subsection (4); and made minor changes in style.

Criminal Law Commission Comment

This section confines the criminal offense of nonsupport to failure to provide support which the accused knows he is legally obliged to provide. The policy of the former law is retained, that is, the section is designed to compel the defendant to perform his duty rather than make him an object of exemplary punishment. Exemplary punishment is of doubtful efficacy in complex family situations, where many forces, both social and economic, may combine to excuse the behavior. The fact that nonsupport can be prosecuted lays the basis for intervention by the county attorney, who can thus provide legal aid to indigent families and coerce the accused to support his family. The problem of enforcing support obligations of defendants who leave their families and go to another state has been largely solved by the Uniform Reciprocal Enforcement of Support Act. However, extraditing the defendant on a felony criminal charge is still possible under the aggravating circumstances of subsection (2).

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Mutual obligations of husband and wife M.C.A. 1978, § 40-2-101
Duties of husband and wife as to support M.C.A. 1978, § 40-2-102
Support of spouse M.C.A. 1978, § 40-2-103
Liability of married person when abandoned by spouse M.C.A. 1978, § 40-2-104
Child support M.C.A. 1978, § 40-4-204
Enforcement of support M.C.A. 1978, Title 40, Chapter 5
Reciprocal duties of parents and children in maintaining each other M.C.A. 1978, § 40-6-214

Library References

Husband and Wife Key No. 302
Parent and Child Key No. 17
C.J.S. Husband and Wife, §§ 631, 632, 634, 653, 655
C.J.S. Parent and Child, §§ 91 et seq.

Law Review Commentaries

Comment. Persistent non-support. Model Penal Code, Tent. Draft No. 9, § 207.14, p. 188 (May 8, 1959)

Paulsen. Support rights and duties between husband and wife. 9 Vand. L. Rev. 709 (1956)

45-5-622. Endangering the welfare of children. (1) A parent, guardian, or other person supervising the welfare of a child less than 16 years old commits the offense of endangering the welfare of children if he knowingly endangers the child's welfare by violating a duty of care, protection, or support.

(2) A parent or guardian or any person who is 18 years of age or older, whether or not he is supervising the welfare of the child, commits the offense of endangering the welfare of children if he knowingly contributes to the delinquency of a child less than 16 years old by:

(a) supplying or encouraging the use of intoxicating substances by the child; or

(b) assisting, promoting, or encouraging the child to:

(i) abandon his place of residence without the consent of his parents or guardian;

(ii) enter a place of prostitution; or

(iii) engage in sexual conduct.

(3) A person convicted of endangering the welfare of children shall be fined not to exceed $500 or imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of a second offense of endangering the welfare of children shall be fined not to exceed $1,000 or imprisoned in the county jail for any term not to exceed 6 months, or both.

(4) On the issue of whether there has been a violation of the duty of care, protection, and support, the following, in addition to all other admissible evidence,

is admissible: cruel treatment; abuse; infliction of unnecessary and cruel punishment; abandonment; neglect; lack of proper medical care, clothing, shelter, and food; and evidence of past bodily injury.

(5) The court may order, in its discretion, any fine levied or any bond forfeited upon a charge of endangering the welfare of children paid to or for the benefit of the person or persons whose welfare the defendant has endangered.

Historical Note

Enacted: M.C.C. 1973, § 94-5-607, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 85, Laws of Montana 1975; Sec. 1, Ch. 218, Laws of Montana 1977; Sec. 18, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: R.C.M. 1947, §§ 94-303, 94-304, and 94-306, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The 1975 amendment inserted subsection (2); redesignated former subsections (2) to (4) as (3) to (5); and added the second sentence in subsection (3).

The first of the 1977 amendments substituted "any person who is eighteen years of age or older, whether or not he is supervising the welfare of the child" near the middle of subsection (2) for "other person"; substituted "child" for "youth" near the end of subsection (2); divided portions of subsection (2)(b) into separate items; deleted "leave or" after "encouraging a child to" at the end of the introductory paragraph of subdivision (2)(b); deleted "or to enter places exclusively for adults" at the end of subdivision (2)(b); separated subdivision (2)(b) into distinct acts and made minor phraseology and punctuation changes.

The second of the 1977 amendments substituted "child less than sixteen years old" near the end of subsection (2) for "youth"; deleted "evidence" at the beginning of subsection (4); and made minor stylistic changes.

The purpose of subdivision (1) of this section is the punishment of a limited class of misbehavior by parents or guardians. This subdivision expands the coverage of the criminal law in that any breach of duty owed to a child by his parent or guardian is made a criminal offense. Criminal sanctions are thus made applicable to situations which under prior law could be remedied only by civil law. In this context it should be noted that this section is in a sense "quasi-civil" in that subdivision (5) allows the court to use a criminal fine levied under this section to aid the wronged child.

Subdivision (1) is applicable to any act or omission by a parent or guardian which is in violation of a legal duty to a child. The duty can be created by either a civil or criminal statute or by common law. It is applicable even though the legal duty which is breached does not itself carry with it a criminal penalty.

The amendments to this section taken together have further expanded its scope to include not only parents or guardians but anyone eighteen years or older whether or not he has custody of the child, who under any of the enumerations in subdivision (2) is contributing to the delinquency of a child less than sixteen years old. The doing of any of the acts in subdivision (2) with respect to a child less than sixteen years old will subject the actor, be it parent or guardian or anyone eighteen years or older, to the penalties of this section. As amended in 1975, a second offense under this statute will result in increased penalties.

Subdivision (4) adopts expanded rules for the admissibility of evidence which allow the introduction of evidence bearing not only on the violation charged but also on the general treatment of the child and the parents' course of conduct toward him.

Criminal Law Commission Comment

This section penalizes a limited class of misbehavior by a parent or other person legally responsible for the care and supervision of children. This offense can be commited only by an act or omission in violation of a legal duty. That legal duty may be one which does not itself carry a penal sanction; this section adds the penal sanction when violation of the duty creates a known danger to the child. Although the commission recognizes that prosecution of parents will seldom be a constructive solution to intra-family problems, it seems worthwhile to retain a penal sanction for gross breach of parental responsibility. Also provision is made that any criminal fine levied against the offender may be used to aid the disadvantaged minor. The age designation is arbitrary but consistent with the other provisions in the code intended to protect children.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Library References

Parent and Child, Key Nos. 3, 17
C.J.S. Parent and Child, §§ 1, 91 et seq.

45-5-623. Unlawful transactions with children. (1) A person commits the offense of unlawful transactions with children if he knowingly:

(a) sells or gives explosives to a child under the age of majority except as authorized under appropriate city ordinances;

(b) sells or gives intoxicating substances other than alcoholic beverages to a child under the age of majority;

(c) sells or gives alcoholic beverages to a person under 19 years of age; or

(d) being a junk dealer, pawnbroker, or secondhand dealer, receives or purchases goods from a child under the age of majority without authorization of the parent or guardian.

(2) A person convicted of the offense of unlawful transactions with children shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of a second offense of unlawful transactions with children shall be fined not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-5-609, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 2, Referendum 74, approved Nov. 7, 1978

Source: New

Prior Law: R.C.M. 1947, §§ 94-35-106 to 94-35-106.2 and § 94-3702, repealed, Sec. 32, Ch. 513, Laws of Montana 1973; R.C.M. 1947, § 69-1902

Annotator's Note

This section is essentially a recodification of certain statutes on unlawful transactions with children. Although R.C.M. 1947, § 69-1902 was not repealed [now M.C.A. 1978, § 19-3-701], subsection (1)(a) repeats the prohibition therein contained on the sale of explosives to individuals under the age of eighteen. The same subsection also adds a penalty for such a transaction thus filling a gap resulting from the apparently inadvertent repeal of the penalties section of Title 69, Chapter 19. The area covered by this subsection remains uncertain in the absence of an applicable statutory definition of the word explosives, but the exception which allows municipalities to permit, under appropriate ordinances, the sale of explosives to minors, suggests that the framers intended to include even fireworks within the section's coverage.

Subsection (1)(b) replaces former R.C.M. 1947, § 94-35-106 and expands the prior law's prohibition on the sale or gift of intoxicating liquor to minors to include the sale or gift of any intoxicating substance. The term "intoxicating substance" is defined by M.C.A. 1978, § 45-2-101(24) to include both the alcoholic bev-

erages described by R.C.M. 1947, § 94-35-107 and any other substance having an hallucinogenic, depressant, stimulating or narcotic effect.

Subsection (1)(c) was adopted following approval by the voters in the general election of November 7, 1978, of the constitutional amendment which raised the drinking age to 19 years or older. Subsection (1)(d) reenacts the prohibition on the purchase or acceptance of property from minors by pawnbrokers, second-hand dealers and junk dealers contained in R.C.M. 1947, § 94-3704. This section also lowers the age limit on the prohibition to 18 from 21 in accordance with the Constitutional requirement in Art. II, Sec. 14.

Criminal Law Commission Comment

This section is merely a partial recodification of a number of statutes on unlawful transactions with children. (See R.C.M. 1947, sections 94-35-106 to 94-35-106.2, 94-3702 and 69-1902.) Other statutes relating to children were repealed. (See R.C.M. 1947, sections 94-35-138, 94-35-137 and 94-35-208.) The substance of still other statutes relating to children were placed elsewhere in the code.

Cross References

Adult rights, Mont. Const. Art. II, Sec. 14 (1972)
Definition of "intoxicating substance" M.C.A. 1978, § 45-2-101(24)
Definition of "knowingly" M.C.A. 1978, 45-2-101(27)

Library References

Explosives Key Nos. 1-5
C.J.S. Explosives, §§ 1, 2, 3, 6
Intoxicating Liquors Key Nos. 159, 242
C.J.S. Intoxicating Liquors, §§ 259, 380
Pawn Brokers and Money Lenders Key no. 11
C.J.S. Pawn Brokers, § 15

45-5-624. Unlawful possession of an intoxicating substance by children. (1) A person under the age of 18 years commits the offense of possession of an intoxicating substance if he knowingly has in his possession an intoxicating substance other than an alcoholic beverage. A person under the age of 19 commits the offense of possession of an intoxicating substance if he knowingly has in his possession an alcoholic beverage, except that he does not commit the offense when in the course of his employment it is necessary to possess alcoholic beverages.

(2) A person convicted of the offense of possession of an intoxicating substance shall be fined not to exceed $50 or be imprisoned in the county jail for any term not to exceed 10 days, or both. If proceedings are held in the youth court, the preceding penalty does not apply, and the offender shall be treated as an alleged youth in need of supervision as defined in 41-5-103(13). In such case, the youth court may enter its judgment under 41-5-523.

Historical Note

Enacted: M.C.C. 1973, § 94-5-610, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 87, Laws of Montana 1974; Sec. 1, Ch. 536, Laws of Montana 1977; Sec. 3, Referendum 74, approved Nov. 7, 1978

Source: Substantially the same as R.C.M. 1947, § 94-35-106.2

Prior Law: R.C.M. 1947, § 94-35-106.2, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section is a recodification of the former statute on the subject and continues the policy of preventing the exposure of minors to intoxicating substances. The penalty has been reduced from a possible maximum of 6 months or $500 or both to a possible maximum of 10 days or $50 or both.

The 1974 amendment removes the possibility that an individual under the minimum legal age who carries alcoholic beverages in the course of his employment as, for example, a grocery carry-out person, would be technically in violation of the statute. The 1977 amendment indicates that when the proceedings are held in youth court for a violation of this statute, the Youth Court Act controls the proceedings. The amendment that was adopted by referendum in 1978 makes an individual under the age of 19 culpable under this section if the intoxicating substance he possessed was an alcoholic beverage.

The 1977 amendment took effect following the approval of the constitutional amendment, raising the drinking age to nineteen years or older, by the voters in the general election held November 7, 1978. The 1974 amendment added the exception at the end of subsection (1) and the approved 1977 amendment added the last two sentences of subsection (2).

Criminal Law Commission Comment

This section is merely a recodification of the present statute on this subject.

Cross References

Adult rights, Mont. Const. Art. II, Sec. 14 (1972)
Definition of "intoxicating substance" M.C.A. 1978, § 45-2-101(24)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Library References

Intoxicating Liquors Key Nos. 159, 242
C.J.S. Intoxicating Liquors, §§ 259, 380

45-5-625. Sexual abuse of children. (1) A person commits the offense of sexual abuse of children if he knowingly:

(a) employs, uses, or permits the employment or use of a child in an exhibition of sexual contact, actual or simulated;

(b) photographs, films, videotapes, or records a child engaging in sexual contact, actual or simulated;

(c) persuades, entices, counsels, or procures a child to engage in sexual contact, actual or simulated, for use as designated in (1)(a), (1)(b), or (1)(d);

(d) processes, develops, prints, publishes, transports, distributes, sells, possesses with intent to sell, exhibits, or advertises material consisting of or including a photograph, photographic negative, undeveloped film, videotape, or recording representing a child engaging in sexual contact, actual or simulated; or

(e) finances any of the activities described in subsections (1)(a) through (1)(d) knowing that the activity is of the nature described in those subsections.

(2) A person convicted of the offense of sexual abuse of children shall be fined not to exceed $10,000 or be imprisoned in the state prison for any term not to exceed 20 years, or both.

(3) For the purposes of this section, "child" means any person less than 16 years old.

Historical Note

Enacted: Sec. 1, Ch. 505, Laws of Montana 1979

Cross References

Definition of "sexual contact" M.C.A. 1978, § 45-2-101(54)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Sexual Crimes M.C.A. 1978, Title 45, Chapter 5, Part 5

Library References

Infants Key Nos. 12, 13, 20
C.J.S. Infants §§ 95 et seq.

45-6-101. Criminal mischief. (1) A person commits the offense of criminal mischief if he knowingly or purposely:

(a) injures, damages, or destroys any property of another or public property without consent;

(b) without consent tampers with property of another or public property so as to endanger or interfere with persons or property or its use;

(c) damages or destroys property with the purpose to defraud an insurer; or

(d) fails to close a gate previously unopened which he has opened, leading in or out of any enclosed premises. This does not apply to gates located in cities or towns.

(2) A person convicted of the offense of criminal mischief shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. If the offender commits the offense of criminal mischief and causes pecuniary loss in excess of $150, injures or kills a commonly domesticated hoofed animal, or causes a substantial interruption or impairment of public communication, transportation, supply of water, gas, or power, or other public services, he shall be imprisoned in the state prison for any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-102, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 88, Laws of Montana 1975

Source: New

Prior Law: R.C.M. 1947, §§ 94-3301 et seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This part of Chapter 6 dealing with Criminal Mischief and Arson has been drafted to provide a comprehensive treatment of activities which either intentionally or negligently destroy or damage personal or real property. Under the old Code there were six sections in Chapter 5 of Title 94, R.C.M. 1947, which dealt with arson and at least thirty-four sections in Chapter 33 dealing with malicious mischief. In addition, this part encompasses numerous sections contained in Chapter 35 of the old code on "Miscellaneous Offenses." Because the offenses in this part of the new Code are closely interrelated and heavily dependent upon precise construction and application of the terminology in the various subsections, attention is directed to M.C.A. 1978, § 45-2-101 in which the key words and phrases are defined.

This section on Criminal Mischief is the lowest offense in the hierarchy of crimes which deal with behavior that harms or threatens to harm property. While each subsection has its own requirements for culpability, in general, the prosecution under this section must establish: (1) that the prohibited conduct occurred--damage, destruction, tampering, etc.; (2) that the defendant possessed the required mental states of knowingly or purposely, as defined in § 45-2-101; and (3) that the defendant had no reasonable ground to believe he was right as indicated by the phrase "without consent," which is construed according to its normal grammatical meaning. Negligent or inadvertent damage to property is not covered by this section.

Under this definition of "without consent" the defense could raise the affirmative defense that the actor owned the property or believed that he had authority for the act. Similarly, the U.S. Supreme Court has ruled that a person who intentionally destroys property of another, but held an honest belief that it was abandoned, cannot be convicted. See Morisette v. United States, 342 U.S. 246 (1952).

Subsection (1)(a) which proscribes actual harm to property of another, corresponds to traditional malicious mischief. "Property of another," M.C.A. 1978, § 45-2-101(49), includes both real and personal property. The subsection is intentionally broad to eliminate the need for having a number of offenses which define more specific types of behavior such as the destruction of art, literature, crops, livestock, etc. This subsection would also include forms of arson which may not fit into the more exacting requirements of the arson statute which follow. For example, if a person intentionally sets fire to a shack, to livestock housing or to any other articles which do not meet the criteria of an "occupied structure" as required in the Arson statute, M.C.A. 1978, § 45-6-103, he may be prosecuted under subsection (1)(a) of this statute.

Subsection (1)(b), which deals with tampering, encompasses numerous offenses such as the meddling with and disarrangement of papers, files, and records, and the breaking or obstruction of public utility equipment. "Tampering" as defined by § 45-2-101(61) implies meddling, interfering, or altering property. The definition of "tampering" also includes depositing refuse--thus allowing prosecution for littering under this section.

Subsection (1)(c), which prohibits the destruction of property with the intent to defraud an insurer, encompasses former section 94-506. Since the offense defined in this subsection is ordinarily occasioned upon the offender's property, it is

not necessary that the property destroyed belong to another. The offense does, however, require a purpose to defraud as well as the purpose to perform the act. Property, as defined in § 45-2-101(48) includes anything tangible or intangible of value.

Subsection (1)(d) provides a criminal penalty for the failure to close gates previously unopened. It should be noted that this subsection only prohibits intentional acts. Negligent or accidental failure to close a gate is not a criminal act. The provision only applies to rural areas where the danger to livestock from such acts is generally high. This subsection replaces former section 94-35-116.

Subsection (2) classifies Criminal Mischief as either a felony or misdemeanor depending upon the value of the injured property. The sentencing provision is broad to allow use of this section as an alternative or lesser included offense in arson prosecutions. Attention is directed to M.C.A. 1978, § 45-2-101(63), which defines the manner in which the value of property is to be ascertained.

The 1975 amendment inserted "or public property" after "property of another" in subdivisions (1)(a) and (b). There was some question whether public property was included in the original statute because "property of another" was defined as property in which another person had an interest (§ 45-2-101(49)). The amendment was intended to make certain that property owned by any governmental entity or agency, or any other public body is within the protection of the statute.

Criminal Law Commission Comment

This section defines the behavior that is punishable because it harms or threatens to harm property. In so far as the section deals with purposeful, unjustified actual harm to property, it corresponds to the traditional "malicious mischief" offense. This section would include killing, maiming, or poisoning livestock. The section is more comprehensive and requires proof of a different mental state than prior law.

Subsection (2) classifies some criminal mischief a felony by providing imprisonment up to ten (10) years in the state prison for causing pecuniary loss in excess of one hundred fifty ($150) dollars. Under the old malicious mischief section (R.C.M. 1947, section 94-3301) the amount of loss required for a felony conviction was only fifty ($50) dollars and there was a mandatory minimum penalty of one year. This section has changed the minimum amount necessary for a felony conviction to conform with changing values.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Definition of "property of another" M.C.A. 1978, § 45-2-101(49)
Definition of "tamper" M.C.A. 1978, § 45-2-101(61)
Definition of "value" M.C.A. 1978, § 45-2-101(63)

Library References

Criminal Mischief Key Nos. 1 et seq.
C.J.S. Criminal Mischief, §§ 1 et seq.

Notes of Decisions

Double Jeopardy

The offenses of criminal mischief and escape have no common elements, are separate and distinct criminal offenses, and are designed for the protection of completely different interests. There was no error and no violation of defendant's constitutional right against double jeopardy in permitting defendant to be charged with and convicted of both criminal mischief and attempted escape, even though both charges were based on a single physical act, digging a hole in a county jail wall. State v. Davis, ____ Mont. ____, 577 P.2d 375 (1978).

Value

Proof of value held not to be an element of the offense of criminal mischief, but is rather to be considered by trial judge in the exercise of his sentencing discretion and whether a defendant is sentenced for the offense of criminal mischief as a felon or a misdemeanant, is directly contingent upon whether the value of the damage or destruction is shown to be greater or less than $150, respectively. State v. Davis, ____ Mont. ____, 577 P.2d 375, 378 (1978). See also annotations under § 45-2-101(63) (value).

Lesser Included Offense

Misdemeanor criminal mischief is a lesser included offense in felony criminal mischief. Where the charge is felony criminal mischief, the jury must be instructed on the lesser charge if it is to be considered. State v. Davis, ____ Mont. ____, 577 P.2d 375 (1978).

45-6-102. Negligent arson. (1) A person commits the offense of negligent arson if he purposely or knowingly starts a fire or causes an explosion, whether on his own property or property of another, and thereby negligently:

(a) places another person in danger of death or bodily injury; or

(b) places property of another in danger of damage or destruction.

(2) A person convicted of the offense of negligent arson shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. If the offender places another person in danger of death or bodily

injury, he shall be imprisoned in the state prison for any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-103, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 220.1(2)

Prior Law: R.C.M. 1947, §§ 94-501 et seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Negligent Arson and the complementary section on Arson (M.C.A. 1978, § 45-6-103) replace the former Model Arson Law. Under the new Code, arson is classified by the mental state of the actor rather than by the class of property destroyed as under the old Code. Negligent Arson requires three elements: (1) the offender must purposely or knowingly start a fire or cause an explosion; (2) this conduct must then be followed by a negligent act or omission, which (3) places either a person or some property in danger of injury. The action has two important features. First, it prohibits the use of fire or explosives which endanger persons or property whether or not injury or damage result. Second, it prohibits the burning of one's own property where there is high probability that adjoining property will be damaged. This sections requires an initial affirmative intentional act and does not cover failures to report or control fires not started by the actor. If a person starts a fire negligently he is not guilty under this provision. Similarly, if a person purposely allows a fire to spread to adjoining property he may be guilty of either Criminal Mischief or Arson, but not Negligent Arson. Damage which results from misuse of campfires is dealt with in M.C.A. 1978, § 76-13-123 rather than with this provision. Similarly, damage from fires negligently started is punished under M.C.A. 1978, § 50-63-102. The wording for this section on Negligent Arson has been adapted from the Model Penal Code provision on reckless arson.

Criminal Law Commission Comment

Section 94-6-103 [now M.C.A 1978, § 45-6-102] differs substantially from the current Model Arson Law. First, it eliminates the grading of arson into degrees by reference to the class of property destroyed. Second, it prohibits negligent uses of fire or explosives which endanger persons or property unaccompanied by injury or damage, and third, it includes the burning of one's own property in circumstances where there is a high risk that the fire will spread to property of others or where the burning of lesser forms of property is accomplished in close proximity to occupied structures.

The provisions of subsection (1) are to be construed as pertaining to affirmative knowing and purposeful acts and are not intended to include omissions to report, control or combat a fire which has placed a person in danger of bodily injury or death, or an occupied structure in danger of damage or destruction. If a person

starts a fire negligently or fails to control a fire thus placing persons or property in danger the act is made punishable by R.C.M. 1947, section 28-115 [now M.C.A. 1978, § 76-13-123].

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Definition of "property of another" M.C.A. 1978, § 45-2-101(49)
Definition of "bodily injury" M.C.A. 1978, § 45-2-101(5)
Penalty for setting or leaving fire causing damage M.C.A. 1978, § 50-63-102
Failure to extinguish campfire M.C.A. 1978, § 76-13-123

Library References

Arson Key Nos. 1 et seq.
C.J.S. Arson, §§ 1 et seq.

Law Review Commentaries

Comment. Arson and related offenses. Model Penal Code, Tent. Draft No. 11, § 220.1, p. 34 (April 27, 1960)

45-6-103. Arson. (1) A person commits the offense of arson when, by means of fire or explosives, he knowingly or purposely:

(a) damages or destroys an occupied structure which is property of another without consent; or

(b) places another person in danger of death or bodily injury.

(2) A person convicted of the offense of arson shall be imprisoned in the state prison for any term not to exceed 20 years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-104, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 261, Laws of Montana 1975

Source: New

Prior Law: R.C.M. 1947, §§ 94-501 et seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Arson is the highest offense in the hierarchy of crimes involving the destruction of property. Together with the section on Negligent Arson, this provision replaces the Model Arson Law which classified offenses according to the class of property destroyed rather than by the criminality of the offender's conduct. Under this section the prosecution must show: (1) that the offender knowingly or purposely started a fire or explosion (2) which either damaged an occupied structure or placed a person other than the actor in danger of being injured. Under the definition of occupied structure (M.C.A. 1978, § 45-2-101(34)), the property need not be inhabited; it need only be capable of habitation. Thus, the purposeful burning of any building in which a person conceivably could lodge would be sufficient for conviction. Since the definitions of knowingly and purposely (M.C.A. 1978, §§ 45-2-101(27), 45-2-101(52)) do not require initial knowledge of the final result, actual knowledge that the person injured was present in the building is not necessary. This section also covers burning of any occupied structure to defraud an insurer. Burning of an unoccupied structure with intent to defraud an insurer is punishable under M.C.A. 1978, § 45-6-101, Criminal Mischief. Since the burning of the property must be without consent, it would be the burden of the defense to bring forth evidence raising an affirmative defense of authority to act. Together with the section on Causal Relationship Between Conduct and Result (M.C.A. 1978, § 45-2-201), this section would be applicable to a person who purposely starts a fire on his own property in order to destroy the property of his neighbor. Attention is directed to the other arson related offenses in this part of Chapter 6 which may provide alternative or lesser included offenses for Arson.

The 1975 amendment inserted "which is property" after "structure" in subdivision (1)(a).

Criminal Law Commission Comment

This section, together with section 94-6-103 [now M.C.A. 1978, § 45-6-102], Negligent Arson, is intended to completely replace the old Model Arson Law which classifies offenses in an illogical and arbitrary fashion. The burning of an empty isolated dwelling could result in a twenty (20) year sentence under R.C.M. 1947, section 94-502, while setting fire to a crowded church or theater or jail could yield only a maximum sentence of ten (10) years under R.C.M. 1947, section 94-503. Moreover, it makes little sense to treat the burning of miscellaneous personal property, whether out of malice or to defraud insurers a special category of crime apart from the risks associated from burning. To destroy a valuable painting or manuscript by burning it in a hearth or furnace cannot be distinguished criminologically from any other method of destruction.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "occupied structure" M.C.A. 1978, § 45-2-101(34)
Definition of "without consent" M.C.A. 1978, § 45-5-501
Definition of "bodily injury" M.C.A. 1978, § 45-2-101(5)
Causal relationship between conduct and result M.C.A. 1978, § 45-2-201

Library References

Arson Key Nos. 1 et seq.
C.J.S. Arson, §§ 1 et seq.

Notes of Decisions

Information or Indictment

Amending the information from a charge under subsection (a) to a charge under subsection (b) was a change of substance and should not have been allowed after the defendant had pled. State v. Hallam, ____ Mont. ____, 575 P.2d 55 (1978).

Part 2--Criminal Trespass and Burglary

45-6-201. Definition of "enter or remain unlawfully". (1) A person enters or remains unlawfully in or upon any vehicle, occupied structure, or premises when he is not licensed, invited, or otherwise privileged to do so. A person who enters or remains upon land does so with privilege unless notice is personally communicated to him by an authorized person or unless such notice is given by posting in a conspicuous manner.

(2) In no event shall civil liability be imposed upon the owner or occupier of premises by reason of any privilege created by this section.

Historical Note

Enacted: M.C.C. 1973, § 94-6-201, Sec. 1, Ch. 513, Laws of Montana 1973.

Amended: Sec. 21, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: See R.C.M. 1947, §§ 94-901 and 94-904, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The purpose of this section is to provide a definition for the term "enter or remain unlawfully" which is an essential element of the offenses of criminal tres-

pass to property and burglary contained in this part of Chapter 6. Essentially this section makes any entry in or upon any vehicle, occupied structure or premises without license, invitation or other privilege, unlawful. There is, however, an exception relating to land which creates a privilege to enter or remain unless notice to the contrary is given either personally or by posting to the person entering or remaining.

Unlawfully entering or remaining either in an occupied structure or in or upon the premises of another constitutes criminal trespass to property under the provisions of M.C.A. 1978, § 45-6-203. This represents a substantial departure from prior law since it makes mere unprivileged entry an offense while under prior law in addition to an unauthorized entry the intruder had to perform some specifically forbidden act before the offense was complete.

Conversely the application of this definition of unlawful entry to the offense of burglary will result in little change since Montana has already indicated that to constitute an element of the offense of burglary the entry must be unprivileged. (See State v. Starkweather, 89 Mont. 381, 385-386, 297 P. 497 (1931)).

The 1977 amendment substituted "section " for "action" at the end of subsection (2) and made minor changes in style, phraseology and punctuation.

Criminal Law Commission Comment

The core of the common-law concept of burglary was breaking and entering a dwelling house at night with intent to commit a felony therein. The scope of the offense has enlarged until, under prevailing law, the offense may be committed by entry alone, in daytime as well as by night, in any building, structure, or "vehicle."

In this code "occupied structure" is narrowly defined to include buildings where people are living or working and where intrusions are most alarming and dangerous. For example, the definition does not include barns, or derelict and abandoned buildings unsuited for human occupancy. In the case of a mine or ship, for example, occupancy would have to be proved. "Entering or remaining unlawfully" is a concept which takes a middle ground between prevailing law requiring breaking and its complete elimination in some modern legislation.

[CAVEAT: It may no longer be true that the definition of "occupied structure" does not include a barn in Montana. State v. Shannon, 171 Mont. 25, 554 P.2d 743 (1976) held that a semi-trailer is a vehicle suitable for carrying on business and thus within the definition of "occupied structure" (§ 45-2-101(34)). A barn, which is actually in use as part of a farming or ranching business, or is capable of such use although currently unused, would seem to qualify under the same definition. A question of fact is at least presented which would have to be decided in each case. The classification of "barns" along with "derelict or abandoned buildings" seems factually incorrect and, in light of Shannon, probably legally incorrect as well.]

Cross References

Definition of "occupied structure" M.C.A. 1978, § 45-2-101(34)
Definition of "premises" M.C.A. 1978, § 45-2-101(47)
Definition of "vehicle" M.C.A. 1978, § 45-2-101(64)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

Trespass Key Nos. 76 et seq.
C.J.S. Trespass, §§ 140 et seq.

45-6-202. Criminal trespass to vehicles. (1) A person commits the offense of criminal trespass to vehicles when he purposely or knowingly and without authority enters any vehicle or any part thereof.

(2) A person convicted of the offense of criminal trespass to vehicles shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-202, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 21-2

Prior Law: None

Annotator's Note

There was no prior provision covering criminal trespass to vehicles. This section is intended to deal with that troublesome area of criminal activity. The conduct forbidden by this section is limited to trespass to vehicles which are defined by § 45-2-101(64) as including aircraft and watercraft as well as conventional vehicles. If the trespass involves damage to a vehicle, the separate offense of Criminal Mischief (§ 45-6-101) is committed. Similarly, if the trespasser takes possession of the vehicle or steals from it he will have committed either the separate offense of unauthorized use of a motor vehicle (§ 45-6-308) or the separate offense of theft (§ 45-6-301). This section is designed to deal with the prowler of the persons who knowingly accompany an unauthorized user.

Criminal Law Commission Comment

The section is intended to cover a troublesome area of criminal activity which is easily identifiable and well-known to the police. The section covers only trespass to vehicles, aircraft or watercraft. If the trespass involves damage to a vehicle, the separate offense of criminal mischief (94-6-102) [now M.C.A. 1978, § 45-6-101] is committed.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "vehicle" M.C.A. 1978, § 45-2-101(64)
Criminal Mischief M.C.A. 1978, § 45-6-101
Unauthorized use of motor vehicles M.C.A. 1978, § 45-6-308
Theft M.C.A. 1978, § 45-6-301

Library References

Automobiles Key No. 339
C.J.S. Motor Vehicles, §§ 691 et seq.

Notes of Decisions

In General

The Illinois courts have ruled that identity of the property and criminal knowledge are two material elements of the offense of criminal trespass to vehicles. See People v. Acevedo, 5 Ill. App.3d 968, 284 N.E.2d 488 (1972); People v. Owes, 5 Ill. App.3d 936, 284 N.E.2d 465 (1972). Criminal Trespass to Vehicles is not a lesser included offense of theft. People v. Rainbolt, 52 Ill. App.3d 374, 367 N.E.2d 293 (1977). Entry into the trailer portion of a tractor-trailer combination, with intent to commit a theft was burglary under section 94-6-204(1) [now M.C.A. 1978, § 45-6-204] rather than trespass to a vehicle as defined in this section. State v. Shannon, 171 Mont. 25, 554 P.2d 743 (1976).

Indictment and Information

The following two cases ruled on specific language in indictment for criminal trespass to vehicles: People v. Harvey, 132 Ill. App.2d 761, 270 N.E.2d 80 (1971); People v. Pantoja, 7 Ill. App.3d 847, 288 N.E.2d 687 (1972).

Sufficiency of Evidence

Because criminal knowledge is an important element of the offense of criminal trespass to vehicles the Illinois courts have overturned three verdicts which were based upon inferences that the defendant knew that the automobile he was driving was stolen. See People v. Acevedo, 5 Ill. App.3d 968, 284 N.E.2d 488 (1972); People v. Kelly, 84 Ill. App.2d 431, 228 N.E.2d 561 (1967); People v. Chandler, 84 Ill. App.2d 231, 228 N.E.2d 588 (1967).

Verdict and Sentence

Only one sentence for the greater offense of automobile theft may be imposed in prosecution for automobile theft and criminal trespass to vehicles when the prosecution is based upon a single act. People v. Torello, 109 Ill. App.2d 433, 248 N.E.2d 725 (1969). But because these two offenses are separate and distinct there is no inconsistency in a jury returning a verdict which convicts a defendant of criminal trespass to vehicles and acquits him of theft. People v. Johnson, 102 Ill. App.2d 443, 243 N.E.2d 310 (1968). See also, People v. Webb, 131 Ill. App.2d 206, 268 N.E.2d 161 (1971).

45-6-203. Criminal trespass to property. (1) A person commits the offense of criminal trespass to property if he knowingly:

(a) enters or remains unlawfully in an occupied structure; or

(b) enters or remains unlawfully in or upon the premises of another.

(2) A person convicted of the offense of criminal trespass to property shall

be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-203, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 21-3.

Prior Law: See R.C.M. 1947, § 94-3308, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section substantially expands prior law by making individuals criminally liable for knowing trespass. Under former law trespass was not criminal unless the trespasser did some prohibited act, such as hunting, building fires or injuring the realty, and it was these acts, not the trespass itself, which constituted the criminal conduct.

A consideration of the combined effect of M.C.A. 1978, § 45-3-104 (Use of Force in Defense of Property), § 45-6-201 (Definition of "Enter or Remain Unlawfully") and this section indicates that a landowner has no right to use force against an individual who innocently and unknowingly trespasses, since until he is given notice he has committed no offense. M.C.A. 1978, § 45-3-104 does give the landowner the right to use force to remove a trespasser who has been given notice. It is, however, hoped that the effect of this group of statutes will be to encourage the landowner to call in peace officers. Previously, since mere trespass was not an offense, a landowner could not call in peace officers and was, as a result, often placed in a situation in which his only remedy was self-help. It should also be noted that the landowner is limited in any event to the use of reasonable force and can use deadly force or force likely to cause serious bodily injury only to prevent the commission of a forcible felony.

Criminal Law Commission Comment

This section covers criminal trespass to land without regard to the nature, use or location of the land. Criminal trespass is committed only if the offender, immediately prior to entry, receives oral or written notice that such entry is forbidden, or he remains upon the land after being notified to leave. The section differs substantially from R.C.M. 1947, section 94-3308, "Malicious injuries to freehold," in that no specific act causing damage need be alleged, only the unlawful presence of the offender. Should damage occur during the trespass, the offender could be prosecuted under section 94-6-102, Criminal Mischief [now M.C.A. 1978, § 45-6-101].

Cross References

Definition of "enter or remain unlawfully" M.C.A. 1978, § 45-6-201
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "occupied structure" M.C.A. 1978, § 45-2-101(34)
Definition of "premises" M.C.A. 1978, § 45-2-101(47)

Library References

Trespass Key No. 76
C.J.S. Trespass, §§ 140 et seq.

Notes of Decisions

Constitutionality

This section has been ruled not to violate Amendments One and Fourteen of the United States Constitution. People v. Jackson, 133 Ill. App.2d 279, 271 N.E.2d 672 (1971).

In General

This section creates two distinct offenses: the first, to enter on land of another despite warning that entry is forbidden, and, the second to remain on land of another after being notified to depart. People v. Spencer, 131 Ill. App.2d 551, 268 N.E.2d 192 (1971). The purpose of this section, which makes certain acts of trespass illegal, is to deter violence and threats of violence. People v. Hoskins, 5 Ill. App.3d 831, 284 N.E.2d 60 (1972). Thus, convictions under this section have been upheld where a teacher failed to comply with an order of dismissal and where a defendant distributed leaflets in a completely enclosed private shopping mall. People v. Spencer, supra; People v. Sterling, 52 Ill.2d 287, 287 N.E.2d 711 (1972). However, a conviction based on this section was overturned where the defendant was not given sufficient time to leave the premises after being informed that his presence thereon was unlawful. People v. Mims, 8 Ill. App.3d 32, 288 N.E.2d 891 (1972). See also, City of Chicago v. Rosser, 47 Ill.2d 10, 264 N.E.2d 158 (1970), in which the court discussed in general terms the rights of an owner of private property to operate and maintain his premises. See also, People v. Vazquez, 132 Ill. App.2d 291, 270 N.E.2d 229 (1971); People v. Hoskins, 5 Ill. App.3d 831, 284 N.E.2d 60 (1972); People v. Spencer, 131 Ill. App.2d 551, 268 N.E.2d 192 (1971). Entering and remaining on Fish and Game property held not to violate this section where defendant was a member of the public and the property was concededly open to the public. State v. Blakley, ____ Mont. ____, 592 P.2d 501 (1979). This section applies only to "persons," not to trespassing cattle; this section is not as broad as the former statute which made herding of cattle onto another's land a criminal trespass. Id. The landowner's remedies for trespassing cattle are (1) a civil suit for damages under M.C.A. 1978, § 81-4-215 or (2) a criminal action for criminal mischief under M.C.A. 1978, § 45-6-101 (where a person herds cattle onto another's land and causes damage). Id.

45-6-204. Burglary. (1) A person commits the offense of burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein.

(2) A person commits the offense of aggravated burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit a felony therein and:

(a) in effecting entry or in the course of committing the offense or in im-

mediate flight thereafter, he or another participant in the offense is armed with explosives or a weapon; or

(b) in effecting entry or in the course of committing the offense or in immediate flight thereafter, he purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon anyone.

(3) A person convicted of the offense of burglary shall be imprisoned in the state prison for any term not to exceed 10 years. A person convicted of the offense of aggravated burglary shall be imprisoned in the state prison for any term not to exceed 40 years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-204, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec.1, Ch. 260, Laws of Montana 1975

Source: New and M.P.C. 1962, § 221.1

Prior Law: R.C.M. 1947, §§ 94-901 through 94-907, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section substantially changes prior law. The common law offense of burglary required the breaking and entering of the dwelling house of another in the night time with the purpose of committing a felony. Under prior law burglary required only entry into a structure or vehicle with the purpose of committing petit larceny or any felony. The new code has adopted a position between these two views.

While the new code eliminates the need for a "breaking" in any physical sense, it retains explicitly in the definition of enter or remain unlawfully (§ 45-6-201) the requirement that the entry be unprivileged. A literal reading of the prior statute would seem to require mere entry with intent and other courts in interpreting identical statutes have reached that conclusion. The Montana Court has, however expressly rejected that view in State v. Starkweather, 89 Mont. 381, 297 P. 497 (1931), and indicated that, to constitute burglary, the entry must be unprivileged. Prior to the 1975 amendment, the requirement of unprivileged entry was deleted from the offense of aggravated burglary as set forth in subsection (2). The 1975 addition of "unlawfully" after "remains" in that subsection corrected the oversight.

Perhaps the most significant of the changes introduced by the new code is the retreat from the prior view that any building or vehicle could be the object of burglary to the view that to constitute burglary the acts must be directed against an occupied structure. This change reflects a return to the common law view that the gravamen of burglary was the threat to person resulting from the wrongful intrusion. While the new code is not as technically restrictive it does require that the structure entered be either actually occupied or "suited for human occupancy or night

lodging of persons or for carrying on business" (See § 45-2-101(34)). In effect this limits burglary to those situations in which the intrusion is most alarming and the threat to human life the greatest.

The new code rejects both the common law's requirement that the act occur in the night time and the prior law's division of burglary into first and second degree burglary based on the time of the act. It has also rejected the felony or petit larceny requirements of the common and prior laws. The new code retains the prior law in that burglary can occur at any time, day or night, but classifies the offense as either burglary or aggravated burglary by referring solely to the defendant's conduct. Simple burglary is made more inclusive by requiring only the purpose to commit any offense instead of the intent to commit any felony or petit larceny requirement of the old law. Aggravated burglary requires both the purpose to commit a felony and either the infliction of bodily injury or the carrying of explosives or a weapon.

The penalties under the new code have also been modified so that it is possible to more accurately match punishment to conduct.

Criminal Law Commission Comment

The definition of a burglarious entry, i.e., "unprivileged entry" takes a middle ground between the common-law requirement of "breaking" and the complete elimination of that requirement in some modern statutes. The basic concept of "breaking" seems to be an unlawful intrusion, or as defined in section 94-6-201, "entering or remaining unlawfully." This definition is meant to exclude from burglary the servant who enters his employer's house meaning to steal silver; the shoplifter who enters a store during business hours to steal from the counter; the fireman who forms the intent, as he breaks down the door of a burning house, to steal some of the householder's belongings and similar acts in which the defendant is lawfully on the premises.

Where breaking is not required there has been a tendency to hold that guilt may be established by proof that the proscribed intent was secretly entertained in the mind of the entrant although apart from this secret intent the entrance at that time and place would have been authorized. For example, in People v. Brittain, 142 Cal 8, 75 P 314, it was held one could be convicted of burglary for entering a store with larcenous intent. The commission rejects this view and approves of the decision of State v. Starkweather, 89 M 381, 297 P 497 as a more practical result.

Cross References

Definition of "bodily injury" M.C.A. 1978, § 45-2-101(5)
Definition of "enter or remain unlawfully" M.C.A. 1978, § 45-6-201
Definition of "felony" M.C.A. 1978, § 45-2-101(15)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "negligently" M.C.A. 1978, § 45-2-101(31)
Definition of "occupied structure" M.C.A. 1978, § 45-2-101(34)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Definition of "purpose M.C.A. 1978, § 45-2-101(52)
Definition of "weapon" M.C.A. 1978, § 45-2-101(65)

Library References

Burglary Key Nos. 3, 9, 10, 49
C.J.S. Burglary, §§ 1, 7, 10, 27, 68

Law Review Commentaries

Comment. Burglary. Model Penal Code, Tent. Draft No. 11, § 221.1, p. 54 (April 27, 1960)

Note. A rationale of the law of burglary. 51 Colum. L. Rev. 1009 (1951)

Wright. Statutory burglary--the magic of four walls and a roof. 100 U. Pa. L. Rev. 411 (1951)

Notes of Decisions

Information and Indictment

Defendant was properly convicted as an aider or abettor to a burglary under section 94-2-106 [now § 45-2-301] and 94-2-107 [now § 45-2-302] even though the information charged only burglary, without making reference to aiding and abetting, where the form of the charge did not mislead or cause surprise to the defendant and he knew the state's theory throughout the trial. However, the Supreme Court does not condone this method of charging a defendant. Proper practice is to charge aiding and abetting from the outset. State v. Murphy, ____ Mont. ____, 570 P.2d 1103 (1977).

Occupied Structure

Semi-trailer attached to a sleeper cab tractor was a "vehicle" and an "occupied structure" within the meaning of this section, and therefore defendant who entered it and removed a number of cases of beer was properly convicted of burglary. State v. Shannon, 171 Mont. 25, 554 P.2d 743 (1976).

Sufficiency of Evidence

Where defendant was found unlawfully on premises (furniture store) of another in the nighttime with television pushed up against lower panel of garage door and where defendant's account of the reason for his presence there was supported only by a friend of his who was also unlawfully on the premises, evidence was sufficient to allow inference that defendant was on the premises for the purpose of committing a theft and to uphold conviction for burglary. State v. Pascgo, 173 Mont. 121, 566 P.2d 802 (1977). Evidence that defendant had removed a fire extinguisher from the wall and placed it near one of the doors of the clothing store he entered at 3:00 A.M. was sufficient to prove intent to commit an offense therein. State v. Hardy, ____ Mont. ____, 604 P.2d 792 (1980)

45-6-205. Possession of burglary tools. (1) A person commits the offense of possession of burglary tools when he knowingly possesses any key, tool, instrument, device, or explosive suitable for breaking into an occupied structure or vehicle or any depository designed for the safekeeping of property or any part thereof with the purpose to commit an offense therewith.

(2) A person convicted of possession of burglary tools shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months,

or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-205, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 19-2

Prior Law: R.C.M. 1947, § 94-908, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section, while drawn from Illinois, does not represent a substantial change from prior law, R.C.M. 1947, § 94-908, which also prohibited possession of burglary tools. The only real change is the elimination of the old law's prohibition of making, altering or repairing burglary tools.

Criminal Law Commission Comment

This section does not represent a substantial change from the old Montana law, R.C.M. 1947, section 94-908, which prohibited possession of burglary tools. The main purpose for the change is, first, to reconstruct the language of the provision to conform with that of the other burglary statutes in this chapter, and second, to eliminate the concept of altering a tool or instrument for the purpose of committing a felony or misdemeanor, since possession of an altered instrument or tool with the intent to use it to commit a crime, cannot logically be distinguished from possession of an unaltered burglarious tool. The new provision does not alter the penalty for the crime.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "occupied structure" M.C.A. 1978, § 45-2-101(34)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Definition of "purpose" M.C.A. 1978, § 45-2-101(52)
Definition of "vehicle" M.C.A. 1978, § 45-2-101(65)

Library References

Burglary Key No. 12
C.J.S. Burglary, § 69

Law Review Commentaries

Note. Constitutionality of burglar's tools ordinance. 65 Nw. U. L. Rev. 978

(1971)

Thompson. Illinois search and seizure law. 11 DePaul L. Rev. 27 (1961)

Notes of Decisions

In General

To sustain a conviction under this section, it must be proved that tools are adapted and designed for breaking and entering, that defendant possessed them with knowledge of their character, and that he intended to use them for breaking and entering. Proof of an intent to commit a burglary of some place or vehicle is necessary. People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378 (1970); People v. Ray, 3 Ill. App.3d 517, 278 N.E.2d 170 (1972). Possession of keys designed for entering a vending machine and proof of intent to commit a crime therein was held to constitute the crime of possession of burglary tools. People v. Oliver, 129 Ill. App.2d 83, 262 N.E.2d 597, 45 A.L.R.3d 1279 (1970). See also, People v. Johnson, 88 Ill. App.2d 265, 232 N.E.2d 554 (1967).

Nature of Burglary Tools

In a prosecution for unlawful possession of burglary tools, the fact that tools in defendant's possession were suitable for lawful purposes was held to be immaterial when these tools were also suitable for breaking and entering. People v. Johnson, 88 Ill. App.2d 265, 232 N.E.2d 554 (1967). Conviction for possession of burglary tools does not require that the tools be intended for breaking into traditional entrances of vehicles. Tools which are suitable for entering any integral portion of a mechanism, such as a transmission, are sufficient. People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378 (1970).

Indictment and Information

Attention is directed to the following cases which discuss the sufficiency of indictments charging possession of burglary tools: People v. Stafford, 4 Ill. App.3d 606, 279 N.E.2d 395; People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378 (1970); People v. Hall, 55 Ill. App.2d 255, 204 N.E.2d 473 (1965).

Admissibility of Evidence

Stolen property and crowbar were properly admitted into evidence where there was ample showing that shop was burglarized by co-defendant and that the articles were found in the path taken by the fleeing suspect. People v. Bryan, 27 Ill.2d 191, 188 N.E.2d 692 (1963). Similarly, burglary tools were held to be admissible where defendants were seen fleeing from burglarized premises by police officer and the burglary tools were found by the owner of the business in the premises shortly after defendants fled. People v. Craddock, 30 Ill.2d 348, 196 N.E.2d 672 (1964). See also, People v. Johnson, 88 Ill. App.2d 265, 232 N.E.2d 554 (1967).

Sentence and Punishment

Where attempted burglary and unlawful possession of burglary tools arise from the same course of conduct, the defendant may be convicted and sentenced for only one of such offenses. People v. Hambreck, 6 Ill. App.3d 739, 286 N.E.2d 557 (1972); People v. Blahuta, 131 Ill. App.2d 200, 264 N.E.2d 819 (1970); People v. Myles, 132 Ill. App.2d 962, 271 N.E.2d 62 (1971). Accord, People v. Beall, 8 Ill. App.3d 739, 290 N.E.2d 410 (1972).

Part 3--Theft and Related Offenses

45-6-301. Theft. (1) A person commits the offense of theft when he purposely or knowingly obtains or exerts unauthorized control over property of the owner and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(2) A person commits the offense of theft when he purposely or knowingly obtains by threat or deception control over property of the owner and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(3) A person commits the offense of theft when he purposely or knowingly obtains control over stolen property knowing the property to have been stolen by another and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(4) A person commits the offense of theft when he purposely or knowingly obtains or exerts unauthorized control over any part of any public assistance, as

defined in 53-3-101, by means of:

(a) a knowingly false statement, representation, or impersonation; or

(b) a fraudulent scheme or device.

(5) A person convicted of the offense of theft of property not exceeding $150 in value shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of the offense of theft of property exceeding $150 in value or theft of any commonly domesticated hoofed animal shall be imprisoned in the state prison for any term not to exceed 10 years.

(6) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

Historical Note

Enacted: M.C.C. 1973, § 94-6-302, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 22, Ch. 359, Laws of Montana 1977; Sec. 1, Ch. 374, Laws of Montana 1979

Source: Ill. C.C. 1961, Title 38, § 16-1

Prior Law: R.C.M. 1947, §§ 94-1801 et seq., 94-2801 et seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This part of the new Criminal Code dealing with Theft and Related Offenses comprises a comprehensive treatment of crimes which have presented numerous problems to courts and attorneys. The thirteen substantive provisions of this part encompass the former offenses of larceny, larceny by trick, embezzlement, false pretenses, confidence games, fraudulent checks, receiving stolen property and many other crimes which were the subject of at least four chapters in the old Code. The approach taken by the new Code eliminates the troublesome technical distinctions traditionally made between different forms of theft and avoids entirely any reference to prior statutory or common law terminology. Illinois Criminal Code, Title 38, Chapters 16 and 17 are the source for most of the provisions in this part of Chapter 6.

This section on Theft encompasses the traditional crimes of larceny, larceny by trick, false pretenses, embezzlement, receiving stolen property as well as numer-

ous associated offenses. The Montana Criminal Law Commission intended that this section cover every conceivable form of theft and in so doing, eliminate the common law distinctions which encumbered virtually every one of the theft-related offenses.

Perhaps the greatest problems found in the traditional approach to the theft related offenses are the definitional dilemmas found in the terms "property," "possession," "custody," and "title." The nature of the property acquired has always been a determinant of which offense could be charged. To avoid this problem, the former statutes contained long lists of different types of property, choses in action, etc. which were included in the coverage of the provision. The technical distinctions concerning the type of property interest acquired by the offender played a central role in deciding which offense, if any, had been committed. In Montana, these technical distinctions were twisted and juxtaposed to apply the statutes to activities which did not fit precisely into the common law categories. For example, in State v. Dickinson, 21 Mont. 595, 55 P. 539 (1898), the Montana court held, contrary to the traditional position, that both possession and title must be acquired to charge larceny by trick. In State v. Love, 151 Mont. 190, 440 P.2d 275 (1968), the court held, again in opposition to the common law, that only possession need be acquired in order to sustain a charge of false pretenses. These problems have been solved in the new Code by the use of the phrase "obtains or exerts control" which includes every possible property interest which may be acquired and by reference to the broadly defined term "property" which means "anything of value." See M.C.A. 1978, §§ 45-2-101(33), (48), respectively. Thus, any possible interest in any kind of property is covered by this section.

Subsection (1) is the key provision of this section and should prohibit most if not all forms of theft. The subsection requires that the obtainment of control be either purposeful (§ 45-2-101(52)), with some design, or knowing (§ 45-2-101(27)), with knowledge of facts and circumstances. Inadvertent or negligent exertion of control is not punishable. Subsection (1)(a) requires proof of a purpose to deprive --the mental state prevalent in most thefts. This mental state is ordinarily implied from the offender's disposition or handling of the property. Subsections (1)(b) and (1)(c) are designed to cover those situations in which the purpose to deprive is more difficult to prove, such as the taking and subsequent abandonment of vehicles. Subsection (1)(b) makes such conduct an offense if the property has been used by the offender in a manner which would deprive the owner of the property of its use, while (1)(c) allows conviction in the alternative situation where the offender has knowledge that his activities will deprive the owner of his property. It should be noted that none of the provisions in subsection (1) require an intent to permanently deprive, as required under former law. Only obtainment of control for a sufficient period of time to indicate that the offender himself had dominion over the property is necessary under this section. Because subsection (1) makes no distinction concerning the way in which the property was obtained, the subsection should cover all conceivable forms of theft including receiving of stolen property. Because only two elements must be proved under this subsection, a knowing exertion of control and a purpose to deprive, the provision represents a considerable simplification from the traditional approach.

Subsections (2) and (3) cover the specific offenses of theft by threat or deceit and the receiving of stolen property. While these crimes are included within subsection (1), the Criminal Law Commission felt the concise approach of subsection (1) might create problems of application, in view of the bulk of offenses embodied in that section.

Subsection (2) prohibits the intentional acquisition of property of another by threat (M.C.A. 1978, § 45-2-101(62)) or deception (M.C.A. 1978, § 45-2-101(11)) when either the purpose to deprive can be shown or when, as in subsection (1), the purpose to deprive can be implied from the offenders' use of the property or knowledge of his conduct. "Deception," as defined in § 45-2-101(11), no longer distinguishes between representations of past, present, and future facts--thus, eliminating a problem which had plagued the prior law on false pretenses and larceny by trick. "Deception," as defined, includes any knowingly false misrepresentation or promise. "Threat," as provided in section 45-2-101, includes virtually any form of extortion.

Subsection (3) deals with the offense of receiving stolen property. This particular subsection has been interpreted by the Illinois courts as requiring in addition to the basic elements of subsection (1) the proof that 1) the property was stolen by someone other than the accused receiver; and, 2) that the defendant knew that the property was stolen at the time he took possession. People v. Berg, 91 Ill. App.2d 166, 234 N.E.2d 400 (1968). Because of these difficult proof requirements it seems advisable to charge under subsection (1)(a) where possible. There only the receipt of possession with a purpose to deprive is required for conviction. People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342 (1965).

Subsection (4) was enacted by the 1979 amendment and specifically includes the fraudulently obtaining of public assistance within the offense of theft.

Subsection (5) imposes penalties depending upon the value of the property. If the value of the property stolen, as defined in § 45-2-101(63), exceeds $150 the offense is punishable as a felony. Lesser thefts are misdemeanor offenses. The determinative value has been raised from $50 in the old Code to reflect the change in prices and philosophy about the seriousness of minor thefts. The wording for this section has been adapted from substantially similar language from the Illinois source.

The value amount separating misdemeanor and felony theft may now, by virtue of the 1977 amendment which added subsection (6), be met by aggregating the amounts involved in thefts arising from a common scheme or the same transaction. Subsection (6) is identical to section 45-2-101(63)(c), part of the definition of "value."

Criminal Law Commission Comment

The first sentence of the section requires that the act must be done "knowingly" or "purposely." As is true in all except absolute liability offenses the act and the mental state must coincide. Therefore, the offense of theft is committed when any one of the acts coincides with any one of the mental states. After extended and exhaustive study and consideration by the commission, matching various combinations of the subsections to cover every type of conduct proscribed by the old law, and extending such matching to conduct covered by statutes in other states, it is believed that this section will cover any conceivable form of theft.

Subsection (1) is the most comprehensive and should include most if not all forms of theft.

Subdivision (1)(a) covers the traditional mental state required in theft.

This mental state is the one which will be present in the great majority of cases. However, special situations may exist where it is difficult to prove a specific purpose to permanently deprive, but the offender's handling or disposition of the property is such that it directly results in a permanent deprivation to the owner, or would have so resulted but for the fortuitous intervention of circumstances of recovery. Subdivision (1)(c) is not intended to convert all "joy-riding" escapades into theft unless the abandonment of the vehicle is under such circumstances that the owner probably would be deprived premanently of the use or benefit of his car.

While the method by which unauthorized control is obtained or exerted is immaterial in subsection (1), and probably, in conjunction with one of the subdivisions (a), (b), or (c), would cover all forms of theft the commission felt that such an approach might be too concise, and might create problems of application, in view of the large body of statutory material and the large number of offenses it is intended to replace. Therefore, subsections (2) and (3) were added, to cover the specific offenses of theft by threat or deceit and receipt of stolen property, although the commission intends that all forms of theft could be charged and proved under subsection (1).

Cross References

Definition of "deprive" M.C.A. 1978, § 45-2-101(13)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Definition of "obtains or exerts control" M.C.A. 1978, § 45-2-101(33)
Definition of "threat" M.C.A. 1978, § 45-2-101(62)
Definition of "deception" M.C.A. 1978, § 45-2-101(11)
Definition of "owner" M.C.A. 1978, § 45-2-101(40)
Definition of "value" M.C.A. 1978, § 45-2-101(63)
Definition of "stolen property" M.C.A. 1978, § 45-2-101(59)

Library References

Larceny Key No. 1
C.J.S. Larceny, §§ 1, 4, 7, 9

Law Review Commentaries

Anderson and Niro. Intellectual property--rights under siege. 23 DePaul L. Rev. 361 (1973)

Comment. Theft and related offenses in the new Pennsylvania Crimes Code: A new concept in property offenses. 78 Dick. L. Rev. 44 (1973)

Hall. Theft, law and society. 54 A.B.A. J. 960 (1968)

Note. Legislative politics and the criminal law. 64 Nw. U. L. Rev. 277 (1969)

Notes of Decisions

Constitutionality

Because in Montana theft of livestock is a particularly serious problem, due

to the large geographical area and the small population, the classification in this section making the theft of livestock a felony without regard to the monetary value, and the theft of other items a felony only if the item has a value of more than $150, does not offend the equal protection clauses of the federal and state constitutions. State v. Feeley, 170 Mont. 227, 233, 552 P.2d 66 (1976). The Illinois courts have held that the section as a whole is not unconstitutionally vague or uncertain and that various terms used within this section such as "unauthorized control" and "owner" are sufficiently definite to be valid. See People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969); People v. Cleveland, 104 Ill. App.2d 415, 244 N.E.2d 212, 214, cert. den. 396 U.S. 986 (1969); People v. Kamsler, 78 Ill. App.2d 349, 223 N.E.2d 237 (1966); People v. Thompson, 75 Ill. App.2d 289, 221 N.E.2d 120 (1966).

In General

In applying the terminology of this section to specific factual circumstances, the Illinois courts have generally held that the statute is broad enough to encompass virtually all forms of theft and all types of fraudulent acquisitions of property interests. See People v. Henderson, 72 Ill. App.2d 89, 218 N.E.2d 795, 797 (1966); People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 344 (1965); People v. Marino, 44 Ill.2d 562, 256 N.E.2d 770, 778 (1970); People v. Bullock, 123 Ill. App.2d 30, 259 N.E.2d 641, 643 (1970). In prosecution for theft, the state need not prove a defendant took possession of another's property and carried it away; evidence which shows that defendant brought about a transfer of title and possession of property of another to one other than the owner through wrongful sale which deprived the owner of his property coupled with proof of the requisite mental state will suffice to sustain a conviction for theft. State v. McCartney, ____ Mont. ____, 585 P.2d 1321 (1978). Location of crime is not an element of the crime of theft as defined in this section, so the state need not present evidence establishing the location of the crime. State v. Feeley, 170 Mont. 227, 231, 552 P.2d 66 (1976). Control over the property of another as defined in 94-2-101(33) [now M.C.A. 1978, § 45-2-101(33)] is an essential element of the offense of theft. State v. Campbell, ____ Mont. ____, 582 P.2d 783 (1978). Mere association with a stolen article is not sufficient to show control over the stolen article and does not establish the control element of theft. Id.

Under this section two elements are necessary to constitute the offense of theft: a proscribed act--knowingly obtaining or exerting unauthorized control over property, and the requisite mental state--the purpose to deprive the owner of the use or benefit of the property. People v. Jordan, 115 Ill. App.2d 307, 252 N.E.2d 701 (1969); People v. Jackson, 66 Ill. App.2d 276, 214 N.E.2d 316 (1966). Identity of the owner is an essential element of the offense of theft. However, because of the term "unauthorized control," it has been held sufficient if the owner of the property named in the indictment can be shown to have had some possessory interest in the property at the time of the offense. People v. Dell, 77 Ill. App.2d 318, 222 N.E.2d 357, 360 (1966), cert. den. 389 U.S. 826 (1967); People v. Moyer, 1 Ill. App.3d 245, 273 N.E.2d 210, 213 (1971). Thus, a payee of an allegedly stolen check was held to have sufficient interest in the check and the proceeds of the check to meet the definition of "owner" of the property under this section. People v. Jones, 123 Ill. App.2d 389, 259 N.E.2d 393 (1970); People v. Demos, 3 Ill. App.3d 284, 278 N.E.2d 89, 90 (1971). See also, People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 346 (1965); People v. Baddeley, 106 Ill. App.2d 154, 245 N.E.2d 593, 595 (1969).

Defenses

In general, restitution, promised or performed, is not a defense to theft; nor is the fact that the owner of the stolen property eventually recovers it. People v. Green, 74 Ill. App.2d 308, 218 N.E.2d 840, 841 (1966), cert. den. 387 U.S. 930, rehearing den., 389 U.S. 890 (1967); People v. Gant, 121 Ill. App.2d 222, 257 N.E.2d 181, 183 (1970).

Indictment and Information

In order to correctly charge a theft, there must be alleged in the indictment both an act and a mental state of the defendant. An indictment which fails to allege either of these two elements is fatally defective. People v. Hayn, 116 Ill. App.2d 241, 253 N.E.2d 575, 577 (1969); People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 346 (1965); State v. Akers, 106 Mont. 43, 74 P.2d 1138 (1938); State v. Grimsley, 96 Mont. 327, 30 P.2d 85 (1934). Ownership of property allegedly stolen is a necessary averment in an indictment for theft. People v. Berndt, 101 Ill. App.2d 29, 242 N.E.2d 273, 274 (1968); People v. Jones, 7 Ill. App.3d 183, 287 N.E.2d 206 (1972); State v. Akers, 106 Mont. 43, 74 P.2d 1138 (1938); State v. Grimsley, 96 Mont. 327, 30 P.2d 85 (1934). The primary purpose for this requirement that the ownership of the property be alleged in the indictment is to protect the accused from a possible subsequent trial for the same offense. People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969); State v. Akers, 106 Mont. 43, 74 P.2d 1138 (1938); State v. Grimsley, 96 Mont. 327, 30 P.2d 85 (1934).

An indictment is not defective if it fails to list the specific place and time of theft. People v. Orndoff, 39 Ill.2d 96, 233 N.E.2d 378, 381 (1969); People v. Patrick, 38 Ill.2d 255, 230 N.E.2d 843, 846 (1967). See also, People v. Stevenson, 107 Ill. App.2d 441, 246 N.E.2d 309, 312 (1969); People v. Slaughter, 67 Ill. App.2d 314, 214 N.E.2d 20 (1966). Minor variances between allegations in a complaint and the facts as finally proved at trial are not fatal to the validity of the indictment. People v. Jordan, 115 Ill. App.2d 307, 252 N.E.2d 701 (1969); People v. Kaye, 112 Ill. App.2d 141, 251 N.E.2d 306 (1969); People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969).

Admissibility and Sufficiency of Evidence

Rejecting defendant's argument that "positive" identification of stolen property cannot be made unless the property carries some unique marking, the Montana Court held that if the owner can testify that the recovered property is similar in appearance to his property, then the property has been sufficiently identified to become evidence upon which a conviction can be based. State v. Jackson, ____ Mont. ____, 589 P.2d 1009 (1979). Where testimony established that stolen property was purchased new a few years before the theft at a cost in excess of $1700 and it was shown that defendant attempted to sell the property for $800, there was sufficient evidence of value in excess of $150 and the prices established by defendant were tacit admissions that the property was valued at $150 or more. Id. There was sufficient evidence to prove that defendant acted "purposely" or "knowingly" where the evidence showed that defendant had described the property as "hot" and had furtively sought out an isolated location before displaying the goods to a prospective purchaser; that defendant was in possession of the stolen goods was a factor to be considered in connection with other circumstances in determining guilt. Id. Evidence

that defendant issued bill of sale to one who thought him to be rightful owner and that defendant forged rightful owner's name to bill of sale held sufficient to show that defendant had knowingly brought about transfer of possession of property of another so as to deprive the owner of the property. State v. McCartney, ____ Mont. ____, 585 P.2d 1321 (1978). Defendant's testimony that he had had bill of sale for stolen horse, coupled with evidence that he did not produce the bill of sale either when the horse was subsequently inspected or when he sold it and evidence that on the day of the inspection he told a witness that he had never seen the horse before but told the inspector that he had owned the horse for some time held sufficient to establish the criminal intent element, i.e. that defendant knew he possessed a horse belonging to someone else and did so with criminal intent to deprive owner of horse. State v. Feeley, 170 Mont. 227, 230, 552 P.2d 66 (1976). Even if defendants shot steer accidentally while hunting deer, they satisfied the prima facie case for theft when they "knowingly" butchered steer belonging to another and carried carcass to their home, thus depriving lawful owner of his property. State v. Openshaw, 172 Mont. 511, 565 P.2d 319 (1977). Evidence that defendant was present on certain occasions at house where stolen property was found and that defendant paid rent for the premises one time while named lessee was being hospitalized held insufficient to establish control over the property and show more than "mere association of defendant with the stolen goods. State v. Campbell, ____ Mont. ____, 585 P.2d 783 (1978). Evidence that defendant delivered bogus bill of sale for stolen horse to auction yard, claimed to be wife of person named in bill as owner, and directed yard to pay proceeds from sale of horse to her daughter, held sufficient to establish that defendant was at least aware of a high probability that the horse was stolen and that defendant had exerted unauthorized control over the horse with the purpose of depriving the true owner of the horse. State v. Farnes, 171 Mont. 368, 558 P.2d 472 (1976). Evidence that defendant was in possession of stolen horse, that defendant sold the horse, that the horse was owned by someone else and that defendant was not acting on behalf of the owner at any time held sufficient to indicate that defendant exerted unauthorized control over property of the owner so as to deprive the owner of the property. State v. Feeley, 170 Mont. 227, 230, 552 P.2d 66 (1976). Proof that property had been stolen is not sufficient to establish theft or possession of stolen property since proof is also required of the mental state of the defendant. State v. Jimison, 168 Mont. 18, 540 P.2d 315 (1975).

Circumstantial evidence surrounding theft and the possession of stolen property is admissible in a prosecution under this section and may give rise to inferences of guilt to support a conviction. People v. Bixler, 49 Ill.2d 328, 275 N.E.2d 392, 396 (1971), cert. den. 405 U.S. 1066 (1972); People v. Canaday, 49 Ill.2d 416, 275 N.E.2d 356, 361 (1971); People v. Moore, 130 Ill. App.2d 266, 264 N.E.2d 582, 584 (1970). See also, People v. Smith, 107 Ill. App.2d 267, 246 N.E.2d 880, 881 (1969); People v. Curtis, 116 Ill. App.2d 298, 254 N.E.2d 87, 89 (1969). As with other elements of the offense of theft, the required mental state may be deduced by the trial court from facts and circumstances surrounding the alleged criminal act. People v. McClinton, 4 Ill. App.3d 253, 280 N.E.2d 795, 798 (1972). See also, People v. Williams, 75 Ill. App.2d 342, 221 N.E.2d 28 (1966). Attention is directed to the following cases which examined whether the use of specific evidence constituted reversible error in trial court theft: People v. Adams, 106 Ill. App.2d 396, 245 N.E.2d 904, 909 (1969); People v. Hyde, 97 Ill. App.2d 43, 239 N.E.2d 466, 470 (1968).

Instructions

Where no evidence was introduced which would lead a jury rationally to believe

that the stolen property was worth less than $150 and where, in fact, the uncontroverted evidence placed its value between $800 and $1600, an instruction on misdemeanor theft was not required. State v. Jackson, ____ Mont. ____, 589 P.2d 1009 (1979). The Illinois appellate court has held that once a trial court gave instructions defining the crime of theft and the essential elements to be proved to sustain the charge, the court had no further responsibility to instruct the jury as to specific definitions of the mental states required in the statute. People v. Wick, 125 Ill. App.2d 297, 260 N.E.2d 487, 488 (1970). It the defendant fails to make objections to instructions given by the trial court, any error in instructions is waived. People v. Wooff, 120 Ill. App.2d 225, 256 N.E.2d 881, 882 (1970).

Theft of Motor Vehicle

While M.C.A. 1978, § 45-6-308 covers the specific offense of theft of motor vehicles, prosecution for such activities are possible under this section. Unauthorized use of a motor vehicle under § 94-6-305 [now § 45-6-308] is a lesser included offense in the crime of theft defined by this section and the district court retains jurisdiction to accept a guilty plea on the lesser offense, although the latter is a misdemeanor. State v. Shults, 169 Mont. 33, 544 P.2d 817 (1976).

For decisions interpreting the application of this section to theft of motor vehicles, attention is directed to the following cases: People v. Bullock, 123 Ill. App.2d 30, 259 N.E.2d 641, 643 (1970); People ex rel. Insolata v. Pate, 46 Ill. 2d 268, 263 N.E.2d 44 (1970); People v. Schumacher, 90 Ill. App.2d 385, 234 N.E.2d 574, 575 (1968); People v. Torello, 109 Ill. App.2d 433, 248 N.E.2d 725, 728 (1969); People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 345 (1965); People v. Davis, 69 Ill. App.2d 120, 216 N.E.2d 490 (1966); People v. Smith, 107 Ill. App.2d 267, 246 N.E.2d 880, 882 (1969); People v. Walker, 54 Ill. App.2d 365, 204 N.E.2d 141, 143 (1965).

Theft of Entrusted Property

This section encompasses the prior offense of embezzlement. It was held, however, that this section does not apply to a landlord's refusal to return a portion of a security deposit. People v. Mattingly, 106 Ill. App.2d 74, 245 N.E.2d 647, 648 (1969). Where a charge of embezzlement under this section was adequately proved and established by evidence received in the trial court, it was held to be immaterial that the total amount proven to have been embezzled fell short of the amount alleged in the indictment. People v. Brown, 68 Ill. App.2d 17, 214 N.E.2d 465, 469 (1966).

Fraud or Deception

Prosecution for theft through fraud or deception is possible under this section as well as under M.C.A. 1978, § 45-6-317. Because the elements of the offense, if prosecuted under this section, are simpler to apply than the elements of the deceptive practices statute, this section seems preferable and has received considerably more use in Illinois, which is the source for both statutes. In applying this statute on Theft it has been held that the acquisition of property through false promise of future payment was indictable--a considerable change from prior law. People v. Kamsler, 78 Ill. App.2d 349, 223 N.E.2d 237 (1966). In applying this section to the acquisition of property by threat, the courts have held that where there has been a threat of force prosecution for robbery would be more appropriate than prosecution for theft by deception. People v. Denman, 69 Ill. App.2d 306, 217

N.E.2d 457, 459 (1966). This section has been applied to defrauding an insurance Company by burning insured property, obtainment of property by false claims that the property was to go for charitable purposes, purchasing property with a forged check, securing a fur coat by using a false driver's license and social security card. See People v. Elmore, 128 Ill. App.2d 312, 261 N.E.2d 736, 737 (1970), affirmed 50 Ill.2d 10, 276 N.E.2d 325 (1971); People v. Nickey Chevrolet Sales, Inc., 41 Ill. App.2d 50, 190 N.E.2d 154, 155 (1963); People v. Cassman, 7 Ill. App.3d 786, 288 N.E.2d 667, 668 (1972); People v. Jones, 4 Ill. App.3d 927, 282 N.E.2d 283, 284 (1972); People v. Neary, 109 Ill. App.2d 302, 248 N.E.2d 695, 696 (1969). However, a conviction based on this section was overturned when the complaining witnesses were shown to be experienced investors who fully understood the nature of the defendant's scheme. People v. Warren, 2 Ill. App.3d 983, 276 N.E.2d 92, 93 (1971). In regard to admissibility of evidence, evidence indicating a subsequent scheme similar to the one with which the defendant is charged is proper. People v. Hill, 98 Ill. App.2d 352, 240 N.E.2d 801, 805 (1968), cert. den. 395 U.S. 984 (1969).

Receiving Stolen Property

Theft can be shown by establishing that defendant was purposely or knowingly in possession of stolen property. State v. Standley, ____ Mont. ____, 586 P.2d 1075, 1077 (1978). The necessary elements of receiving stolen property are 1) that the property was stolen; 2) that the defendant bought it or received it knowing it to have been stolen; and 3) that he did so for his own gain or to prevent the owner from regaining possession of it. People v. Baxa, 50 Ill.2d 111, 277 N.E.2d 876, 878 (1971). Because there is no longer a distinction between theft and receiving stolen property, one cannot be guilty of both offenses. People v. Horton, 126 Ill. App.2d 401, 261 N.E.2d 693, 695 (1970). For further interpretations of this section with regard to receiving stolen property see the following cases: People v. Marino, 95 Ill. App.2d 369, 238 N.E.2d 245, 253 (1968); People v. McCormick, 92 Ill. App.2d 6, 235 N.E.2d 832, 836 (1968); People v. Sanders, 75 Ill. App.2d 422, 220 N.E.2d 487, 490 (1966); People v. Malone, 1 Ill. App.3d 860, 275 N.E.2d 236, 237 (1971); People v. Everett, 117 Ill. App.2d 411, 254 N.E.2d 659, 661 (1969); People v. LaValley, 7 Ill. App.3d 1051, 289 N.E.2d 45, 47 (1972); People v. Hansen, 28 Ill. 2d 322, 192 N.E.2d 359, 369 (1963); People v. Dell, 77 Ill. App.2d 318, 222 N.E.2d 357, 363 (1966), cert. den. 389 U.S. 826 (1967); People v. Gates, 29 Ill.2d 586, 195 N.E.2d 161, 163 (1964).

Value of Property

The value of stolen property is a material element of the offense of theft which must be proved by the state to determine the degree of punishment for the offense. People v. Dell, 52 Ill.2d 393, 288 N.E.2d 459, 461 (1972); People v. Jordan, 115 Ill. App.2d 307, 252 N.E.2d 701, 702 (1969). In the absence of contrary evidence, testimony as to the worth of stolen property is the proper proof of its value. People v. Newton, 117 Ill. App.2d 232, 254 N.E.2d 165, 167 (1969). While judicial notice may be taken of the fact that certain property has value, the court may not conclude that value exceeds $150. People v. Tassone, 41 Ill.2d 7, 241 N.E. 2d 419, 422 (1968), cert. den. 394 U.S. 965 (1969); People v. Kelly, 66 Ill. App.2d 204, 214 N.E.2d 290, 293 (1966). Ordinarily, however, expert testimony should be used in ascertaining the value of stolen goods. People v. Dell, 77 Ill. App.2d 318, 222 N.E.2d 357, 361 (1966) cert. den. 389 U.S. 826 (1967); People v. Webb, 131 Ill. App.2d 206, 268 N.E.2d 161, 164 (1971). See also, People v. Nelson, 117 Ill. App.2d 431, 254 N.E.2d 529, 530 (1969); People v. Briseno, 2 Ill. App.3d 814,

277 N.E.2d 743, 744 (1972); People v. Styles, 75 Ill. App.2d 481, 220 N.E.2d 885, 888 (1966). See State v. Jackson, ____ Mont. ____, 589 P.2d 1009 (1979) where evidence of value in excess of $150 was found to be sufficient [see note, supra, on "Admissibility and Sufficiency of Evidence"].

45-6-302. Theft of lost or mislaid property. (1) A person who obtains control over lost or mislaid property commits the offense of theft when he:

(a) knows or learns the identity of the owner or knows, is aware of, or learns of a reasonable method of identifying the owner;

(b) fails to take reasonable measures to restore the property to the owner; and

(c) has the purpose of depriving the owner permanently of the use or benefit of the property.

(2) A person convicted of theft of lost or mislaid property shall be fined not to exceed $500 or be imprisoned in the county jail for a period not to exceed 6 months.

Historical Note

Enacted: M.C.C. 1973, § 94-6-303, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 16-2

Prior Law: R.C.M. 1947, § 94-2709, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section restates former Montana law concerning theft of lost property in a manner which should eliminate the common law distinctions which made enforcement of the statute difficult. The prosecution must establish each of the three elements set forth in the statute: (1) that the finder had some "clue" to the identity of the owner either through actual or constructive knowledge at the time of finding or afterwards; (2) that the finder failed to use reasonable measures to restore the property to the owner; and, (3) that the finder had the purpose, with a conscious objective, to permanently deprive the owner of the found property. As written, the statute avoids the traditional requirement of an initial trespassory taking which prevented the honest finder who later misappropriated the goods from being prosecuted. The statute also eliminates the former distinction between lost property and mislaid property which held that mislaid property was presumed to have a clue to ownership, while lost property was the subject of no presumptions. The above difficulties are avoided by subsection (1) which provides, in effect, that the clue to

ownership may occur at any time and that the trespassory taking may thus occur whenever the clue is discovered and not acted upon. Subsection (3) retains the traditional mental state of a purpose to permanently deprive. Ordinarily, this mental state may be implied from the offender's use of the property. The wording for the substantive part of this section is identical to the Illinois source, but the penalty provision has been completely changed.

Criminal Law Commission Comment

Subsection (a) provides for the case in which the owner is known or there is a "clue" to his identity. The "clue" provision is designed to eliminate the distinction between lost property and property which has merely been mislaid based on the assertion that in all "mislaid" property cases there is a clue to ownership. Subsection (b) requires only that reasonable measures to restore the property be taken. Subsection (c) specifies the traditional mental state in theft, i.e., to deprive permanently. The three subsections must coincide before the offense is committed.

Cross References

Definition of "obtains control" M.C.A. 1978, § 45-2-101(33)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Definition of "owner" M.C.A. 1978, § 45-2-101(40)
Definition of "knowledge" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

Larceny Key No. 10
C.J.S. Larceny, § 49

45-6-303. Offender's interest in the property. (1) It is no defense to a charge of theft of property that the offender has an interest therein when the owner also has an interest to which the offender is not entitled.

(2) It is no defense that theft was from the offender's spouse, except that misappropriation of household and personal effects or other property normally accessible to both spouses is theft only if it occurs after the parties have ceased living together.

Historical Note

Enacted: M.C.C. 1973, § 94-6-306, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 16-4

Prior Law: None

Annotator's Note

This section setting forth those instances in which the offender's interest in the property taken will be a defense to a theft-related crime has been taken without significant change from the Illinois source. The section is explained fully in the comment below.

Criminal Law Commission Comment

Subsection (1) is substantially the same as Model Penal Code, Tent. Draft No. 2, ¶ 206-11(1), (See comment, p. 100). The provision removes any doubt regarding the commission of theft by a co-owner, such as a partner, joint tenant or tenant in common, or any other type of co-owner who exercises unauthorized control with the purpose to permanently deprive a co-owner of his interest in the property.

Subsection (2) recognizes that unless the husband and wife have separated and are living in separate abodes when the supposed theft occurs the criminal law should not intrude into what usually is a civil fight over property, the true ownership of which is dubious at best. The divorce court should be better informed regarding the relationship between the parties and should determine the proper distribution of the property. If, however, the parties have separated and are living in separate abodes and theft occurs, there seems to be no good reason why such conduct should not be punished in the Criminal Code.

Cross References

Definition of "owner" M.C.A. 1978, § 45-2-101(40)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Theft M.C.A. 1978, § 45-6-301

Library References

Larceny Key No. 26
C.J.S. Larceny, §§ 1, 3

Law Review Commentaries

Comment. Co-ownership generally. Model Penal Code, Tent. Draft No. 2, §206.11, p. 100 (May 3, 1954)

Note. Sale of mortgaged chattels as wilful and malicious injury to property not dischargeable in bankruptcy. 15 DePaul L. Rev. 474 (1966)

45-6-304. Effect of possession of stolen property. Possession of stolen

property shall not constitute proof of the commission of the offense of theft. Such fact shall place a burden on the possessor to remove the effect of such fact as a circumstance to be considered with all other evidence pointing to his guilt.

Historical Note

Enacted: M.C.C. 1973, § 94-6-314, Sec. 1, Ch. 513, Laws of Montana 1973

Source: State v. Gray, 152 Mont. 145, 447 P.2d 475, 478 (1968)

Prior Law: R.C.M. 1947, § 94-2704.1, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section represents a substantial change in the currently codified theory concerning possession of stolen property. The only statute dealing with the subject, former R.C.M. 1947, § 94-2704.1, Possession of Stolen Livestock as Evidence of Larceny, made possession of recently stolen livestock prima facie evidence of larceny. Instructions based on this statute have been approved in both State v. Perkins, 153 Mont. 361, 457 P.2d 465 (1969) and State v. Gloyne, 156 Mont. 94, 476 P.2d 511 (1970).

Montana case law, however, has allowed the extension of the principle to cases not involving livestock. State v. Gray, 152 Mont. 145, 447 P.2d 475 (1968), took the position that possession of stolen jewelry and coins, if not explained, was a circumstance to be considered along with all the other facts and circumstances in determining guilt. In reaching this conclusion the court considered and rejected the defendant's claim that allowing such a consideration deprived him of the right to a presumption of innocence and of his right to remain silent. This rule was subsequently affirmed in State v. Branch, 155 Mont. 22, 465 P.2d 821 (1970) with the court observing that possession of stolen property is "a circumstance to be considered in connection with all of the other circumstances in determining guilt." In both of these cases the court was careful to point out that mere possession without more is not sufficient to sustain a conviction. This view is expressly retained by the new code. What is accomplished by proof of the defendant's possession of stolen property is a shift in the burden of going forward with the evidence from the state to the defendant. This does not mean that the burden of proof has been shifted to the defendant, merely that if he does not wish to have an unfavorable inference drawn from the fact of his possession he must introduce some form of evidence to account for it (see State v. Gloyne, supra).

It should be pointed out that given the much more inclusive language of the new code's theft sections, e.g., "obtains or exerts unauthorized control," this presumption may not be needed as frequently as it was under prior larceny law. However, the section is available for those situations which do require it.

Criminal Law Commission Comment

This section represents a substantial change in the prevailing theory con-

cerning possession of stolen property.

Possession of stolen property is not per se a punishable offense. Possession of stolen property is one of the circumstances which may be considered in establishing that the defendant is guilty of theft.

The provision that the possessor of the stolen property has the burden of removing the evidentiary effect of the possession of the stolen goods may deprive the defendant of the presumption of innocence as well as his right to remain silent. However, in State v. Gray, 152 M 145, 447 P 2d 475, 478 (1968), the court held that these fundamental constitutional rights were not violated by such a provision.

Cross References

Definition of "stolen property" M.C.A. 1978, § 45-2-101(59)
Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Definition of "property" M.C.A. 1978, § 45-2-101(48)

Library References

Larceny Key No. 64
C.J.S. Larceny, §§ 105 et seq.

Notes of Decisions

In General

Possession of stolen property without more evidence is insufficient to sustain a conviction for larceny. Territory v. Doyle, 7 Mont. 245, 14 P. 671 (1887); State v. Sullivan, 9 Mont. 174, 22 P. 1088 (1890); State v. Sparks, 40 Mont. 82, 105 P. 87 (1909); State v. Gray, 152 Mont. 145, 447 P.2d 475 (1968); State v. Branch, 155 Mont. 22, 465 P.2d 821 (1970). However, theft can be shown by establishing that defendant was purposely or knowingly in possession of stolen property. State v. Standley, ____ Mont. ____, 586 P.2d 1075, 1077 (1978).

Instructions

Instructions in what is essentially the language of this section were approved despite lack of specific statutory authorization. See State v. Gray, 152 Mont. 145, 447 P.2d 475 (1968); State v. Branch, 155 Mont. 22, 465 P.2d 821 (1970). Instruction authorized by prior law section which made possession of recently stolen livestock prima facie evidence of larceny approved in State v. Perkins, 153 Mont. 361, 457 P.2d 465 (1969) and State v. Gloyne, 156 Mont. 94, 476 P.2d 511 (1970).

45-6-305. Theft of labor or services or use of property. (1) A person commits the offense of theft when he obtains the temporary use of property, labor, or

services of another which are available only for hire, by means of threat or deception or knowing that such use is without the consent of the person providing the property, labor, or services.

(2) A person convicted of theft of labor or services or use of property shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-304, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 16-3

Prior Law: R.C.M. 1947, § 94-1805, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

While the provisions of the general Theft section (45-6-301) are sufficiently broad to include the theft of labor or services, this section provides a more specific alternative misdemeanor offense which may be charged. The prosecution must establish two elements for conviction: (1) the obtainment (M.C.A. 1978, § 45-2-101 (32)) of use of the property, labor, or services, (2) by means of threat (M.C.A. 1978, § 45-2-101(62)) or deception (M.C.A. 1978, § 45-2-101(11)) or with knowledge (M.C.A. 1978, § 45-2-101(27)) that the use was without consent. "Without consent" in this section has its ordinary grammatical meaning. As with section 45-6-301, a permanent deprivation is not required. The wording for this provision in Theft of Labor or Services is identical to the substantive subsection of the Illinois source.

Criminal Law Commission Comment

This section is a slight variation of the traditional requirement of theft found in section 94-6-302 which requires permanent deprivation. In this section a temporary taking will suffice to complete the offense.

Cross References

Definition of "deception" M.C.A. 1978, § 45-2-101(11)
Definition of "obtain" M.C.A. 1978, § 45-2-101(32)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Theft, M.C.A. 1978, § 45-6-301
Definition of "threat" M.C.A. 1978, § 45-2-101(62)

Notes of Decisions

In General

An Illinois court has held that by enacting this statute, the legislature intended to protect all types of businesses from the unscrupulous practices of prospective customers. People v. Dillon, 93 Ill. App.2d 151, 236 N.E.2d 411, 412 (1968). However, it should be noted that such conduct is also effectively prohibited under M.C.A. 1978, § 45-6-301 which is the general Theft statute.

45-6-306. Obtaining communication services with intent to defraud. In a prosecution under 45-6-305 for theft of telephone, telegraph, or cable television services, the element of deception is established by proof that the defendant obtained such services by any of the following means:

(1) by use of a code, prearranged scheme, or other similar stratagem or device whereby said person, in effect, sends or receives information;

(2) by installing, rearranging, or tampering with any facilities or equipment, whether physically, inductively, acoustically, or electronically;

(3) by any other trick, stratagem, impersonation, false pretense, false representation, false statement, contrivance, device, or means; or

(4) by making, assembling, or possessing any instrument, apparatus, equipment, or device or the plans or instructions for the making or assembling of any instrument, apparatus, equipment, or device which is designed, adapted, or otherwise used to avoid the lawful charge, in whole or in part, for any telecommunications service by concealing the existence, place of origin, or destination of any telecommunications.

Historical Note

Enacted: § 94-6-304.1, Sec. 1, Ch. 156, Laws of Montana 1974

Amended: Sec. 1, Ch. 175, Laws of Montana 1977

Source: New

Prior Law: None

Annotator's Note

This section is an evidentiary statement setting forth the means by which deception can be established under 45-6-305 when the services obtained relate to

telecommunications. The 1977 amendment deleted subdivision (5) which prohibited aiding in the avoidance of lawful telecommunications charges. But, see M.C.A. 1978, § 45-6-307, Aiding the Avoidance of Telecommunications Charges, for the analogous current provision.

Cross References

Definition of "tamper" M.C.A. 1978, § 45-2-101(61)
Definition of "obtain" M.C.A. 1978, § 45-2-101(32)

45-6-307. Aiding the avoidance of telecommunications charges. (1) A person commits the offense of aiding the avoidance of telecommunications charges when he:

(a) publishes the number or code of an existing, canceled, revoked, expired, or nonexistent telephone credit card or the numbering or coding which is employed in the issuance of credit cards with the purpose that it will be used to avoid the payment of lawful telecommunications charges;

(b) publishes, advertises, sells, gives, or otherwise transfers to another plans or instructions for the making or assembling of any apparatus, instrument, equipment, or device described in 45-6-306(4) with the purpose that such will be used or with the knowledge or reason to believe that such will be used to avoid the payment of lawful telecommunications charges; or

(c) manufactures, assembles, possesses, sells, gives, or otherwise transfers any apparatus, instrument, equipment, or device described in 45-6-306(4) with the purpose that it will be used to avoid the payment of lawful telecommunications charges.

(2) A person convicted of the offense of aiding the avoidance of telecommunications charges shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) For the purposes of this section, the term "publish" means to communicate information to any one or more persons, either orally; in person; by telephone, radio, or television; or in a writing of any kind, including but not limited to a letter,

memorandum, circular, handbill, newspaper or magazine article, or book.

Historical Note

Enacted: § 94-6-304.2, Sec. 2, Ch. 175, Laws of Montana 1977

Amended: Sec. 1, Ch. 282, Laws of Montana 1979

Source: R.C.M. 1947, § 94-6-304.1(5)

Prior Law: None

Annotator's Note

This section enacts as a separate statute former subsection (5) of § 94-6-304.1 relating to the avoidance of telecommunications charges. The 1979 amendment added subsection (1)(c) which prohibits the manufacture, assembly, possession, sale, gift or other transfer of any apparatus, instrument, equipment, or device designed or intended to avoid lawful telecommunications charges. A conviction under this subsection requires proof of a "purpose" to avoid telecommunications charges as does conviction under subsection (1)(a). Conviction under (1)(b) can also be obtained by showing "knowledge" or "reason to believe" that the device will be used to avoid payment of lawful charges.

45-6-308. Unauthorized use of motor vehicles. (1) A person commits the offense of unauthorized use of motor vehicles if he knowingly operates the automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle of another without his consent.

(2) A person convicted of unauthorized use of motor vehicles shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. It is an affirmative defense that the offender reasonably believed that the owner would have consented to the operation had he known of it.

Historical Note

Enacted: M.C.C. 1973, § 94-6-305, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 223.9

Prior Law: R.C.M. 1947, § 94-3305, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The conduct prohibited in this section is effectively covered by the Theft section 45-6-301. This provision, however, provides an alternative and more advantageous theory for prosecuting such conduct as joyriding and unauthorized use of a vehicle by a bailee. First, the elements which must be proved for conviction place a lesser burden on the state than the theft section requires. The elements are (1) knowing operation of the vehicle, (2) without the consent of the owner. Secondly, this section permits the prosecutor to charge a misdemeanor for the prohibited conduct, rather than a felony as would be required in most cases under the Theft section. The third advantage to using this section is the affirmative defense of constructive consent, which is especially useful in situations where the vehicle has been used as a necessity in emergency situations. "Knowing" is defined in § 45-2-101(27); "without consent" has its ordinary meaning. While this section defines most commonly misappropriated motor vehicles, the word "vehicle," as defined in §45-2-101(64), provides a broad catch-all in the phrase "any other motor propelled vehicle." The wording for this section has been adapted with substantial changes from the Model Penal Code source.

Criminal Law Commission Comment

Common-law larceny did not cover the use of an auto for purposes of a joyride, or where the bailee of a vehicle or animal used the bailed chattel for his own purposes, because larcenous intent was usually found to be absent. This section is intended to deal with that problem.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "vehicle" M.C.A. 1978, § 45-2-101(64)
Motor Vehicle Code M.C.A. 1978, Title 61

Library References

Automobiles Key No. 6
C.J.S. Motor Vehicles, § 688

Law Review Commentaries

Comment. Unauthorized taking of vehicle. Model Penal Code, Tent. Draft No.2, § 206.6(2), p. 89 (May 3, 1954)

Notes of Decisions

Lesser Included Offense

Where an automobile is taken the offense described in this section is a lesser included offense in the crime of theft, § 94-6-302 [now M.C.A. 1978, § 45-6-301], and

the district court retains jurisdiction to accept a guilty plea on this offense although it is a misdemeanor. State v. Schults, 169 Mont. 33, 544 P.2d 817 (1976).

45-6-309 through 45-6-314 reserved.

45-6-315. Defrauding creditors. (1) A person commits the offense of defrauding secured creditors if he destroys, conceals, encumbers, transfers, removes from the state, or otherwise deals with property subject to a security interest with the purpose to hinder enforcement of that interest.

(2) "Security interest" means an interest in personal property or fixtures as defined in the Uniform Commercial Code (30-1-201(37)).

(3) A person convicted of the offense of defrauding secured creditors shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(4) A person who destroys, conceals, encumbers, transfers, removes from the state, or otherwise deals with property subject to a security interest with the purpose of depriving the owner of the property or of the proceeds and value therefrom may be prosecuted under 45-6-301.

Historical Note

Enacted: M.C.C. 1973, § 94-6-313, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 2, Ch. 367, Laws of Montana 1975

Source: M.P.C. 1962, § 224.10

Prior Law: R.C.M. 1947, §§ 94-1811 and 94-1812, repealed, Sec. 32, Ch. 513, Laws of Montana 1973. See also R.C.M. 1947, § 52-318

Annotator's Note

This section retains criminal penalties for mortgagors and conditional vendees who hinder the enforcement of a security interest by destruction, concealment or removal from the state of property subject to the security interest. Both § 94-

1811, dealing with the removal or concealment of mortgaged property, and § 94-1812, dealing with the removal or condealment of property encumbered by lease or conditional sales contract, are replaced by this section.

While the basic scope of prior law has been retained, certain changes should be noted. The prior law requirement that the acts be done with the "intent to defraud" (§94-1811) or the "intent to deprive" (§ 94-1812 has been replaced with the more inclusive "purpose to hinder enforcement" of the security interest. The detailed description contained in each of the prior law sections of the interests protected has been replaced by reference to U.C.C. 1-201 (37) for an inclusive definition of "security interest" which indicates that fundamentally a security interest is "an interest in personal property or fixtures which secures payment or the performance of an obligation." It is no longer a criminal offense, as it was under § 94-1811, to remove encumbered property from the county but the prohibition on removing encumbered property from the state has been retained. The 1975 amendment added subsection (4) providing that an offender who deals with property subject to a security interest with the purpose of depriving the owner thereof may be prosecuted under the general theft statute, M.C.A. 1978, § 45-6-301.

The penalty imposed by subsection (3) seems to make an offense under this section a misdemeanor regardless of the value of the property or security interest involved and where the purpose established by the evidence is a "purpose to hinder enforcement" of the security interest, that is certainly the effect of the section. Subsection (4), however, which was added by the 1975 amendment, allows possible felony conviction for the offense of defrauding creditors in that it permits the offense to be charged under the theft statute, § 45-6-301, where the offender deals with property subject to a security interest "with the purpose of depriving the owner of the property or of the proceeds and value therefrom." Should the value of the property or security interest involved exceed $150, and the purpose to deprive rather than merely to hinder enforcement be shown, the offense would be charged as a felony under a combination of section 45-6-301 and this section.

Criminal Law Commission Comment

The states commonly provide criminal penalties for debtors or conditional vendees who dispose of property subject to a security interest to the prejudice of the secured creditor. This is necessary because laws dealing with theft are framed in terms of larceny or embezzlement of goods "of another." Although there is a need for penal legislation in this area, it is possible to go too far in providing penalties for acts such as removing encumbered property from the county or selling the property without the consent of the secured creditor. Such behavior may be evidence of fraud, but it is also quite consistent with innocence, as where the owner-debtor drives his mortgaged car to an out-of-state resort for a weekend without notifying the finance company, or where he trades the car in on a new car without finance company consent, but makes adequate arrangements to discharge the old debt.

The offense is classified as a misdemeanor regardless of the amount involved. This differs from the section on theft, section 94-6-302 [now M.C.A. 1978, § 45-6-301] under which stealing amounts over one hundred fifty dollars ($150) is felonious. The difference seems justified because offenders against this section are less obviously dangerous than outright thieves who take property to which they have no claim. Moreover, sellers can better guard against this kind of criminal behavior in extending credit.

It is no longer a criminal offense to remove mortgaged property from the county as under former Montana law but the section retains the prohibition against removing secured property from the state.

Cross References

Definition of "property" M.C.A. 1978, § 45-2-101(48)
Definition of "purpose" M.C.A. 1978, § 45-2-101(52)
Definition of "security interest" M.C.A. 1978, § 30-1-201(37)

Library References

Chattel Mortgages Key No. 230
C.J.S. Chattel Mortgages, §§ 280, 281

Law Review Commentaries

Comment. Defrauding secured creditors. Model Penal Code, Tent. Draft No. 11, § 223.7, p. 98 (April 27, 1960)

45-6-316. Issuing a bad check. (1) A person commits the offense of issuing a bad check when with the purpose of obtaining control over property or to secure property, labor, or services of another, he issues or delivers a check or other order upon a real or fictitious depository for the payment of money knowing that it will not be paid by the depository.

(2) If the offender has an account with the depository, failure to make good the check or other order within 5 days after written notice of nonpayment has been received by the issuer is prima facie evidence that he knew that it would not be paid by the depository.

(3) A person convicted of issuing a bad check shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. If the offender has engaged in issuing bad checks which are part of a common scheme or if the value of any property, labor, or services obtained or attempted to be obtained exceeds $150, he shall be imprisoned in the state prison for any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-309, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 17-1(d)

Prior Law: R.C.M. 1947, § 94-2-702 and § 94-2007, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section replaces R.C.M. 1947, § 94-2007, Making, Passing or Uttering Fictitious Bills, etc. and R.C.M. 1947, § 94-2702, Uttering Fraudulent Checks or Drafts. The principal change is the consolidation of the fictitious depository section (94-2007) and the no funds/insufficient funds section (94-2702). In the consolidation the 5-day notice provision (subsection (2) of the new code) of R.C.M. 1947, § 94-2702 has been carried over. This provision, which is applicable only to those cases in which the accused has an account with the depository on which the check or other order is drawn, does not require that the offender be given five days notice of dishonor but does provide that failure to make the check good within five days after receiving notice of dishonor is prima facie evidence of knowledge that it would not be paid. Of course, in cases in which the defendant did not have an account or the depository is non-existent the inference that he did not expect the check or order to be paid is so overwhelming that no presumption would seem necessary. An exception under prior law would also appear to be continued, although not explicitly, in that there would seem to be no offense if the individual accepting the check knows that it is not valid or will not be paid, in which case the defense of consent could be interposed (see M.C.A. 1978, § 45-2-211). Similarly, this section does not change Montana law which held a post-dated check did not fall within the bad check provisions of prior law in that it was in the nature of a promissory note and not an order. (See State v. Patterson, 75 Mont. 315, 243 P. 355 (1926)).

It should also be noted that it will be possible in most cases to apply either the provisions of this section or of the general section on Theft, M.C.A. 1978, § 45-6-301, to bad check activities. The decision as to which section should be applied is essentially one of prosecutorial discretion and should hinge on both the circumstances surrounding the offense and the character of the accused.

In the event the check is passed as part of a common scheme or the property obtained exceeds $150 in value, subsection (3) provides for an increased penalty; in all other cases the punishment has been reduced to a misdemeanor. The term "common scheme" is defined by § 45-2-101(7) and would allow the imposition of increased penalties whenever it can be established that a series of bad checks was cashed within a limited time frame.

Criminal Law Commission Comment

Bad check laws, in addition to eliminating the doubt as to liability on false promises, accomplish two other things which seem worth preserving: (a) they eliminate the requirement of proof of obtaining property by means of false pretense; and (b) they create a presumption of knowledge that the check would not be paid under certain circumstances. The presumption of knowledge is probably the most important practical reason for maintaining special bad check provisions. In the fictitious account case it is possible but highly improbable that the transac-

tion was innocent; the drawer may absent-mindedly have put the name of the wrong bank on a blank check, or he may have intended to open an account before the check was presented. In the case of checks on real but inadequate accounts, the chance of innocent miscalculation by the drawer is much greater but is negatived by a refusal to make the check good.

Cross References

Definition of "common scheme" M.C.A. 1978, § 45-2-101(7)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Definition of "value" M.C.A. 1978, § 45-2-101(63)

Library References

Forgery Key No. 16
C.J.S. Forgery, § 37

Law Review Commentaries

Annot. Application of "bad check" statute with respect to postdated checks. 52 A.L.R.3d 464 (1973)

Note. Insufficient funds in the criminal area: Elements, issues and proposals. 38 Mo. L. Rev. 432 (1973)

Note. Proof of intent to defraud with respect to the issuing of worthless checks. 28 Temp. L. Q. 470 (1955)

Notes of Decisions

In General

Caution should be used in considering the elements of this offense as set out in the Illinois decisions. While the Montana provisions are drawn directly from Illinois, the Illinois bad check provisions are a part of a general statute dealing with deceptive practices (Title 38, § 17-1) which is prefaced with the general requirement that each of the acts proscribed in the subsections be done with the intent to defraud. Montana has adopted for its bad check provision only subsection (d) of Ill. C.C. 1961, Title 38, § 17-1 and did not include the preliminary requirement that the acts be done with the intent or purpose to defraud. Accordingly, in Montana there is no need to either allege or prove that the check was drawn with intent to defraud. It is only necessary to allege and prove that the check or order was drawn with the purpose of obtaining property or services and that the accused knew that it would not be paid. See, People v. Lanners, 122 Ill. App.2d 290, 258 N.E.2d 390 (1970); First Nat. Bank of Decatur v. Insurance Co. of North America, 424 F.2d 312 (7th Cir.), cert. den. 398 U.S. 939 (1970); People v. Tenen, 132 Ill. App.2d 786, 270 N.E.2d 179 (1971).

45-6-317. Deceptive practices. (1) A person commits the offense of deceptive practices when he purposely or knowingly:

(a) causes another, by deception or threat, to execute a document disposing of property or a document by which a pecuniary obligation is incurred;

(b) makes or directs another to make a false or deceptive statement addressed to the public or any person for the purpose of promoting or procuring the sale of property or services;

(c) makes or directs another to make a false or deceptive statement to any person respecting his financial condition for the purpose of procuring a loan or credit or accepts a false or deceptive statement from any person who is attempting to procure a loan or credit regarding that person's financial condition; or

(d) obtains or attempts to obtain property, labor, or services by any of the following means:

(i) using a credit card which was issued to another without the other's consent;

(ii) using a credit card that has been revoked or canceled;

(iii) using a credit card that has been falsely made, counterfeited, or altered in any material respect;

(iv) using the pretended number or description of a fictitious credit card;

(v) using a credit card which has expired provided the credit card clearly indicates the expiration date.

(2) A person convicted of the offense of deceptive practices shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both. If the deceptive practices are part of a common scheme or the value of any property, labor, or services obtained or attempted to be obtained exceeds $150, the offender shall be imprisoned in the state prison for a term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-307, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 23, Ch. 359, Laws of Montana 1977

Source: Ill. C.C. 1961, Title 38, § 17-1

Prior Law: Chapters 18 and 21 of Title 94, R.C.M. 1947, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The purpose of this section is the punishment of a wide variety of deceptive conduct in which either the act or the mental state does not fall within § 45-6-301. As such this section should be considered supplementary to § 45-6-301. Perhaps the most significant difference between this section and § 45-6-301 is that § 45-6-301 requires, in addition to the purposeful or knowing act, that there be a purpose to deprive the owner of the property.

Subsection (1)(a) requires that the state show only that the defendant by "deception or threat" caused the execution of a document disposing of property or incurring an obligation. The defendant's purpose in causing the execution is irrelevent, i.e., he need not have a purpose to deprive. It should be noted that this subsection is applicable to salesmen who go beyond a mere "puffing" of their wares.

Subsection (1)(b) is essentially a ban on false or misleading advertising, replacing R.C.M. 1947, §§ 94-1818, 94-1819 and 94-1821. The gist of the offense is a statement made purposely or knowingly for "the purpose of promoting or procuring" a sale. This section is directed to the public statement. It should be noted that there need be no proof of "purpose to deprive" or an actual sale to support a conviction under this subsection.

Subsection (1)(c) replaces prior law, R.C.M. 1947, § 94-1803, and continues the prohibition of false statements to obtain a loan or credit. It should be noted under this subsection that there is no requirement of "purpose to deprive" and it is not necessary that the individual charged with making the false statement actually obtain credit or a loan.

Subsection (1)(d) makes the wrongful use of a credit card which belongs to another or which is forged or expired specifically punishable. While in most instances the conduct which this subsection covers will also be punishable as theft, this section will offer an answer to those situations in which it is not possible to show a purpose to deprive, as for example, when a credit card is used by an individual who claims he planned to repay the holder prior to the billing date on the credit account. It also offers an alternative to the invocation of the higher penalties of the theft section for those situations which do not merit felony treatment.

The 1977 amendment deleted "or knowingly accepts" after "make" in subsection (1)(c); added "or accepts a false or deceptive statement from any person who is

attempting to procure a loan or credit regarding that person's financial condition" to subsection (1)(c); and made minor stylistic changes.

Criminal Law Commission Comment

This section supplements section 94-6-302(2)(b) [M.C.A. 1978, § 45-6-301(2)(b)]. Most outright swindles with no pretext of legitimacy will fall within section 94-6-302(2) [M.C.A. 1978, § 45-6-301(2)] and be prosecuted thereunder because of the greater penalty. Section 94-6-307 [M.C.A. 1978, § 45-6-317] is designed to cover a greater variety of deceptive practices than were formerly proscribed by Montana law (See Title 94, chapter 18, which contains such offenses as: obtaining property or services by false pretenses; confidence games; sale without consent of holder; deception in the sale of land; etc.; and chapter 21, fraudulent conveyances.) See also R.C.M. 1947, section 94-1803 (False statement respecting financial condition) and section 94-35-256 (Workmen--false representation to procure punishable.)

The four (4) subsections of this section are intended to cover deceptive practices which might not fall under the prohibition of section 94-6-302 [45-6-301], Theft.

Cross References

Definition of "deception" M.C.A. 1978, § 45-2-101(11)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "threat" M.C.A. 1978, § 45-2-101(62)

Library References

False Pretenses Key Nos. 7 et seq.
Larceny Key No. 14(4)
C.J.S. False Pretenses, §§ 8, et seq.
C.J.S. Larceny, §§ 7, 23, 36

Notes of Decisions

In General

Under this statute the state must prove: (1) that the defendant acted "purposely" or "knowingly" in (2) making or directing another to make a false or deceptive statement (3) addressed to the public or any person (4) for the purpose of promoting or procuring a sale of property or services; the state need not prove that the statements relate to past events or existing facts or that the injured party relied on the statements in parting with money or property. State v. Duncan, ____ Mont. ____, 593 P.2d 1026, 1030 (1979). As with the general section on Theft, § 45-6-301, which overlaps with the provisions of this section, it has been held that absolute liability is not provided for the conduct described herein. To impose liability, an intent to defraud is necessary. People v. Billingsley, 64 Ill.

App.2d 292, 213 N.E.2d 765 (1966). This section has been generally applied to fraudulent acquisitions of property by use of credit cards, while section 45-6-301 has been used for more traditional forms of theft. See People v. Enright, 1 Ill. App.3d 654, 275 N.E.2d 294 (1971); People v. Adornetto, 3 Ill. App.3d 647 (1972).

Sufficiency of Evidence

Evidence of representations made by defendant that he had secured large contracts for the purchase of his products when in fact he had not and evidence of promises made by defendant (1) to set up a trust account to guarantee repayment of security deposits, (2) that a limited number of contracts would be issued in the area and (3) that the contracting parties were guaranteed a set quota of products, coupled with evidence that defendant never set up the trust account, that more than the specified number of contracts were issued and that defendant frequently delivered less than the guaranteed quota held to lead inescapably to the conclusion that defendant deliberately made false statements to induce others to enter into contracts with him. State v. Duncan, ____ Mont. ____, 593 P.2d 1026 (1979).

Welfare Fraud

Despite the fact that § 71-226 [now M.C.A. 1978, § 53-2-107] of the Welfare Code makes welfare fraud a misdemeanor, the state may prosecute welfare fraud under this provision making the offense a felony. State v. Moore, ____ Mont. ____, 570 P.2d 580 (1977).

45-6-318. Deceptive business practices. (1) A person commits the offense of deceptive business practices if in the course of engaging in a business, occupation, or profession he purposely or knowingly:

(a) uses or possesses for use a false weight or measure or any other device for falsely determining or recording any quality or quantity;

(b) sells, offers, exposes for sale, or delivers less than the represented quantity of any commodity or service;

(c) takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnished the weight or measure;

(d) sells, offers, or exposes for sale adulterated commodities;

(e) sells, offers, or exposes for sale mislabeled commodities; or

(f) makes a deceptive statement regarding the quantity or price of goods in any advertisement addressed to the public.

(2) "Adulterated" means varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulation or, if none, as set by established commercial usage.

(3) "Mislabeled" means:

(a) varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regulation or, if none, as set by established commercial usage; or

(b) represented as being another person's produce though otherwise labeled accurately as to quality and quantity.

(4) A person convicted of the offense of deceptive business practices shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-308, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Proposed Michigan Criminal Code 1967, § 4105

Prior Law: R.C.M. 1947, §§ 94-1814 through 94-1821, 94-1901 through 94-1904, 94-3502, 94-3503, 95-3505, 94-35-145 through 94-35-147, 94-35-217, 94-35-227, 94-35-270 through 94-35-271.4, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This provision derives from the Proposed Michigan Criminal Code of 1967 which was never adopted by the Michigan legislature. There is, therefore, no Michigan case law interpreting the section. The purpose of this section is the punishment of a wide variety of deceptive conduct which might not be within the purview of the general section on theft. This section replaces a number of sections of the prior law dealing with the contents of goods, labeling, and the use of false weights and measures. This section provides a single, simple definition for false weights and measures, short weight sales and purchases, adulteration, mislabeling of commodities, and false advertising.

It should also be noted that under this section there need be no showing of a "purpose to deprive" state of mind. All that need be shown is the knowing or purposeful doing of one of the prohibited acts. Subsections (3) and (4) provide definitions of "adulterated" and "mislabeled" for use when applicable with the

subparagraphs of subsection (1).

Criminal Law Commission Comment

This section replaces a large number of statutes in the old code which provided for the content of goods, marks which they are to bear and the use of false weights and measures. The purpose of this section is to provide a single, simple definition for false weights and measures, short weight sales and purchases, adulteration, mislabeling of commodities, and false advertising.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

Druggist Key No. 12
C.J.S. Druggist, §§ 5, 12, 14, 36A
False Pretenses Key Nos. 3 et seq.
C.J.S. False Pretenses, §§ 8 et seq.
Food Key Nos. 5, 6, 11 et seq.
C.J.S. Food, §§ 18, 21, 22, 24, 26-28
Trade Regulation Key No. 339
C.J.S. Trade-Marks, Trade-Names and Unfair Competition, §§ 66 et. seq., 219 et seq.
Weights and Measures Key Nos. 5, 10
C.J.S. Weights and Measures, §§ 4, 9

45-6-319. Chain distributor schemes. (1) As used in this section, the following definitions apply:

(a) "Person" means a natural person, corporation, partnership, trust, or other entity; and in the case of an entity it shall include any other entity which has a majority interest in such entity or effectively controls such other entity as well as the individual officers, directors, and other persons in act of control of the activities of each entity.

(b) "Chain distributor scheme" means a sales device whereby a person, under a condition that he make an investment, is granted a license or right to recruit for consideration one or more additional persons who are also granted such license

or right upon condition of making an investment and may further perpetuate the chain of persons who are granted such license or right upon such condition.

(2) It is unlawful for any person to promote, sell, or encourage participation in any chain distributor scheme.

(3) Any person violating the provisions of this section shall, upon conviction, be imprisoned in the state prison for a period not to exceed 1 year or fined not to exceed $1,000, or both.

(4) Any person convicted of a second offense under this section shall be imprisoned in the state prison for a period not to exceed 5 years or fined not to exceed $5,000, or both.

Historical Note

Enacted: § 94-6-308.1, Sec. 1-3, Ch. 465, Laws of Montana 1973

Amended: Sec. 24, Ch. 359, Laws of Montana 1977

Source: §§ 94-1832 to 94-1834, R.C.M. 1947

Prior Law: R.C.M. 1947, §§ 94-1832 to 94-1834

Annotator's Note

This section was derived from a separate 1973 act not originally part of the criminal code. It imposes sanctions upon the promotion or encouragement of a chain distributorship scheme by any person. As "person" is defined by subsection (1)(a) it includes any entity directly involved and any entity which controls the entity directly involved, even though the controlling entity has no direct involvement. The sanctions of the act extend also to the individuals who control the activities of the entities which are not natural persons.

The 1977 amendment eliminated the possibility that the first violation of this section would be a felony by deleting a provision in subsection (3) that a person violating this section will be deemed guilty of a felony. However, a second offense under this section is an automatic felony offense.

45-6-320 through 45-6-324 reserved.

45-6-325. Forgery. (1) A person commits the offense of forgery when with purpose to defraud he knowingly:

(a) without authority makes or alters any document or other object apparently capable of being used to defraud another in such manner that it purports to have been made by another or at another time or with different provisions or of different composition;

(b) issues or delivers such document or other object knowing it to have been thus made or altered;

(c) possesses with the purpose of issuing or delivering any such document or other object knowing it to have been thus made or altered; or

(d) possesses with knowledge of its character any plate, die, or other device, apparatus, equipment, or article specifically designed for use in counterfeiting or otherwise forging written instruments.

(2) A purpose to defraud means the purpose of causing another to assume, create, transfer, alter, or terminate any right, obligation, or power with reference to any person or property.

(3) A document or other object capable of being used to defraud another includes but is not limited to one by which any right, obligation, or power with reference to any person or property may be created, transferred, altered, or terminated.

(4) A person convicted of the offense of forgery shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. If the forgery is part of a common scheme or if the value of the property, labor, or services obtained or attempted to be obtained exceeds $150, the offender shall be imprisoned in the state prison for any term not to exceed 20 years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-310, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 17-3

Prior Law: R.C.M. 1947, §§ 94-2001, 94-2002, 94-2005, 94-2006 and 94-35-226 through 94-35-236, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section replaces a number of prior provisions proscribing various forms of forgery, including § 94-2001, Forgery of Wills; § 94-2002, Making False Entries in Records or Returns; § 94-2003, Forgery of Public or Corporate Seal; § 94-2005, Forging Telegraphic Messages; § 94-2006, Possessing or Receiving Forged or Counterfeit Bills or Notes With Intent to Defraud; and various sections dealing with trademarks, §§ 94-35-226 through 94-35-236. To avoid one of the sources of trouble under prior forgery laws "a purpose to defraud" is broadly defined in subsection (2) and subsection (3) gives a broad definition of "document or other subject capable of being used to defraud" which is illustrative but not limited to any object which affects any right.

Transactions covered by this section are also largely covered by the section on Theft, § 45-6-301. However, subsections (1)(c) and (1)(d) extend the prohibition to possession of such documents and devices with the purpose of issuance or use. The offense has been reduced to a misdemeanor although an increased penalty has been retained for those cases involving either a common scheme or property having value in excess of $150 (see M.C.A. 1978, § 45-2-101(63)).

Criminal Law Commission Comment

There is doubt that a specific forgery law is necessary because the provisions dealing with false pretense and fraud should be adequate to cover forgery. Forgery is retained as a distinct offense partly because the concept is so embedded in popular understanding that it would be unlikely that any legislature would completely abandon it, and partially in recognition of the special effectiveness of forgery as a means of undermining public confidence in important symbols of commerce, perpetrating large-scale frauds.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purpose" M.C.A. 1978, § 45-2-101(52)
Definition of "value" M.C.A. 1978, § 45-2-101(63)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Definition of "common scheme" M.C.A. 1978, § 45-2-101(7)

Library References

Forgery Key No. 1
C.J.S. Forgery, § 1

Notes of Decisions

In General

The essential elements of forgery are false writing or an alteration of an instrument which, as written is apparently capable of defrauding coupled with an intent to defraud. People v. Dauphin, 53 Ill. App.2d 433, 203 N.E.2d 166 (1965). A common instance of forgery is the use by an offender of a fictitious person as a purported maker of a bank draft. People v. Lanners, 122 Ill. App.2d 290, 258 N.E.2d 390 (1970). However, this section is broad enough to incorporate all forms of forgery within its coverage. People v. Merchant, 5 Ill. App.3d 636, 283 N.E.2d 724 (1972). Despite the fact that technically an instrument is void or not payable, it may still be the subject of a forgery prosecution if the necessary elements of culpability are present. See, for example, People v. Marks, 63 Ill. App.2d 384, 211 N.E.2d 548, cert. den. 385 U.S. 876 (1965); People v. Dauphin, 53 Ill. App.2d 433, 203 N.E.2d 166 (1965); People ex rel. Miller v. Pate, 42 Ill.2d 283, 246 N.E.2d 225 (1969).

Indictment and Information

For discussions of various indictments and informations based on this section attention is directed to the following decisions: People v. Marks, 63 Ill. App.2d 384, 211 N.E.2d 548, cert. den. 385 U.S. 876 (1965); People v. Broverman, 4 Ill. App.3d 929, 282 N.E.2d 279 (1972); People v. Moyer, 1 Ill. App.3d 245, 273 N.E.2d 210 (1971); People v. Dzielski, 130 Ill. App.2d 581, 264 N.E.2d 426 (1970); People v. Merchant, 5 Ill. App.3d 636, 283 N.E.2d 724 (1972); People v. White, 130 Ill. App.2d 775, 267 N.E.2d 129 (1971), appeal after remand. 3 Ill. App.3d 792, 279 N.E.2d 87 (1972); People v. Meeks, 55 Ill. App.2d 437, 205 N.E.2d 62 (1965).

Description of Instrument

In a forgery indictment, the instrument may be described in two ways, either by its purport description or by its tenor description. If both descriptions are used, however, they must be compatible. People v. Addison, 75 Ill. App.2d 358, 220 N.E.2d 511 (1966).

Evidence

Evidence concerning subsequent forgeries may be properly admitted in a prosecution under this section for the purpose of establishing identity, intent, knowledge, or a common scheme or plan. People v. Clark, 104 Ill. App.2d 12, 244 N.E.2d 842 (1969). In forgery prosecutions, proof must often be by circumstantial evidence. People v. Dauphin, 53 Ill. App.2d 433, 203 N.E.2d 166 (1965). Where proof of a forged instrument is established, an intent to defraud is presumed. People v. Dauphin, supra; People v. Bailey, 15 Ill.2d 18, 153 N.E.2d 548 (1958).

Sentence and Punishment

Forgery and theft are separate offenses. When a conviction for both crimes arises out of the same transaction, however, only the greater of the two sentences should be imposed--the lesser to run concurrently. People v. Rose, 7 Ill. App.3d 374, 287 N.E.2d 195 (1972). The purpose of the forgery may be examined to determine the seriousness of the offense. People v. Palmer, 2 Ill. App.3d 934, 274 N.E.2d 658 (1971).

45-6-326. Obscuring the identity of a machine. (1) A person commits the offense of obscuring the identity of a machine if he:

(a) removes, defaces, covers, alters, destroys, or otherwise obscures the manufacturer's serial number or any other distinguishing identification number or mark upon any machine, vehicle, electrical device, or firearm with the purpose to conceal, misrepresent, or transfer any such machine, vehicle, electrical device, or firearm; or

(b) possesses with the purpose to conceal, misrepresent, or transfer any machine, vehicle, device, or firearm knowing that the serial number or other identification number or mark has been removed or otherwise obscured.

(2) A person convicted of obscuring the identity of a machine shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) The fact of possession or transfer of any such machine, vehicle, electrical device, or firearm creates a presumption that the person knew the serial number or other identification number or mark had been removed or otherwise obscured.

Historical Note

Enacted:	M.C.C. 1973, § 94-6-311, Sec. 1, Ch. 513, Laws of Montana 1973
Amended:	Sec. 1, Ch. 167, Laws of Montana 1977
Source:	Substantially the same as New York Penal Law 1965, § 170.65
Prior Law:	See R.C.M. 1947, § 94-35-262, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section as originally enacted was aimed at the professional automobile thief and those who deal in stolen machinery and equipment. The 1977 amendment included the person who deals in stolen firearms. It should be noted that the conduct specifically condemned by this section is characteristic of organized criminal activity and accordingly, when possible, prosecution should be brought under the general section on theft with its higher penalties.

Possession of a vehicle, machine, electrical device or firearm with an obscured or altered identification mark with the purpose to conceal, misrepresent or transfer is a violation of this provision. The 1977 amendment established a presumption of knowledge whenever possession is established. The state still has the burden of proving possession and a purpose to conceal, misrepresent or transfer.

This section also represents an expansion of prior law which had offered protection to farm machinery only (see R.C.M. 1947, § 94-35-262). The offense is punishable as a misdemeanor as it was under prior law.

Criminal Law Commission Comment

This section is directed at a specialized class of criminals who deal in machinery and motor vehicles. The citizen is given the opportunity to avoid criminal liability by reporting the fact of the obscured identity to the proper agency.

Vehicles and certain kinds of machinery are particularly vulnerable to organized rings who steal, attempt to render unidentifiable and resell them. Under the old law only farm machinery was protected from such alteration. (See R.C.M. 1947, section 94-35-262.)

Possession of a vehicle or machine with obscured identity is also a violation, but there must be a purpose to misrepresent and knowledge that the identification number or mark has been obscured or altered. The burden of proving purpose and knowledge rests with the state.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "vehicle" M.C.A. 1978, § 45-2-101(64)

Library References

Automobiles Key No. 340
C.J.S. Motor Vehicles, §§ 596, 688

45-6-327. Illegal branding or altering or obscuring a brand. (1) A person commits the offense of illegal branding or altering or obscuring a brand if he marks or brands any commonly domesticated hoofed animal or removes, covers, alters, or defaces any existing mark or brand on any commonly domesticated hoofed animal with the purpose to obtain or exert unauthorized control over said animal or with the purpose to conceal, misrepresent, transfer, or prevent identification of said

animal.

(2) A person convicted of the offense of illegal branding or altering or obscuring a brand shall be imprisoned in the state prison for any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-312, Sec. 1, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, §§ 94-3504, 94-3514

Prior Law: R.C.M. 1947, §§ 94-3504 and 94-3514, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section is essentially a recodification of the prior law contained in R.C.M. 1947, § 94-3504 and 94-3514. While situations which would give rise to this offense will also fall within the general provisions of the forgery and theft sections, it was felt advisable to retain this as a separate offense in view of the special problems faced by Montana law enforcement officers in this area. Since there is no purpose to alter existing law, prior Montana cases should still be considered applicable.

Criminal Law Commission Comment

This section is merely a recodification of old Montana law. Although the offense of forgery would seem to make the same acts punishable, the commission deemed it necessary to have this specific statute included in the code in light of the special problems that Montana law enforcement authorities face in the area of cattle rustling.

Cross References

Definition of "purpose" M.C.A. 1978, § 45-2-101(52)
Definition of "obtains or exerts control" M.C.A. 1978, § 45-2-101(33)

Library References

Animals Key Nos. 11, 12
C.J.S. Animals, §§ 30, 31

Notes of Decisions

In General

An unauthorized brand or mark does not have to touch, alter or deface a former

brand on an animal to be in violation of this section. State v. Johnson, 155 Mont. 351, 472 P.2d 287 (1970).

Chapter VII: OFFENSES AGAINST PUBLIC ADMINISTRATION

Part 1--Bribery and Corrupt Influence

45-7-101. Bribery in official and political matters. (1) A person commits the offense of bribery if he purposely or knowingly offers, confers, or agrees to confer upon another or solicits, accepts, or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(b) any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding; or

(c) any benefit as consideration for a violation of a known duty as a public servant or party official.

(2) It is no defense to prosecution under this section that a person whom the offender sought to influence was not qualified to act in the desired way whether because he had not yet assumed office or lacked jurisdiction or for any other reason.

(3) A person convicted of the offense of bribery shall be imprisoned in the state prison for any term not to exceed 10 years and shall forever be disqualified from holding any public office in this state.

Historical Note

Enacted: M.C.C. 1973, § 94-7-102, Sec. 1, Ch. 513, Laws of Montana 1973.

Source: M.P.C. 1962, § 240.1

Prior Law: R.C.M. 1947, §§ 94-801 through 94-803, 94-805, 94-808, 94-810, 94-3523, 94-1418, 94-2916 through 94-2919, 94-3903, 94-3904, 94-3909, 94-3910, 94-3913, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The purpose of this section on Bribery is to prohibit and provide punishment for the improper influencing of any official or governmental action. To this end the section replaces a number of repetitive, overlapping statutes which created numerous narrow offenses with sweeping provisions designed to deal with all situations involving improper influence of official or public actions. This section is applicable both to the individual who "offers, confers, or agrees to confer" and to the individual who "solicits, accepts or agrees to accept" a bribe. Subsection (1)(a) prohibits the giving or receiving of pecuniary benefit to influence official or political discretion. As far as it concerns elections, this section may overlap with Title 13, Chapter 35, on Election and Campaign Practices and Criminal Provisions. Offers of nonpecuniary gain, e.g., political support, honorific appointments, are penalized under subsection (1)(b) but limited to judicial and administrative proceedings.

Subsection (1)(c) deals with the known duty situations and punishes the offer or acceptance of any benefit as consideration for the duty's violation by a public servant or party official.

The defense of lack of jurisdiction or of lack of qualification to act in the desired manner is expressly eliminated by subsection (1). This represents an apparent change from current Montana law which indicates that it is a defense that the person attempted to be improperly influenced is no longer capable of action (see State v. Porter, 125 Mont. 503, 242 P.2d 984, 987 (1952)).

It should be noted that subsection (3) which provides for permanent disqualification from public office on conviction may be in conflict with Mont. Const. Art. II, Sec. 28 (1972) which mandates full restoration of rights on discharge from supervision for "any offense against the state."

Criminal Law Commission Comment

Subsection (a) prohibits the giving or receiving of any pecuniary benefit to influence official or political discretion. Offers of nonpecuniary gain, e.g., political support, honorific appointments, are penalized under subsection (b) but limited to judicial and administrative proceedings. "Administrative proceedings" is defined in section 94-2-101(3) [now M.C.A. 1978, § 45-2-101(3)] and includes some actions that might be called "executive" or "administrative," where the official action applies a general rule to an individual, e.g., in granting or revoking a license, awarding veteran's disability compensation or social security payments. Gifts to officials are covered by section 94-7-105 [now M.C.A. 1978, § 45-7-104].

Cross References

Definition of "administrative proceeding" M.C.A. 1978, § 45-2-101(3)
Definition of "benefit" M.C.A. 1978, § 45-2-101(4)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "pecuniary benefit" M.C.A. 1978, § 45-2-101(43)
Definition of "party official" M.C.A. 1978, § 45-2-101(41)

Definition of "public servant" M.C.A. 1978, § 45-2-101(51)
Definition of "purpose" M.C.A. 1978, § 45-2-101(52)
Definition of "solicits" M.C.A. 1978, § 45-2-101(56)
Election and campaign practices and criminal provisions M.C.A. 1978, Title 13, Chapter 35

Library References

Bribery Key Nos. 1, 16
C.J.S. Bribery, §§ 1, 2, 3, 20
Elections Key No. 315
C.J.S. Elections, § 332
Embracery Key No. 1
C.J.S. Embracery, §§ 1, 3
Extortion Key No. 1
C.J.S. Extortion, § 1
Officers Key Nos. 27, 64, 121
C.J.S. Officers, §§ 24, 57, 133

Law Review Commentaries

Comment. Bribery in official and public matters. Model Penal Code, Tent. Draft No. 8, § 208.10, p. 102 (May 9, 1958)

Perkins. Sampling the evolution of social engineering. 17 U. Pitt. L. Rev. 362 (1956)

45-7-102. Threats and other improper influence in official and political matters. (1) A person commits an offense under this section if he purposely or knowingly:

(a) threatens unlawful harm to any person with the purpose to influence his decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(b) threatens harm to any public servant with the purpose to influence his decision, opinion, recommendation, vote, or other exercise of discretion in a judicial or administrative proceeding;

(c) threatens harm to any public servant or party official with the purpose to influence him to violate his duty;

(d) privately addresses to any public servant who has or will have official

discretion in a judicial or administrative proceeding any representation, entreaty, argument, or other communication designed to influence the outcome on the basis of considerations other than those authorized by law; or

(e) as a juror or officer in charge of a jury receives or permits to be received any communication relating to any matter pending before such jury, except according to the regular course of proceedings.

(2) It is no defense to prosecution under subsections (1)(a) through (1)(d) that a person whom the offender sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office or lacked jurisdiction or for any other reason.

(3) A person convicted under this section shall be fined not to exceed $500 or imprisoned in the county jail for any term not to exceed 6 months, or both, unless the offender threatened to commit an offense or made a threat with the purpose to influence a judicial or administrative proceeding, in which case the offender shall be imprisoned in the state prison for any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-7-103, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 25, Ch. 359, Laws of Montana 1977.

Source: M.P.C. 1962, § 240.2

Prior Law: R.C.M. 1947, §§ 94-804, 94-805, 94-807, 94-1911, and 94-3905. Repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section concerning improper influencing of official matters prohibits conduct not covered by the preceding section on Bribery and is directed toward the improper influencing of public servants, party officials, jurors or voters by threat or private communication. The effect of this section is to broaden prior law to cover classes of persons who were not previously clearly protected against attempts to exert improper influence by these means. Subsection (1)(a) is all-inclusive in prohibiting the use of threats to influence the exercise of discretion by any public servant or party official or to influence a private citizen in the

exercise of his franchise. Subsection (1)(b) is a narrower class drawn from those included in subsection (1)(a) for the imposition of additional penalties as provided under subsection (2) for those who use threats to influence judicial or administrative proceedings. Subsections (1)(d) and (1)(e) provide criminal sanctions for unauthorized private communications with the purpose of influencing the decision of a public servant having official discretion in a matter or a juror with regard to a matter pending before the jury.

The 1977 amendment made the former second sentence of subsection (1)(d) the separate subsection (2) and made the punishment subsection number (3). Subsection (2) establishes that it is not a defense to charges brought under this provision that the person sought to be influenced could not have acted. Thus, the offender will not benefit from a mistaken belief that an official could have acted so as to bring about the offender's desired result.

The offenses under this section are generally punished as misdemeanors but if the threat is to commit an offense or the threat is intended to influence a judicial or administrative proceeding the punishment may be any term up to ten years. It should be noted that the facts justifying the increased penalty would have to be found by the jury. It should be also noted that many, if not all, of the situations involving threats which are punishable under this section are also punishable under M.C.A. 1978, § 45-5-203, Intimidation. Consideration should be given to charging under that section in those situations since the penalties are heavier and elements of proof required are no greater.

Criminal Law Commission Comment

Penal legislation against the use of intimidation to influence the behavior of public officials is much rarer than legislation against bribery, although there are many statutes relating to jurors, legislators, and law enforcement officers.

Cross References

Definition of "administrative proceeding" M.C.A. 1978, § 45-2-101(3)
Definition of "party official" M.C.A. 1978, § 45-2-101(41)
Definition of "public servant" M.C.A. 1978, § 45-2-101(51)
Definition of "purpose" M.C.A. 1978, § 45-2-101(52)
Definition of "threat" M.C.A. 1978, § 45-2-101(62)
Intimidation M.C.A. 1978, § 45-5-203
Election and campaign practices and criminal provisions M.C.A. 1978, Title 13, Chapter 35

Library References

Elections Key Nos. 316, 319
C.J.S. Elections, §§ 330, 332
Embracery Key No. 1
C.J.S. Embracery, §§ 1, 3
Obstructing Justice Key No. 7
C.J.S. Obstructing Justice, § 5

Officers Key No. 121
C.J.S. Officers, § 133

Law Review Commentaries

Comment. Intimidation in official and political matters, Model Penal Code, Tent. Draft No. 8, § 208.11, p. 107 (May 9, 1958)

Comment. Corrupt influence in official proceedings. Model Penal Code, Tent. Draft No. 8, § 208.14, p. 111 (May 9, 1958)

45-7-103. Compensation for past official behavior. (1) A person commits an offense under this section if he knowingly solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having, as a public servant, given a decision, opinion, recommendation, or vote favorable to another, for having otherwise exercised a discretion in another's favor, or for having violated his duty. A person commits an offense under this section if he knowingly offers, confers, or agrees to confer compensation which is prohibited by this section.

(2) A person convicted under this section shall be fined not to exceed $500 or imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-104, Sec. 1, Ch. 32, Laws of Montana 1973

Amended: Sec. 26, Ch. 359, Laws of Montana 1977

Source: M.P.C. 1962, § 240.3

Prior Law: None

Annotator's Note

The purpose of this section on Compensation for Past Official Behavior is the elimination of a problem occasionally encountered in bribery prosecution when the defendant claims he did not solicit or receive anything until after the transaction in question had been completed. It should be noted that, while this section is limited to pecuniary benefits to public servants, it punishes both the public servant who "solicits, accepts or agrees to accept" and the individual who "offers, confers or agrees to confer" such benefits.

Compensation for past action which implies a promise of similar compensation

for future favor undermines public confidence in the integrity of government quite as effectively as the payment in advance. It is made punishable by the new code on those grounds.

The 1977 amendment changed the wording of subsection (1) slightly from "having otherwise exercised discretion in his favor" to read "having otherwise exercised a discretion in another's favor." As originally enacted it was unclear whether "his" referred to the public servant or to the person offering the compensation--as amended it is now clear that the phrase refers to the person making the offer of compensation.

Criminal Law Commission Comment

There is little legislative precedent for this section, but it obviates the difficulty occasionally encountered in a bribery prosecution when the defendant contends that he did not solicit or receive anything until after the official transaction had been completed. This behavior should be discouraged because it undermines the integrity of government. Compensation for past action implies a promise of similar compensation for future favor.

Cross References

Definition of "administrative proceeding" M.C.A. 1978, § 45-2-101(3)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "pecuniary benefit" M.C.A. 1978, § 45-2-101(43)
Definition of "public servant" M.C.A. 1978, § 45-2-101(51)
Definition of "solicit" M.C.A. 1978, § 45-2-101(56)

Library References

Bribery Key No. 1
C.J.S. Bribery, §§ 1-3

Law Review Commentaries

Comment. Compensation for past official favor. Model Penal Code, Tent. Draft No. 8, § 208.12, p. 109 (May 9, 1958)

45-7-104. Gifts to public servants by persons subject to their jurisdiction. (1) No public servant in any department or agency exercising regulatory function, conducting inspections or investigations, carrying on a civil or criminal litigation on behalf of the government, or having custody of prisoners shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be subject to such

regulation, inspection, investigation, or custody or against whom such litigation is known to be pending or contemplated.

(2) No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims, or other pecuniary transactions of the government shall solicit, accept, or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim, or transaction.

(3) No public servant having judicial or administrative authority and no public servant employed by or in a court or other tribunal having such authority or participating in the enforcement of its decision shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant or tribunal with which he is associated.

(4) No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the legislature or any committee or agency thereof.

(5) This section shall not apply to:

(a) fees prescribed by law to be received by a public servant or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise entitled; or

(b) trivial benefits incidental to personal, professional, or business contacts and involving no substantial risk of undermining official impartiality.

(6) No person shall knowingly confer or offer or agree to confer any benefit prohibited by subsections (1) through (5).

(7) A person convicted of an offense under this section shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months,

or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-105, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.5

Prior Law: None

Annotator's Note

This section on Gifts to Public Servants proscribes conduct which, while suspect, was beyond the scope of prior law. Prior law provisions dealing with bribery required an element of showing of purpose to affect as well as to transfer or offer to transfer property or other consideration. Under this section, all that need be shown is the jurisdiction or probable jurisdiction and the transfer, offer to transfer, agreement to transfer or solicitation of a pecuniary benefit. The section is limited in that the benefit must be pecuniary in nature. Pecuniary benefit is defined as being a "benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain." (M.C.A. 1978, § 45-2-101(43)). This would seem to exclude from the scope of this section such gifts as the traditional Christmas bottle of Scotch or advertising gifts such as pens, note pads, or calendars.

The various subsections are broadly inclusive as to what public servants are barred from the acceptance of pecuniary benefits. Subsection (1) bars those engaged in regulatory functions or legal representation from the acceptance of gifts from persons known to be subject to regulation or likely to be involved in a legal struggle with the state. Subsection (2) bars purchasing agents and others dealing in claims or other similar transactions from accepting gifts offered by other parties interested in the transaction. Subsection (3) is aimed at the protection of the judiciary and its employees and subsection (4) prohibits gifts to legislators and legislative employees when the donor is either involved or likely to be involved in a matter pending before the court or legislature, respectively. Subsection (5) offers as exceptions to the foregoing such benefits as are allowed by law and trivial benefits which involve no substantial risk of undermining official impartiality.

It should be noted that this section makes it an offense to either "solicit, accept or agree to accept" or to "confer, offer or agree to confer" a prohibited gift. Accordingly, either party to the transaction can be subject to criminal sanction.

Criminal Law Commission Comment

This section covers gifts by businessmen to government inspectors or by carriers and utilities to regulatory authorities. In some cases a noncriminal sanction against a public servant would be preferred, but there is difficulty in arriving at satisfactory generalizations for all classes of persons and conduct covered by this

section. This section is broader than the old law.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "pecuniary benefit" M.C.A. 1978, § 45-2-101(43)
Definition of "public servant" M.C.A. 1978, § 45-2-101(51)
Definition of "solicit" M.C.A. 1978, § 45-2-101(56)

Library References

Bribery Key No. 1
C.J.S. Bribery, §§ 1-7

Law Review Commentaries

Comment. Paying public servant for services in relation to matter pending before him. Model Penal Code, Tent. Draft No. 8, § 208.16, p. 115 (May 9, 1958)

Part 2--Perjury and Other Falsification in Official Matters

45-7-201. Perjury. (1) A person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made, when the statement is material.

(2) A person convicted of perjury shall be punished by imprisonment in the state prison for any term not to exceed 10 years.

(3) Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

(4) It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant

was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the offender presents it as being so verified shall be deemed to have been duly sworn or affirmed.

(5) No person shall be guilty of an offense under this section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

(6) Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(7) No person shall be convicted of an offense under this section where proof of falsity rests solely upon the testimony of a single person other than the defendant.

Historical Note

Enacted: M.C.C. 1973, § 94-7-202, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Adapted from M.P.C. 1962, § 241.1

Prior Law: R.C.M. 1947, §§ 94-3801, 94-3804 through 94-3808, 94-3811, 94-3813, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Under the common law perjury was narrowly defined as a false oath in a judicial proceeding in regard to a material matter. A companion crime, false swearing, prohibited conduct similar to perjury occurring in official proceedings in which an oath was required but which were not classed as judicial proceedings. Prior Montana law followed a fairly common pattern in extending the scope of perjury until it covered the entire field, including "any case in which an oath may by law be admin-

istered." The prior Montana provisions also reflect a divergence from the common law offense of perjury in that the gist of the offense was knowing the falseness of the information given under oath. The common law made the gist of the offense a false oath for which criminal sanctions could be imposed even though the information given turned out to be accurate.

This section of the new code represents a partial retreat to the common law concept of perjury. Subsection (1) limits perjury to false statements made under oath in official proceedings. A false statement within the meaning of subsection (1) may be made either by giving a statement or by swearing that a statement previously made is true, when the person so doing does not believe the statement to be true. The second phrase in subsection (1) which penalizes a person for swearing that a statement previously made is true will provide punishment when either the statement was untrue when made and is still untrue or the statement was true when made but has since become untrue and the declarant is aware of the fact. It should be noted that this represents a change from the prior law which provided punishment for a statement made when the declarant did not know whether the statement was true or false even when the statement was shown to be true (§ 94-3810). Under the new code an unknowing statement is punishable only if it is shown to be false.

Subsection (3) continues the prior law requirement that materiality be determined by reference to the possible effect on the proceedings. Inadmissiblity and the defendant's belief of immateriality are expressly eliminated as possible defenses. The determination of materiality in any given fact situation is expressly made a matter of law.

Subsection (4) continues the prior law position that an irregularity in the administration of the oath or defendant's incompetence to take an oath is not a defense to a perjury charge. This subsection also provides that presentation of a document which is purportedly verified by oath is sufficient to establish the oath or affirmation element of perjury.

Subsection (5), which makes retraction a defense, is new. It should be noted that to establish an effective defense of retraction the defendant would have to show both that the retraction was made before it became manifest that the falsehood would be exposed and that the retraction occurred before the proceedings had been substantially affected by the falsehood. The section was included as an incentive to correct falsehoods without impairing the compulsion to tell the truth.

Subsection (6) is also new in allowing both accusation and proof in the alternative. The effect of this provision is to allow conviction without requiring proof of falsehood in one of the specific statements. In these situations the state still has the burden of showing that the defendant at the time he made one of the statements could not have believed it to be true.

The common law rule that falsehood be established by two witnesses is adopted in part by subsection (7). At the common law this rule was adopted to deal with the problem of an oath against an oath. The modern rationale is a policy determination based on a balancing of the need for protection of witnesses and the need to maintain the sanctions for false testimony. In adopting the requirement of more than one witness Montana has followed the majority of states in affording additional protection to the witness at the possible cost of being unable to convict an apparent perjurer. This section requires that at a minimum there be circumstances which

will serve to corroborate the testimony of the prosecuting witness.

Criminal Law Commission Comment

The proposed definition of "materiality" in subsection (3) does not differ substantially from that given by prior law. The question of materiality in a perjury trial is not governed by the rules of evidence applicable in the proceeding. It would be against public policy to immunize false swearing merely because the testimony might have been excluded on objection which was not made. The result would be that an unqualified expert witness could not be punished for consciously falsifying an opinion which he did in fact give to the jury. It sould be noted that this section applies to grand jury proceedings, legislative investigations, and administrative hearings, as well as to court trials, each with its own peculiar rules of evidence. Technical irregularities in the administration of the oath are of no concern to the defendant as provided in subsection (4). This is not a change from prior law. Subsection (5) making a retraction a defense is new. It is included in many state code revisions since it attempts to preserve incentive to correct falsehoods, without impairing the compulsion to tell the truth in the first place. The danger that witnesses might be encouraged to take a chance on perjury is limited by the requirement that recantation must take place before the falsity becomes manifest. The distinctive feature of subsection (6) is that accusation and proof in the alternative is authorized, without relieving the prosecution of the burden of proving mens rea. The defendant would not be able to escape conviction because the state cannot prove which of the contradictory statements was false and known to be so. The rule that proof of falsity be by at least two witnesses with corroborating circumstances was adopted at common law because of the problem created by an oath against an oath. The policy question to be decided is whether the protection of witnesses counterbalances the occasional inability to convict an apparent perjurer. The majority of jurisdictions still require at least one witness and corroborating circumstances.

Cross References

Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "official proceeding" M.C.A. 1978, § 45-2-101(38)
General time limitations M.C.A. 1978, § 45-1-205
Periods excluded from limitation M.C.A. 1978, § 45-1-206

Library References

Perjury Key Nos. 1-12, 41
C.J.S. Perjury, §§ 1, 3-17, 24, 51

Law Review Commentaries

Comment. An analysis of New York's perjury law. 40 Albany L. Rev. 198 (1975)
Comment. Criminal law: Perjury in Kansas. 13 Washburn L. J. 479 (1974)
Comment. Introduction to provisions relating to perjury and other falsification to authorities. Model Penal Code, Tent. Draft No. 6, p. 100 (May 6, 1957)

Comment. Perjury. Model Penal Code, Tent. Draft No. 6, § 208.20, p. 104 (May 6, 1957).

Comment. Perjury: The forgotten offense. 65 J. Crim. L. & Criminology 361 (1974)

Hibschmann. "You do solemnly swear!" or that perjury problem. 24 J. Crim. L. & Criminology 901 (1934)

McClintock. What happens to perjurers. 24 Minn. L. Rev. 727 (1940)

Note. White collar crimes. 28 Me. L. Rev. 96, 108-116 (1976)

Notes of Decisions

Corroboration

Corroboration of a witness' testimony cannot be in the form of hearsay evidence, nor can it be solicited from the only witness providing direct evidence of the perjury. State v. Scanlon, ____ Mont. ____, 569 P.2d 368 (1977).

Perjury must be proved by either two or more witnesses furnishing direct testimony of facts incompatible with the sworn statement of the accused or one witness and corroborating circumstances sufficient to overcome the defendant's oath and presumption of innocence. State v. Scanlon, ____ Mont. ____, 569 P.2d 368 (1977).

Materiality

In the context of the Workmen's Compensation investigation, statements were "material" if they could have altered the course of the investigation. State v. Scanlon, ____ Mont. ____, 569 P.2d 368 (1977).

Venue

Where the acts constituting the crime of conspiracy to commit perjury were committed in Missoula County but were related to a pending criminal prosecution in Powell County, venue would properly lie in either county. However, since charges were initially brought in Powell County there was no basis for changing venue. State v. Bretz, 169 Mont. 505, 548 P.2d 949 (1976).

45-7-202. False swearing. (1) A person commits the offense of false swearing if he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of such a statement previously made when he does not believe the statement to be true and:

(a) the falsification occurs in an official proceeding;

(b) the falsification is purposely made to mislead a public servant in performing his official function; or

(c) the statement is one which is required by law to be sworn or affirmed

before a notary or other person authorized to administer oaths.

(2) Subsections (4) to (7) of 45-7-201 apply to this section.

(3) A person convicted of false swearing shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-202, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 241.2

Prior Law: See generally Title 94, Chapter 38, R.C.M. 1947, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

False swearing was the common law crime of giving a false oath in official proceeding other than a judicial proceeding or in a matter in which an oath is required by law. As such it had no precise counterpart in prior Montana law but was, in general, treated as a species of perjury. Accordingly, the addition of this section marks in some measure a return to the common law. The area covered by this section is, however, broader than the area covered by the common law crime of false swearing and deals with those situations not amounting to perjury under the preceding section.

Thus, a false statement made in an official proceeding, which is not material, is punishable under subsection (1)(a). A material false statement not made in an official proceeding but under oath and made with the purpose of misleading a public servant in performing his official function is punishable under subsection (1)(b). Subsection (1)(c) allows the application of sanctions for falsification of any statement required by law to be under oath. It should be noted that subsection (c) does not apply to statements which while made under oath are not required by law to be so made.

Subsection (2) adopts the requirements of M.C.A. 1978, § 45-7-201, subsections (4), (5), (6) and (7), thus eliminating irregularities in the oath as defense, providing for a defense of retraction, allowing pleading and proof in the alternative and requiring proof by at least one witness and corroborating circumstances.

Criminal Law Commission Comment

This section makes it a misdemeanor to swear falsely in cases not amounting to perjury under section 94-7-202 [now M.C.A. 1978, § 45-7-201]. Thus, if the false statement is made in an official proceeding, but is not material, it falls within subdivision (a) of subsection (1). If it is material, but is not made in an official proceeding involving a hearing, subdivision (b) applies. Subdivision (c) applies where an affidavit is sworn to before a notary public, but is restricted to

affidavits required by law. The possibility of abuse where there is criminal liability for falsification in private affidavits has occurred where such law exists. For example, small loan companies have been known to obtain oaths from debtors and threaten criminal charges to collect on their loans.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "official proceeding" M.C.A. 1978, § 45-2-101(38)
Definition of "public servant" M.C.A. 1978, § 45-2-101(51)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

Perjury Key Nos. 1-12, 41
C.J.S. Perjury, §§ 1-17

Law Review Commentaries

Comment. False swearing. Model Penal Code, Tent. Draft No. 6, § 208.21, p. 140 (May 6, 1957)

Comment. Introduction to provisions relating to perjury and other falsification to authorities. Model Penal Code, Tent. Draft No. 6, p. 100 (May 6, 1957)

45-7-203. Unsworn falsification to authorities. (1) A person commits an offense under this section if, with purpose to mislead a public servant in performing his official function, he:

(a) makes any written false statement which he does not believe to be true;

(b) purposely creates a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading;

(c) submits or invites reliance on any writing which he knows to be forged, altered, or otherwise lacking in authenticity; or

(d) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

(2) A person convicted of an offense under this section shall be fined not to

exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-204, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 241.3

Prior Law: R.C.M. 1947, § 94-1507, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section is almost entirely new. The only similar provision of prior law was limited to false statements made with regard to taxes. While this section is directly based on the Model Penal Code, its ultimate source is 18 U.S.C., § 1001 which provides penalties for knowing misstatements of material fact in "any matter within the jurisdiction of any agency of the U.S." The section requires that there be a purpose to mislead a public servant in the performance of his official duties. It is also required, to establish an offense under three of the subsections, that there be a writing. Subsection (1)(d) extends the section's coverage to non-written matters involving samples, boundary marks or other objects. It should be noted that, in addition to punishing the submission of writings either known to be false or forged, sanctions are provided for the submission of a writing which, because of omission, is misleading.

If pecuniary benefits or other property are obtained as a result of the false or misleading statements, the conduct may also be punishable under the provisions of § 45-6-301(2) relating to theft by deception.

Criminal Law Commission Comment

This section was suggested by 18 U.S.C. Sec. 1001, which authorizes imprisonment up to five (5) years for knowing mis-statement of material fact in "any matter within the jurisdiction of any department or agency of the United States." There is no parallel in the Montana law. There is a requirement of writing and purpose to mislead in this section, as well as the extension of liability to misleading omissions, in subdivision (1)(b), and to things other than writings, e.g., false samples, etc., in subdivision (1)(d). If there is a pecuniary benefit from misleading omissions, the code provisions on theft by deception would apply.

Cross References

Definition of "benefit" M.C.A. 1978, § 45-2-101(4)
Definition of "pecuniary benefit" M.C.A. 1978, § 45-2-101(43)
Definition of "public servant" M.C.A. 1978, § 45-2-101(51)
Definition of "purpose" M.C.A. 1978, § 45-2-101(52)

Library References

Fraud Key Nos. 68, 69
C.J.S. Fraud, §§ 154-158

Law Review Commentaries

Comment. Introduction to provisions relating to perjury and other falsification to authorities. Model Penal Code, Tent. Draft No. 6, p. 100 (May 6, 1957).

Comment. Unsworn falsification to authorities. Model Penal Code, Tent. Draft No. 6, § 208.22, p. 141 (May 6, 1957)

45-7-204. False alarms to agencies of public safety. (1) A person commits an offense under this section if he knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, which deals with emergencies involving danger to life or property.

(2) A person convicted of an offense under this section shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-205, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 241.4

Prior Law: None

Annotator's Note

This section is new and offers a remedy for the recurring problem of nuisance alarms which pose a danger that equipment needed to deal with a true emergency will be unavailable and which results in a waste of government resources. To establish an offense under this section it is necessary to prove knowing communication of a report or alarm, known to be false, to an organization which deals with emergencies. It should be noted that this section overlaps with M.C.A. 1978, § 45-5-203(2), Intimidation. The offense of Intimidation, which requires knowing communication of a threat or false report of pending disaster, is aimed at the far more socially destructive conduct involved in terrorist threats. Accordingly, despite the overlap between the sections, it is urged that care be taken in making the determination under which section to charge, particularly since Intimidation is a felony while this section provides only for misdemeanor penalties. It should also be noted that

this section cannot be treated as a lesser included offense under Intimidation since to establish this offense there must be proof of communication to an organization whose purpose it is to deal with emergencies, whereas in Intimidation, the requirement is one of mere communication.

Criminal Law Commission Comment

This section covers all dangerous emergency alarms, e.g., floods, hurricanes, landslides, civil defense. The police force would qualify as an emergency organization. The provision is justifiable on the ground of waste of government resources and the likelihood that the actor will cause personnel or equipment to be unavailable to deal with real emergencies.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Intimidation M.C.A. 1978, § 45-5-203

Law Review Commentaries

Comment. False alarms. Model Penal Code, Tent. Draft No. 6, § 208.23, p. 143 (May 6, 1957)

Comment. Introduction to provisions relating to perjury and other falsification to authorities. Model Penal Code, Tent. Draft No. 6, p. 100 (May 6, 1957)

45-7-205. False reports to law enforcement authorities. (1) A person commits an offense under this section if he knowingly:

(a) gives false information to any law enforcement officer with the purpose to implicate another;

(b) reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur; or

(c) pretends to furnish such authorities with information relating to an offense or incident when he knows he has no information relating to such offense or incident.

(2) A person convicted under this section shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-206, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 241.5

Prior Law: None

Annotator's Note

This section deals with a problem area in which there has been little legislation. The purpose of the section is to deter and punish the giving of false information to law enforcement authorities. To this end, subsection (1)(a) prohibits the giving of false information with the purpose of implicating another; subsection (1)(b) prohibits the report of an incident known not to have occurred and subsection (1)(c) deals with the problem of an individual supplying information which he does not really possess. It should be noted that knowingly giving false information is sufficient to complete the offense; there need be no action taken in reliance on it. While perhaps not a common problem, the purposeful giving of false information merits the imposition of sanction because such behavior creates a probability of asocial consequences both in terms of the individual against whom the information is supplied and the public which must foot the bill for the fruitless investigation which may follow.

Criminal Law Commission Comment

Few state statutes now deal with this offense. The recent Wisconsin Code, section 346.30(a) requires that the officer act in reliance upon such false information, but such behavior is likely to have antisocial consequences regardless of any action in reliance.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)

Law Review Commentaries

Comment. False reports to law enforcement authorities. Model Penal Code, Tent. Draft No. 6, § 208.24, p. 144 (May 6, 1957)

Comment. Introduction to provisions relating to perjury and other falsification to authorities. Model Penal Code, Tent. Draft No. 6, p. 100 (May 6, 1957)

45-7-206. Tampering with witnesses and informants. (1) A person commits the offense of tampering with witnesses and informants if, believing that an official proceeding or investigation is pending or about to be instituted, he purposely or

knowingly attempts to induce or otherwise cause a witness or informant to:

(a) testify or inform falsely;

(b) withhold any testimony, information, document, or thing;

(c) elude legal process summoning him to testify or supply evidence; or

(d) absent himself from any proceeding or investigation to which he has been summoned.

(2) A person convicted of tampering with witnesses or informants shall be imprisoned in the state prison for any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-7-207, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 27, Ch. 359, Laws of Montana 1977

Source: M.P.C. 1962, § 241.6

Prior Law: R.C.M. 1947, §§ 94-1702, 94-1705, 94-1706, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Tampering with Witnesses replaces a number of prior provisions and is directed toward the prevention of any interference with testimonial evidence. The section is broad in scope and penalizes any attempt to induce by any means a witness or potential witness to testify falsely, to withhold testimony, to elude service of process or to fail to attend any proceeding to which he has been summoned. It should be noted that all that is required to complete this offense is purposely or knowingly attempting to influence the witness. There need be no showing of success in altering the witness' testimony or conduct. Also any inducement is sufficient, whether an offer of pecuniary benefit or an appeal to friendship, if it is offered with the purpose of influencing the witness' testimony or availability.

The 1977 amendment made minor changes in phraseology, punctuation and style.

Criminal Law Commission Comment

This section covers "informants" and "witnesses." Under prior law most such offenses were misdemeanors. This section gives the judge discretion to impose a sentence of up to ten (10) years if the circumstances justify it.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "official proceeding" M.C.A. 1978, § 45-2-101(38)
Definition of "witness" M.C.A. 1978, § 45-2-101(66)

Library References

Obstructing Justice Key Nos. 4-6
C.J.S. Obstructing Justice, §§ 7-10

Law Review Commentaries

Comment. Tampering with witnesses and informants. Model Penal Code, Tent. Draft No. 8, § 208.25, p. 121 (May 9, 1958)

45-7-207. Tampering with or fabricating physical evidence. (1) A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(a) alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or availability in such proceeding or investigation; or

(b) makes, presents, or uses any record, document, or thing knowing it to be false and with purpose to mislead any person who is or may be engaged in such proceeding or investigation.

(2) A person convicted of tampering with or fabricating physical evidence shall be imprisoned in the state prison for a term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-7-208, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 241.7

Prior Law: R.C.M. 1947, §§ 94-1702 through 94-1704, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section is a necessary companion to the preceding section on Tampering with Witnesses. The purpose of this section is the protection of physical evidence. To this end, the section prohibits the alteration, destruction, concealment or removal of physical evidence and the making or presentation of physical evidence known to be false. To establish the offense, it must be shown that the accused believed an official proceeding or investigation was pending or imminent and that he acted either with the purpose of impairing the availability or verity of physical evidence or that he knowingly presented false evidence with the purpose of misleading. It should be noted that to complete the offense the accused need merely do the proscribed acts with the requisite mental state--he need not succeed in making the evidence unavailable or in misleading the investigation. The most significant differences between this section and prior law are the increase in scope to include investigations as well as trials and other formal proceedings and the increase in penalties from punishment as a misdemeanor to punishment by up to ten years.

Criminal Law Commission Comment

This section is broader than prior law since it covers investigations as well as trials and other formal proceedings.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "official" M.C.A. 1978, § 45-2-101(38)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

Obstructing Justice Key Nos. 4-6
C.J.S. Obstructing Justice, §§ 7-10

Law Review Commentaries

Comment. Tampering with or fabricating physical evidence. Model Penal Code, Tent. Draft No. 8, § 208.26, p. 121 (May 9, 1958)

45-7-208. Tampering with public records or information. (1) A person commits the offense of tampering with public records or information if he:

(a) knowingly makes a false entry in or false alteration of any record, document, legislative bill or enactment, or thing belonging to or received, issued, or kept by the government for information or record or required by law to be kept by

others for information of the government;

(b) makes, presents, or uses any record, document, or thing knowing it to be false and with purpose that it be taken as a genuine part of information or records referred to in subsection (1)(a); or

(c) purposely destroys, conceals, removes, or otherwise impairs the verity or availability of any such record, document, or thing.

(2) A person convicted of the offense of tampering with public records or information shall be imprisoned in the state prison for any term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-7-209, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 241.8

Prior Law: R.C.M. 1947, §§ 94-1501(6), 94-1507, 94-1517, 94-1802, 94-2722, 94-2724 through 94-2726, 94-2903, 94-2904, repealed, Sec. 32, Ch. 513 Laws of Montana 1973

Annotator's Note

The purpose of this section on Tampering with Public Records is the protection of the integrity of government records and of records required by the government to be kept by private individuals. This section consolidates a number of prior law provisions into one unitary statute which prohibits false entries and alterations in presentations, as genuine, of records or documents known to be false for inclusion in, and destruction of "any record, document, legislative bill or enactment, or thing belonging to, or received or issued or kept by the government for information or record, or required by law to be kept by others for information of government." The only addition to prior law appears to be subsection (1)(b) which prohibits the presentation or fabrication of records for inclusion as genuine and even this may have been a part of the more general prohibitions contained in prior law. It should be noted that this section does not protect private records unless such private records are required to be kept by the government.

Criminal Law Commission Comment

It is common to penalize falsification, destruction or concealment of public records. The only innovation in this section is the explicit provision of subdivision (1)(b) as to fabrication of false records. This section would not cover records of private persons; however, records maintained at the behest of government,

such as legislative bills or enactments would fall within this section.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

Forgery Key Nos. 15, 16
C.J.S. Forgery, § 29
Records Key Nos. 21, 22
C.J.S. Records, §§ 72-76

Law Review Commentaries

Comment. Tampering with public records or information. Model Penal Code, Tent. Draft No. 8, § 208.27, p. 122 (May 9, 1958)

45-7-209. Impersonating a public servant. (1) A person commits the offense of impersonating a public servant if he falsely pretends to hold a position in the public service with purpose to induce another to submit to such pretended official authority or otherwise to act in reliance upon that pretense to his prejudice.

(2) A person convicted of impersonating a public servant shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-210, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 241.9

Prior Law: R.C.M. 1947, §§ 94-35-149, 94-35-253, 94-3901, 94-3911, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Impersonating a Public Servant consolidates a number of prior law provisions including § 94-35-149, Impersonating an Officer, § 94-35-253, Wearing

Certain Uniforms Prohibited, § 94-3901, Acting in A Public Capacity Without Having Qualified, and § 94-3911, Exercising Functions of Office Wrongfully. This section represents an improvement over prior law in that it is specifically directed toward harmful conduct. To establish an offense under this section it is necessary to show that the accused falsely pretended to be a public servant and that he did so with the purpose of causing another to act on that basis. It should be noted that these provisions apply to all public offices and would include any actions made under color of that office by a pretender.

Criminal Law Commission Comment

Legislation prohibiting impersonation of some or all public officials is found in most penal codes. The object is to prevent imposition on people by the pretense of authority, and partly to ensure proper respect for genuine authority by suppressing discreditable imitations. These objectives are regarded as especially important in relation to law enforcement officers.

Cross References

Definition of "act" M.C.A. 1978, § 45-2-101(1)
Definition of "public servant" M.C.A. 1978, § 45-2-101(51)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

False Personation Key No. 1
C.J.S. False Personation, §§ 1-4
Officers Key Nos. 86, 87, 89
C.J.S. Officers, §§ 80, 82

Law Review Commentaries

Comment. Impersonating a public servant. Model Penal Code, Tent. Draft No. 8, § 208.28, p. 123 (May 9, 1958)

Part 3--Obstructing Governmental Operations

45-7-301. Resisting arrest. (1) A person commits the offense of resisting arrest if he knowingly prevents or attempts to prevent a peace officer from effecting an arrest by:

(a) using or threatening to use physical force or violence against the peace

officer or another; or

(b) using any other means which creates a risk of causing physical injury to the peace officer or another.

(2) It is no defense to a prosecution under this section that the arrest was unlawful, provided the peace officer was acting under color of his official authority.

(3) A person convicted of the offense of resisting arrest shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-301, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Proposed Mich. C.C. 1967, § 4625

Prior Law: R.C.M. 1947, § 94-35-169, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Until the passage of this section, Montana had no provision dealing specifically with resistance to an arrest. The proposed Michigan Criminal Code of 1967 was never adopted by the Michigan legislature. There is, therefore, no Michigan case law interpreting this statute. Subsection (1) is narrower than the repealed statute which concerned resistance to the discharge by public officers of their duties (§ 94-35-169, R.C.M. 1947). The old law specifically applied not only to interference with arrest made by a peace officer, but to the discharge by any public officer of any duty of his office. Also, this subsection unlike the repealed statute, requires the use of threat of force or the risk of injury in connection with the interference with the peace officer. "Peace officer" is defined at M.C.A. 1978, § 45-2-101(42).

Subsection (2) was not a part of the repealed law. This subsection is in opposition to the common law theory that an officer undertaking an unlawful arrest was deemed to be not acting in the line of duty. Under this theory the intended arrestee had the privilege to use reasonable force to prevent the unlawful deprivation of his liberty. Subsection (2) takes the often complicated decision as to the lawfulness of the arrest away from the arrestee, thereby allowing such decision to be decided ultimately in court rather than by force. This is also the position taken by the Model Penal Code, § 3.04(2)(a)(1), and establishes the policy basis for both this section and section 45-3-108 which handles another aspect of the same problem in removing the defense of justifiable use of force in resisting an arrest even if the arrest is unlawful. These two sections work together to deal with the problems posed by citizen efforts to counter what they believe to be unlawful arrest by officers of the law and are intended to discourage self-help and require resort to the courts for relief.

Subsection (3) reduces the maximum penalty allowed under the prior law.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "peace officer" M.C.A. 1978, § 45-2-101(42)
Definition of "threat" M.C.A. 1978, § 45-2-101(62)
Use of force in defense of person M.C.A. 1978, § 45-3-102
Method of arrest M.C.A. 1978, § 46-6-104
Manner of arrest without a warrant M.C.A. 1978, § 46-6-106
Use of force in resisting arrest M.C.A. 1978, § 45-3-108

Library References

Obstructing Justice Key Nos. 7, 9, 21
C.J.S. Obstructing Justice, §§ 5, 6, 22

45-7-302. Obstructing a peace officer or other public servant. A person commits the offense of obstructing a peace officer or public servant if he knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided he was acting under color of his official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-302, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Proposed Mich. C.C. 1967, § 4506

Prior Law: R.C.M. 1947, § 94-35-169, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Criminal Law Commission Comment

This section is designed to deal generally with the knowing obstruction of governmental activities. It protects both peace officers and public servants in the administration of their respective duties. Generally, the section seeks to retain the coverage of the old law to encompass protection of all governmental functions. It imposes a uniform mens rea requirement for all illegal obstruction, i.e., knowingly.

The section requires a person to "knowingly" obstruct, impair or hinder government administration. The old law required a "willful" obstruction. Subsection (2) of this section makes a distinction between the obstruction of illegal activity by a peace officer and a public servant. The commission has followed the basic premise that a person should not take the law into his own hands when faced with illegal police activity.

Cross References

Definition of "peace officer" M.C.A. 1978, § 45-2-101(42)
Definition of "public servant" M.C.A. 1978, § 45-2-101(51)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Library References

Obstructing Justice Key Nos. 7, 9, 21
C.J.S. Obstructing Justice, §§ 5, 6, 22

45-7-303. Obstructing justice. (1) For the purpose of this section "an offender" means a person who has been or is liable to be arrested, charged, convicted, or punished for a public offense.

(2) A person commits the offense of obstructing justice if, knowing a person is an offender, he purposely:

(a) harbors or conceals an offender;

(b) warns an offender of impending discovery or apprehension, except this does not apply to a warning given in connection with an effort to bring an offender into compliance with the law;

(c) provides an offender with money, transportation, weapon, disguise, or other means of avoiding discovery or apprehension;

(d) prevents or obstructs by means of force, deception, or intimidation anyone from performing an act that might aid in the discovery or apprehension of an offender;

(e) suppresses by act of concealment, alteration, or destruction any physical evidence that might aid in the discovery or apprehension of an offender; or

(f) aids an offender who is subject to official detention to escape from such official detention.

(3) A person convicted of obstructing justice shall be:

(a) imprisoned in the state prison for a term not to exceed 10 years if the offender has been or is liable to be charged with a felony; or

(b) fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both, if the offender has been or is liable to be charged with a misdemeanor.

Historical Note

Enacted: M.C.C. 1973, § 94-7-303, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-205, 94-206, 94-4201, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Prior law provided that a person who concealed his knowledge of a felony or who harbored or protected one charged or convicted of a felony was an "accessory." R.C.M. 1947, § 94-205. At common law such a person was an "accessory after the fact." These terms encompassed all of the specific activities in subsections (2)(a) through (2)(e). These subsections are broader than previous law in two respects. Prior law applied to helping felons, whereas this section applies also to obstruction of justice in connection with misdemeanors. Second, R.C.M. 1947, § 94-205 required that the aider have "full knowledge" of the crime, whereas under this section he may not know what crime has been committed.

Subsection (2)(f) applies to a person who aids another to commit the offense of escape, M.C.A. 1978, § 45-7-306. The subsection covers the old crime of Rescue, R.C.M. 1947, § 94-4201, but is more comprehensive than prior law in that it covers not only violent jailbreaks and aiding the rescue or escape of a person "from an officer having him in lawful custody," but it applies also to the person who aids a person in departing from any lawful custody. See the definition of "official detention," M.C.A. 1978, § 45-2-101(37). "Aids" in this subsection is more inclusive than "rescues" under prior law. The maximum penalty for the offense is reduced from felony to misdemeanor.

Criminal Law Commission Comment

The section is based on the theory that a person who aids another to elude apprehension or trial is obstructing justice and interfering with the processes of government. It is his willingness to interfere and the harm threatened by such

interference that constitutes the offense rather than any fiction that equates a "harborer" with the murderer or traitor whom he harbors.

This section makes it an offense to aid misdemeanants as well as felons. This result follows from the purpose to deter an obstruction of justice. Also the aider may not know what crime the offender has committed.

Knowledge or reason to believe that the putative offender is guilty of or charged with a crime is simply evidence of the purpose to aid the putative offender to elude justice. A purpose to aid the offender to avoid arrest is not proved merely by showing that defendant gave succor to one who was in fact a fugitive. When a fugitive seeks help from friends and relatives there may be other motivations in addition to the objective of impeding law enforcement. Such other motivations are not taken into consideration by way of exception of certain classes of near kin, but could possibly be a ground for mitigating sentence after conviction. This section specifies the prohibited forms of aid in addition to the traditional offense of harboring or concealing the fugitive. Subdivision (2)(b) contains an exception to take care of cases like fellow-motorists warning speeder to slow down, or a lawyer advising a client to discontinue illegal activities.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "offender" M.C.A. 1978, § 45-2-101(35)
Definition of "official detention" M.C.A. 1978, § 45-2-101(37)

Library References

Criminal Law Key Nos. 75 et seq.
C.J.S. Criminal Law, § 98

45-7-304. Failure to aid a peace officer. (1) A peace officer may order a person to cooperate where it is reasonable for the peace officer to enlist the cooperation of such person in:

(a) effectuating or securing an arrest of another pursuant to 46-6-402; or

(b) preventing the commission by another of an offense.

(2) A person commits the offense of failure to aid a peace officer if he knowingly refuses to obey such an order.

(3) A person convicted of the offense of failure to aid a peace officer shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to

exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-304, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-35-177, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Subsection (1)(a) refers to M.C.A. 1978, § 46-6-402, which states that in securing an arrest the peace officer may command cooperation from male persons over the age of eighteen. A further limitation on the power to so command is imposed by subsection (1). Unlike prior law, it requires that the request be reasonable. The power to so command is limited to "peace officers," defined at M.C.A. 1978, § 45-2-101(42).

In subsection (2) the penalty has been increased to provide a possibility of imprisonment.

Criminal Law Commission Comment

The section is limited to "peace officer" (see definition of peace officer in R.C.M. 1947, section 95-210 [now M.C.A. 1978, § 45-2-101(42)]). Rather than require every eighteen-year-old male to assist, a more flexible standard of reasonableness is substituted.

Cross References

Definition of "peace officer" M.C.A. 1978, § 45-2-101(42)
Definition of "another" M.C.A. 1978, § 45-2-101(2)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)

Library References

Arrest Key No. 69
C.J.S. Obstructing Justice, § 4

45-7-305. Compounding a felony. (1) A person commits the offense of compounding a felony if he knowingly accepts or agrees to accept any pecuniary benefit in consideration for:

(a) refraining from seeking prosecution of a felony; or

(b) refraining from reporting to law enforcement authorities the commission or suspected commission of any felony or information relating to a felony.

(2) A person convicted of compounding a felony shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-305, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 242.5

Prior Law: R.C.M. 1947, § 94-3535, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Subsection (1) retains most of the coverage of prior law concerning Compounding a Felony. The significant difference between this section and previous law is that there is now no offense of compounding a "misdemeanor," (defined at M.C.A. 1978, § 45-2-101(30)). The old law graded the offense according to whether the crime was punishable by death or life imprisonment, was punishable by less than death or life imprisonment, or was a misdemeanor. The section has not gone as far as the Model Penal Code which expressly authorizes the compromise of a misdemeanor for which the injured person has a civil action.

The omission of misdemeanors does not leave unregulated the event of a person taking a reward to forbear or stifle a criminal prosecution for a misdemeanor. This is covered by Bribery in Official and Political Matters, M.C.A. 1978, § 45-7-101 and Gifts to Public Servants by Persons Subject to Their Jurisdiction, § 45-7-104. To an extent subsection (1)(a) overlaps in coverage with these sections.

Subsection (2) authorizes a maximum penalty which is the same as that provided for the lowest grade of the offense under old law.

Criminal Law Commission Comment

The significant difference between this section and prior law is that there is no grading of the offense.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "felony" M.C.A. 1978, § 45-2-101(15)
Definition of "misdemeanor" M.C.A. 1978, § 45-2-101(30)

Bribery in Official and Political Matters M.C.A. 1978, § 45-7-101
Gifts to Public Servants by Persons Subject to Their Jurisdiction M.C.A. 1978, § 45-7-104

Library References

Compounding Offenses Key No. 1
C.J.S. Compounding Offenses, §§ 1, 2, 3

Law Review Commentaries

Comment. Compounding. Model Penal Code, Tent. Draft No. 6, § 208.32, p. 203 (May 8, 1959)
Miller. The compromise of criminal cases. 1 So. Cal. L. Rev. 1 (1927)

45-7-306. Escape. (1) "Official detention" means imprisonment which resulted from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society. "Official detention" does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

(2) A person subject to official detention commits the offense of escape if he knowingly or purposely removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited time.

(3) A person convicted of the offense of escape shall be:

(a) imprisoned in the state prison for a term not to exceed 20 years if he escapes from a state prison, county jail, or city jail by the use or threat of force, physical violence, weapon, or simulated weapon;

(b) imprisoned in the state prison for a term not to exceed 10 years if he:

(i) escapes from a state prison, county jail, or city jail; or

(ii) escapes from another official detention by the use or threat of force, physical violence, weapon, or simulated weapon; or

(c) fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both, if he commits escape under circumstances other than (a) and (b) of this subsection.

Historical Note

Enacted: M.C.C. 1973, § 94-7-306, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 242.6

Prior Law: R.C.M. 1947, §§ 94-4203 et seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Escape covers any unauthorized departure from legal custody. The definition of subsection (1) is not limited to confinements upon a charge or conviction of a crime, but also includes imprisonment or detention for some purpose in connection with a civil case such as a sanity hearing. The portion of the definition concerning the use of force during an unlawful arrest is consistent with the rule that the illegality of an arrest is no defense to a prosecution on the charge of Resisting Arrest. M.C.A. 1978, § 45-7-301. One may not use force either to resist an unlawful arrest or to escape from one.

Subsection (2) describes the offense of escape. Notably, the offense may be committed even where the physical departure from official detention has been authorized. A person who fails to return to official detention when required commits the offense.

Criminal Law Commission Comment

The section classifies escapes according to the risk they create. Punishment is more severe for the offense when committed by the use of or threat of force, physical violence, weapon or simulated weapon. The grading of the offense by relying on the prisoner's use of force is actually a return to common law, since early common law clearly distinguished between escapes with and without use of force. The grading scheme implicit in the old code by which punishment is provided in reference to the type of confinement, is not entirely abandoned by section 94-7-306 [now M.C.A. 1978, § 45-7-306]. For example, use of force in escaping from a noninstitutional detention calls for a lesser punishment than escape from a prison, county or city jail. Further, an escape without use of force from a noninstitutional detention as provided in subdivision (3)(c) removes the offense from the felony category altogether.

Another grading method for escapes is based on the seriousness of the crime causing the detention. The section includes the grading indirectly in that the seriousness of the crime causing the detention is indicated by the institution in which the detention is made. For example, persons held in the state prison will usually be felons while those in city or county jails will be misdemeanants.

Cross References

Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Definition of "peace officer" M.C.A. 1978, § 45-2-101(42)
Definition of "official detention" M.C.A. 1978, § 45-2-101(37)
Definition of "weapon" M.C.A. 1978, § 45-2-101(65)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "threat" M.C.A. 1978, § 45-2-101(62)
Resisting arrest M.C.A. 1978, § 45-7-301

Library References

Escape Key Nos. 1 et seq.
C.J.S. Escape, §§ 1 et seq.

Law Review Commentaries

Comment. Escape from official detention. Model Penal Code, Tent. Draft No. 8, § 208.33, p. 132 (May 9, 1958)

Notes of Decisions

Defense of Compulsion

In order to establish the defense of justification or necessity to the offense of escape the defendant must establish that (1) he was faced with the threat of death or serious bodily injury, (2) there was insufficient time to complain to prison authorities, (3) there was insufficient time to resort to the courts, (4) the prisoner immediately reported to the police when he obtained a position of safety. State v. Stuit, ____ Mont. ____, 576 P.2d 264 (1978).

Double Jeopardy

The offenses of criminal mischief and escape have no common elements, are separate and distinct criminal offenses, and are designed for the protection of completely different interests. There was no error and no violation of defendant's constitutional right against double jeopardy in permitting defendant to be charged with and convicted of both criminal mischief and attempted escape, even though both charges were based on a single physical act, digging a hole in a county jail wall. State v. Davis, ____ Mont. ____, 577 P.2d 375 (1978).

45-7-307. Transferring illegal articles or unauthorized communication. (1) (a) A person commits the offense of transferring illegal articles if he knowingly or purposely transfers any illegal article or thing to a person subject to official detention or is transferred an illegal article or thing by a person subject to official detention.

(b) A person convicted of transferring illegal articles shall be:

(i) imprisoned in the state prison for a term not to exceed 20 years, if he conveys a weapon to a person subject to official detention; or

(ii) fined not to exceed $100 or imprisoned in the county jail for any term not to exceed 10 days, or both, if he conveys any other illegal article or thing to a person subject to official detention.

(c) Subsection (1)(b)(ii) does not apply unless the offender knew or was given sufficient notice so that he reasonably should have known that the article or thing he conveyed was an illegal article.

(2)(a) A person commits the offense of unauthorized communication if he knowingly or purposely communicates with a person subject to official detention without the consent of the person in charge of such official detention.

(b) A person convicted of the offense of unauthorized communication shall be fined not to exceed $100 or imprisoned in the county jail for any term not to exceed 10 days, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-7-307, Sec. 1, Ch. 513, Laws of Montana 1973
Amended:	Sec. 28, Ch. 359, Laws of Montana 1977
Source:	R.C.M. 1947, §§ 94-35-241, 94-35-264, 94-4208
Prior Law:	R.C.M. 1947, §§ 94-35-241, 94-35-264, 94-4208, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on illegal transaction with prisoners retains the coverage of prior law. Additionally, subsection (1) applies to the transfer of any illegal article, whereas previous law applied to an enumerated list of articles (R.C.M. 1947, § 94-35-264) and to articles useful in making an escape (R.C.M. 1947, § 94-4208). The prohibition of communication in subsection (2) is the same as that of prior law, R.C.M. 1947, § 94-35-241. Both subsections are broader than prior law in that they apply to all "official detention," defined at M.C.A. 1978, § 45-2-101(37), rather than just to the state prison. The maximum penalty for transfer of any illegal article other than a "weapon," defined at M.C.A. 1978, § 45-2-101(65), is reduced to ten days or $100 from ten years or $10,000.

The 1977 amendment added the word "illegal" before the word "article" throughout this section so as to make it clear that the provision prohibits only the transfer of illegal articles rather than all articles. The 1977 amendment also changed former subsection (1)(b)(ii), slightly rewording the first sentence and transferring the last sentence ot a new subsection, (1)(c), and rewording it slightly so as to make it clear that the defense of lack of notice is unavailable when the article transferred is a weapon.

Criminal Law Commission Comment

The section does not require proof of an intent to assist an inmate to escape, but requires only that the actor intended to convey the item involved. It is sufficient that he know the nature of the item as an illegal article, i.e., something that he is prohibited from conveying to the inmate by statute, regulation or institutional rule. The offense is graded on the basis of the nature of the article or thing introduced, i.e., if the thing be a deadly weapon, the offense is a felony; and the section applies to all official detention rather than just the state prison.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "official detention" M.C.A. 1978, § 45-2-101(37)
Definition of "weapon" M.C.A. 1978, § 45-2-101(65)

Library References

Prisons Key no. 17-1/2
C.J.S. Prisons, § 22

45-7-308. Bail-jumping. (1) A person commits the offense of bail-jumping if, having been set at liberty by court order, with or without security, upon condition that he will subsequently appear at a specified time and place, he purposely

fails without lawful excuse to appear at that time and place.

(2) This section shall not interfere with the exercise by any court of its power to punish for contempt.

(3) This section shall not apply to a person set at liberty by court order upon condition that he will appear in connection with a charge of having committed a misdemeanor, except it shall apply where the judge has released the defendant on his own recognizance.

(4) A person convicted of bail-jumping in connection with a felony shall be imprisoned in the state prison for a term not to exceed 10 years. In all other cases he shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-308, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 242.8

Prior Law: None

Annotator's Note

Bail-jumping was not a crime under the old code under which the penalty for jumping bail was forfeiture of the money or property which was posted as bail. Many recent studies have shown that the great majority of offenders may safely be released on bail, and federal appellate courts are tending toward requiring release on bail that is very moderate in amount. The Montana Code of Criminal Procedure (Title 46, Chapter 9) has attempted to encourage this trend by making bail easier to secure and lower in amount, and, where possible, to allow release on the prisoner's own recognizance with no bail at all. However, when bail is nominal or non-existent, forfeiture is no real penalty and provides no incentive to the offender to appear for trial. This statute is intended to provide a penalty for anyone who (1) jumps bail and is accused of a felony, or (2) has been released without bail on a misdemeanor charge. The section is intended to work together with Chapter 9, Title 46 to encourage release on little or no bail, but it enables the courts to deal with those who violate their trust.

Because the definition of "official detention," M.C.A. 1978, § 45-2-101(37), expressly excludes "restraint incidental to release on bail," bail-jumping is not covered by the section on escape. The creation of a second offense allows a different treatment of forfeiture of bonds on misdemeanor charges. This is accomplished by

subsection (3). Unless otherwise required by the court, it is lawful to forfeit bond on a misdemeanor, but it is not lawful to remove oneself from "official detention" resulting from a misdemeanor charge or conviction. "Misdemeanor" is defined at M.C.A. 1978, § 45-2-101(30).

Subsection (2) establishes that the fact that bail-jumping may be punished as an independent offense does not prevent it from being punished as a contempt of court.

Criminal Law Commission Comment

Statutes designating the offense of "bail-jumping" are of comparatively recent origin. The first such statute was passed in New York in 1928, and it was over a generation later that the federal provision was enacted in 1954. Montana had no statute making it a separate punishable crime for failure to comply within a condition of a bail bond or recognizance, although such a provision had been anticipated. In the proposed Montana Code of Criminal Procedure of 1966, under section 95-1106, the following comment can be found: "In addition it is recommended that Montana make it a separate punishable crime not to appear, regardless of the method by which the accused was released. It is believed this will be a greater deterrent than any anticipated financial loss." The section is graded on the basis of the seriousness of the crime charged so bail-jumping in connection with a felony is a potential felony and all other cases of bail-jumping are misdemeanors.

Cross References

Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "misdemeanor" M.C.A. 1978, § 45-2-101(30)
Bail M.C.A. 1978, Title 46, Chapter 9
Escape M.C.A. 1978, § 45-7-306

Library References

Bail Key No. 75
C.J.S. Bail, § 51(2)

Law Review Commentaries

Comment. Bail jumping; default in required appearance. Model Penal Code, Tent. Draft No. 8, § 208.35, p. 138 (May 9, 1958)
Foote. Compelling appearance in court. 102 U. Pa. L. Rev. 1031 (1954)

45-7-309. Criminal contempt. (1) A person commits the offense of criminal contempt when he knowingly engages in any of the following conduct:

(a) disorderly, contemptuous, or insolent behavior committed during the

sitting of a court in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority;

(b) breach of the peace, noise, or other disturbance directly tending to interrupt a court's proceeding;

(c) purposely disobeying or refusing any lawful process or other mandate of a court;

(d) unlawfully refusing to be sworn as a witness in any court proceeding or, after being sworn, refusing to answer any legal and proper interrogatory;

(e) purposely publishing a false or grossly inaccurate report of a court's proceeding; or

(f) purposely failing to obey any mandate, process, or notice relative to juries issued pursuant to Title 3, chapter 15.

(2) A person convicted of the offense of criminal contempt shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-309, Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1967, § 215.50; R.C.M. 1947, § 94-3540

Prior Law: R.C.M. 1947, § 94-3540, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section is substantially the same as prior law. The mental state requirements, "knowingly" and "purposely" are new. Subsection (1)(f) is also new.

Criminal Law Commission Comment

See "The Increasing Use of the Power of Contempt," John L. Hilts, 32 Mont. L. Rev. 183.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

Contempt Key Nos. 1 et seq.
C.J.S. Contempt, §§ 1 et seq.

Law Review Commentaries

R. Goldfarb. The Contempt Power (1963)

Hilts. The increasing use of the power of contempt. 32 Mont. L. Rev. 183 (1971)

Note. Character of response required to support a finding of contempt. 35 N.Y. U. L. Rev. 939 (1960)

Note. Witness's incredible and evasive responses held contemptuous refusal to answer. 60 Colum. L. Rev. 405 (1960)

Notes of Decisions

In General

The power to punish for contempt is inherent in the courts of record of this state, is a necessary incident to the exercise of judicial functions, exists independently of statutes, and cannot be taken away or abridged by the legislature. State ex rel. Metcalf v. District Court, 52 Mont. 46, 155 P. 278 (1916). Accord, Territory v. Murray, 7 Mont. 251, 15 P. 145 (1887); State ex rel. Boston & Montana Consol. Copper and Silver Min. Co. v. Judges, 30 Mont. 193, 76 P. 10 (1904); In re Mettler, 50 Mont. 299, 146 P. 747 (1915). Thus, although the publication of a contemptuous report of a court proceeding is punishable as a misdemeanor under this section, this does not deprive the court of the power to punish such acts as a contempt. State ex rel. Haskell v. Faulds, 17 Mont. 140, 42 P. 285 (1895). Otherwise contemptuous language concerning a dissenting opinion does not constitute contempt of court, since it is the view of an individual justice and not the opinion of the court, but the remedy for such language is an action for libel. In re Nelson, 103 Mont. 43, 60 P.2d 365 (1936).

Constitutionality

The Montana court has held that, although a citizen has a right to publish decisions of the supreme court, comment upon them freely and discuss their correctness, there is no constitutional right of freedom of speech to do so by false and defamatory publications which dispose the public to disregard the judgments or orders of the court. In re Nelson, 103 Mont. 43, 60 P.2d 365 (1936). However, such false publication is punishable as a contempt of court only when published while the cause is still pending. Id. See also, Bridges v. California, 314 U.S. 252 (1941). Thus, the publication of an article in a newspaper, charging a judge with wrongdoing in a cause disposed of by him six months previously, did not constitute con-

stitute contempt of court under this section. State ex rel. Metcalf v. District Court, 52 Mont. 46, 155 P. 278 (1916).

Criminal and Civil Contempt Distinguished

A criminal contempt is conduct that is directed against the dignity and authority of the court; a civil contempt consists of failure to obey the order of the court to do something for the benefit of the opposing party in a civil action. Pelletier v. Glacier County, 107 Mont. 221, 82 P.2d 595 (1938).

Part 4--Official Misconduct

45-7-401. Official misconduct. (1) A public servant commits the offense of official misconduct when in his official capacity he commits any of the following acts:

(a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction;

(b) knowingly performs an act in his official capacity which he knows is forbidden by law;

(c) with the purpose to obtain advantage for himself or another, performs an act in excess of his lawful authority;

(d) solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law; or

(e) knowingly conducts a meeting of a public agency in violation of 2-3-203.

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) The district court shall have exclusive jurisdiction in prosecutions under this section. Any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) may be suspended from his office without pay pending final judgment. Upon final judgment of conviction he shall permanently forfeit his office. Upon acquittal he shall be reinstated in his office and shall receive all backpay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect such impeachment or removal.

Historical Note

Enacted: M.C.C. 1973, § 94-7-401, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 2, Ch. 474, Laws of Montana 1975

Source: Ill. C.C. 1961, § 33-3

Prior Law: R.C.M. 1947, §§ 94-802, 94-803, 94-805, 94-3523, 94-35-141, 94-2906, 94-3910, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section codifies a variety of provisions of similar import found under prior law. It applies to "public servants," defined at M.C.A. 1978, § 45-2-101(51).

The section provides criminal sanctions for failure of a public servant to perform specific mandatory duties set forth outside the criminal code. It also provides sanctions for failure to comply with mandatory duties set forth within the provisions of the criminal code.

To an extent, subsection (1)(d) overlaps with Bribery in Official and Political Matters, M.C.A. 1978, § 45-7-101 and Gifts to Public Servants by Persons Subject to Their Jurisdiction, § 45-7-104. However, this section goes far beyond the offenses of bribery and accepting gifts to encompass any act by a public servant contrary to either statute or regulation. It encompasses acts done in excess of authority (subsection (1)(c)) and failures to perform a mandatory duty (subsection (1)(a)). Notably, the failure to perform in subsection (1)(a) is punishable even though the omission is "negligently" done. "Negligently" is defined at M.C.A. 1978, § 45-2-101(31). Affirmative actions are not punishable unless done "knowingly" or "with a purpose" contrary to law. "Knowingly" is defined at M.C.A. 1978, § 45-2-101(27); "purposely" at M.C.A. 1978, § 45-2-101(52).

The 1975 amendment added subsection (e) making it a violation of this provision to hold a public meeting in violation of § 2-3-203, requiring certain meetings to be open to the public.

The existence of the section does not dispute the fundamental premise that inadequate performance in public office should be regulated by civil service. However, the section does provide an additional means of discouraging misfeasance or malfeasance of public officers.

Criminal Law Commission Comment

The intent of this section is to provide criminal sanctions when a public servant intentionally acts in a manner he knows to be contrary to regulation or statute. The existence of the section does not dispute the fundamental premise that inadequate performance in public office should be regulated by civil service.

The section provides punishment for failure to comply with specific mandatory duties set forth outside of the Criminal Code. It also provides punishment for failure to comply with mandatory duties which are set forth in provisions of the Criminal Code.

Cross References

Definition of "public servant" M.C.A. 1978, § 45-2-101(51)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "negligently" M.C.A. 1978, § 45-2-101(31)
Bribery in Official and Political Matters M.C.A. 1978, § 45-7-101
Gifts to Public Servants by Persons Subject to Their Jurisdiction M.C.A. 1978, § 45-7-104
Meetings of Public Agencies to be Open to Public--Exceptions M.C.A. 1978, § 2-3-203

Library References

Officers Key No. 121
C.J.S. Officers, §§ 133 et seq.

Law Review Commentaries

Note. Developments in the law of search and seizure. 59 Nw. U. L. Rev. 611 (1964)

Spak and Parenti. Conflict of interest. 52 Chi.-Kent L. Rev. 64 (1975)

Notes of Decisions

In General

An indictment which charged that a police officer solicited a fee to have a charge of petty theft and possession of fictitious license plates dismissed when charge came up for hearing and which charged that he knew he was not authorized to solicit the fee was sufficient to charge the offense of "official misconduct." People v. Smith, 57 Ill. App.2d 74, 206 N.E.2d 463, cert. den. 383 U.S. 910 (1965).

An indictment which did not set forth some act constituting malfeasance of office was not sufficient in view of the fact that the statute does not specifically set out what conduct constitutes malfeasance in office. People v. Crosson, 30 Ill. App.2d 57, 173 N.E.2d 552 (1961). Use of word "corruptly" in indictment purporting to charge malfeasance in office was merely conclusion of law on part of pleader and added nothing to accusation. Id.

An individual county commissioner may be criminally liable under this section for entering into a contract for the purchase of road equipment in excess of $10,000 cost without publishing notice calling for bids (as required by § 16-1803, R.C.M. 1947 [now M.C.A. 1978, § 7-5-2301]). State v. Cole, ____ Mont. ____, 571 P.2d 87 (1977). Any contract made by an individual board member without board approval is "an act in excess of his lawful authority," and a crime under this section. State v. Cole, ____ Mont. ____, 571 P.2d 87 (1977).

Penalty

Forfeiture of office is automatic upon conviction under § 94-7-401(4) [now M.C.A. 1978, § 45-7-401(4)] and is not stayed by the filing of an appeal from the conviction. State v. DeGeorge, 173 Mont. 35, 560 P.2d 138 (1977).

Chapter VIII: OFFENSES AGAINST PUBLIC ORDER

Part 1--Conduct Disruptive of Public Order

45-8-101. Disorderly conduct. (1) A person commits the offense of disorderly conduct if he knowingly disturbs the peace by:

(a) quarreling, challenging to fight, or fighting;

(b) making loud or unusual noises;

(c) using threatening, profane, or abusive language;

(d) discharging firearms;

(e) rendering vehicular or pedestrian traffic impassable;

(f) rendering the free ingress or egress to public or private places impassable;

(g) disturbing or disrupting any lawful assembly or public meeting;

(h) transmitting a false report or warning of a fire, impending explosion, or other catastrophe in such a place that its occurrence would endanger human life; or

(i) creating a hazardous or physically offensive condition by any act that serves no legitimate purpose.

(2) A person convicted of the offense of disorderly conduct shall be fined not to exceed $100 or be imprisoned in the county jail for a term not to exceed 10 days, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-101, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-1420, 94-2901, 94-2902, 94-3560 through 94-3563, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section gathers in one statute former Montana laws relative to the public peace and provides a more concise statement of those laws. This section is an attempt to cover the entire range of minor breaches of the public peace.

Criminal Law Commission Comment

There appeared to have been no distinct crime known as disorderly conduct at common law. Some of the acts now included by statute in this category fell under the general heading of breaches of the peace such as fighting or causing a disturbance which would tend to provoke fighting among those present.

In many jurisdictions statutes have developed which go beyond merely preventing breaches of the peace. Included generally are acts which offend others or annoy them or create resentment without necessarily leading to a breach of peace. The crime of disorderly conduct appears to be directed at curtailing that kind of behavior which disrupts and disturbs the peace and quiet of the community by various kinds of annoyances. These acts standing alone may not be criminal under other categories such as theft, or assault and battery, or libel, etc. The difficulty is in defining the conduct which falls within these objectives, for a given act under some circumstances is not objectionable, while under others it is. Thus sounding a horn at a carnival is not objectionable. But sounding it at midnight in a residential section might be. The intent of the provision is to use somewhat broad, general terms to establish a foundation for the offense and leave the application to the facts of a particular case. Two important qualifications are specified in making the application, however. First, the offender must knowingly make a disturbance of the enumerated kind, and second, the behavior must disturb "others." It is not sufficient that a single person or a very few persons have grounds for complaint.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Library References

Breach of the Peace Key No. 1
C.J.S. Breach of the Peace, §§ 1-6

Law Review Commentaries

Comment. Disorderly conduct; riot. Model Penal Code, Tent. Draft No. 13, § 250.1, p. 4 (April 19, 1961)

Comment. Public disorder offenses under Pennsylvania's New Crimes Code. 78 Dick. L. Rev. 15 (1973)

Comment. Public order and the right of assembly in England and the United States: A comparative study. 47 Yale L. J. 404 (1938)

Goldstein. Police discretion not to invoke the criminal process: Low visibility decisions in the administration of justice. 69 Yale L. J. 543 (1960)

Note. Limitations on the right of assembly. 23 Calif. L. Rev. 180 (1935)
Note. Restrictions on the right of assembly. 42 Harv. L. Rev. 265 (1928)
Stewart. Public speech and public order in Britain and the United States. 13 Vand. L. Rev. 625 (1960)

45-8-102. Failure of disorderly persons to disperse. (1) Where two or more persons are engaged in disorderly conduct, a peace officer, judge, or mayor may order the participants to disperse. A person who purposely refuses or knowingly fails to obey such an order commits the offense of failure to disperse.

(2) A person convicted of the offense of failure to disperse shall be fined not to exceed $100 or be imprisoned in the county jail for a term not to exceed 10 days, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-102, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 250.1(2)

Prior Law: R.C.M. 1947, § 94-35-244, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Failure to Disperse is basically a restatement of the former Montana law on the subject. However, it requires "disorderly conduct" while previous law prohibited remaining at the place of a "riot, rout, or unlawful assembly" after being warned to leave. Also, the new section enumerates the persons having power to order dispersement. The new law, therefore, is broader as to the circumstances under which an order to disperse may be given, and narrower as to the persons who may give such an order so as to bring the assembled persons within the statute.

Criminal Law Commission Comment

State statutes commonly penalize refusal to disperse when ordered to do so by those in authority and present at the scene of an unlawful assembly. The elements of the offense are that at least two persons be involved and that the group members must purposely refuse or fail to disperse when they are ordered to do so by an official of the law or one given authority by law.

Cross References

Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Law Review Commentaries

Comment. Disorderly conduct; riot. Model Penal Code, Tent. Draft No. 13, § 250.1, p. 4 (April 19, 1961)

Comment. Public disorder offenses under Pennsylvania's New Crimes Code. 78 Dick. L. Rev. 15 (1973)

Comment. Public order and the right of assembly in England and the United States: A comparative study. 47 Yale L. J. 404 (1938)

Goldstein. Police discretion not to invoke the criminal process: Low visibility decisions in the administration of justice. 69 Yale L. J. 543 (1960)

Note. Limitations on the right of assembly. 23 Calif. L. Rev. 180 (1935)

Note. Restrictions on the right of assembly. 42 Harv. L. Rev. 265 (1928)

Stewart. Public speech and public order in Britain and the United States. 13 Vand. L. Rev. 625 (1960)

45-8-103. Riot. (1) A person commits the offense of riot if he purposely and knowingly disturbs the peace by engaging in an act of violence or threat to commit an act of violence as part of an assemblage of five or more persons, which act or threat presents a clear and present danger of or results in damage to property or injury to persons.

(2) A person convicted of the offense of riot shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-103, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-35-181, 94-35-182, 94-35-183, 94-35-242, 94-35-243, and 94-35-244, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

At common law there were three substantive offenses involving group disorders:

unlawful assembly, rout, and riot. "Unlawful assembly" was the gathering of three or more persons with a common plan which, if carried out, would result in riot. "Rout" was the movement of these people toward the commission of acts which would constitute riot when committed. Former law incorporated this common law scheme, but the former sections on rout and unlawful assembly have been repealed, and riot has been changed.

This section on Riot covers all group acts of violence and threats of violence. To be in violation of this section the assemblage must have proceeded to or beyond the point of threatening damage to property or injury to persons. The acts of the group must constitute at least a "clear and present danger" of causing such result. Under former Montana law, Riot covered only threats "accompanied by immediate power of execution." R.C.M. 1947, § 94-35-181. The new definition does away with the almost impossible task of defining or determining what is "immediate power of execution." It also does away with the problem of determining what is an "attempt" at riot or an "advance toward the commission of an act which would be riot." The latter constituted the old offense of Rout, R.C.M. 1947, § 94-35-183. These problems culminate in what under old law would be a conceivable situation, of a group of persons advancing toward a threat to use violence, thereby committing the offense of Rout.

There are other important differences between this section and prior law and the common law. The required number of persons is five rather than two, as under R.C.M. 1947, § 94-35-181, or three as under common law; the concept of malice has been replaced with the mental states "knowingly" and "purposely," defined in § 45-2-101; and the penalty for the offense has been lowered from felony punishment to a misdemeanor.

This chapter, like all of the new code, attempts to define crimes in terms of objective and observable acts. The new code, like the old one, presents a hierarchy of offenses, but the progression proceeds on a different basis. The individual members of as assemblage may be guilty of disorderly conduct if they are loud, quarrelsome or abusive, or if they make streets, sidewalks or building entrances impassible. M.C.A. 1978, § 45-8-101. This is the manner in which the new code deals with most conduct which is thought of as "riotous," and there are only a few individuals who can be dealt with individually. If the assembly is so large that individual identification is impossible or very difficult, the members can be ordered to disperse and be arrested for that offense, M.C.A. 1978, § 45-8-102, if they do not. If the assemblage goes beyond disorderly conduct and threatens or commits violence, then the offense of riot is committed. This is a more serious offense, as is reflected in the penalties. Further, the leaders or inciters can be charged under M.C.A. 1978, § 45-8-104, Incitement to Riot.

Criminal Law Commission Comment

The common-law misdemeanor, "unlawful assembly," was a gathering of three or more persons with the common purpose of committing an unlawful act. When an act was done toward carrying out this purpose, the offense was "rout." The actual beginning of the perpetration of the unlawful act became "riot." All states penalize some form of unlawful assembly or riot. The section follows the common law with the exception of the number of people involved and the inclusion of the language "purposely and knowingly," which is the standard mens rea requirement in the code.

Cross References

Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "threat" M.C.A. 1978, § 45-2-101(62)
Definition of "act" M.C.A. 1978, § 45-2-101(1)
Definition of "property" M.C.A. 1978, § 45-2-101(48)
Failure of Disorderly Persons to Disperse M.C.A. 1978, § 45-8-102

Library References

Riot Key Nos. 1 et seq.
C.J.S. Riot, § 1

Law Review Commentaries

Comment. Disorderly conduct; riot. Model Penal Code, Tent. Draft No. 13, § 250.1, p. 4 (April 19, 1961)

Comment. Public disorder offenses under Pennsylvania's New Crimes Code. 78 Dick. L. Rev. 15 (1973)

Comment. Public order and the right of assembly in England and the United States: A comparative study. 47 Yale L. J. 404 (1938)

Goldstein. Police discretion not to invoke the criminal process: Low visibility decisions in the administration of justice. 69 Yale L. J. 543 (1960)

Note. Limitations on the right of assembly. 23 Calif. L. Rev. 180 (1935)

Note. Restrictions on the right of assembly. 42 Harv. L. Rev. 265 (1928)

Stewart. Public speech and public order in Britain and the United States. 13 Vand. L. Rev. 625 (1960)

45-8-104. Incitement to riot. (1) A person commits the offense of incitement to riot if he purposely and knowingly commits an act or engages in conduct that urges other persons to riot. Such act or conduct shall not include the mere oral or written advocacy of ideas or expression of belief which advocacy or expression does not urge the commission of an act of immediate violence.

(2) A person convicted of the offense of incitement to riot shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-104, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

Inciting to riot is the employment of words, signs, or actions and movements with the purpose of provoking a riot. The concept is new to Montana criminal law. The rationale behind the section is that preventing a riot before substantial injury to property or persons has occurred is the best method of dealing with such social unrest. While the substantive offense of riot is in progress, normal law enforcement procedures are generally unworkable, and law enforcement officials may overreact, increasing the level of violence. The section contemplates precluding riots by discouraging their immediate and proximate cause. It thereby provides the possibility of more effective law enforcement.

This section defines an offense which would likely be covered under the inchoate offense of solicitation. M.C.A. 1978, § 45-4-101. The purpose of a single statute specifically prohibiting incitement to riot is to focus upon a method of preventing an offense which has been committed increasingly within the context of general social upheaval in many jurisdictions.

Criminal Law Commission Comment

This section introduces a new concept to the Montana Criminal Code. The intent of the section is to specifically define an offense which might otherwise be covered in another part of the code.

It is conceivable that an act constituting incitement to riot would be covered under the inchoate offense of solicitation. However, with the increase in the general social upheaval in many jurisdictions, a single statute specifically prohibiting incitement to riot might provide more effective law enforcement. Preventing a riot before substantial injury to property and persons has occurred is the only practical method of dealing with such social unrest, for after the substantive offenses are committed, and a riot is in progress, normal law enforcement procedures are generally unworkable and the tactics used by enforcement officials to restore order often extend beyond that which may be considered a reasonable use of force under the circumstances.

Cross References

Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "act" M.C.A. 1978, § 45-2-101(1)
Solicitation M.C.A. 1978, § 45-4-101
Riot M.C.A. 1978, § 45-8-103

Library References

Riot Key Nos. 1 et seq.
C.J.S. Riot, §§ 1 et seq.

Law Review Commentaries

Comment. Disroderly conduct; riot. Model Penal Code, Tent. Draft No. 13, § 250.1, p. 4 (April 19, 1961)

Comment. Public disorder offenses under Pennsylvania's New Crimes Code. 78 Dick. L. Rev. 15 (1973)

Comment. Public order and the right of assembly in England and the United States: A comparative study. 47 Yale L. J. 404 (1938)

Goldstein. Police discretion not to invoke the criminal process: Low visibility decisions in the administration of justice. 69 Yale L. J. 543 (1960)

Note. Limitations on the right of assembly. 23 Calif. L. Rev. 180 (1935)

Note. Restrictions on the right of assembly. 42 Harv. L. Rev. 265 (1928)

Stewart. Public speech and public order in Britain and the United States. 13 Vand. L. Rev. 625 (1960)

45-8-105. Criminal syndicalism. (1) "Criminal syndicalism" means the advocacy of crime, malicious damage or injury to property, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

(2) A person commits the offense of criminal syndicalism if he purposely or knowingly:

(a) orally or by means of writing, advocates or promotes the doctrine of criminal syndicalism;

(b) organizes or becomes a member of any assembly, group, or organization which he knows is advocating or promoting the doctrine of criminal syndicalism; or

(c) for or on behalf of another whose purpose is to advocate or promote the doctrine or criminal syndicalism, distributes, sells, publishes, or publicly displays any writing advocating or advertising such doctrine.

(3) A person convicted of the offense of criminal syndicalism shall be imprisoned in the state prison for a term not to exceed 10 years.

(4) Whoever, being the owner or in possession or control of any premises, knowingly permits any assemblage of persons to use such premises for the purpose of advocating or promoting the doctrine of criminal syndicalism shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-503, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 29, Ch. 359, Laws of Montana 1977

Source: Minn. Crim. Code, 1963, § 609.405

Prior Law: R.C.M. 1947, §§ 94-4401 et seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Criminal Syndicalism encompasses 26 former statutes on the subject in the old Criminal Code. The statute was intended to provide a concise approach to dealing with activities which have a tendency to promote violence and disrupt traditional governmental and political processes. To sustain a conviction under this section, the state must show that the defendant committed one of the three acts listed in subsection (2) and that he did so purposely or knowingly. Subsection (4) provides misdemeanor punishment for the owner of premises who allows criminal syndicalism to occur on his property. The wording for this section is substantially the same as the Minnesota source.

The 1977 amendment made only minor changes in wording, changing "who purposely thereby" in subsection (2)(c) to "whose purpose is" and "premise" is subsection (4) to "premises."

Criminal Law Commission Comment

The intent of the provision is to provide a more concise statute to deal with those social elements which advocate violence, subversion and destruction by (1) eliminating the cumbersome and convoluted language found in the old sedition statute (R.C.M. 1947, section 94-4401) and (2) modernizing the statute for application to present social needs.

There can be little doubt that the former sedition statute is obsolete. The statute was derived from the Espionage Act of 1917, as amended. (40 Stat. 553) The amended language provided a more detailed delineation of acts causing the offense and broadened immensely the scope of activity that could be included therein. The amendment was passed exclusively as a wartime measure. In upholding the constitutionality of the section, Justice Holmes said in Schenck v. United States, 249 US 47, 52, 63 L Ed 470, 39 S Ct 247 (1919) "When a nation is at war, many things that might be said in time of peace are such a hinderance to its effect that those utterances will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right." The Congress of the United States, in keeping with the intent of the section as a wartime measure, repealed it in 1921 (41 Stat. 1395, 1360) and replaced it with the original act. This, in turn was repealed in 1948 (62 Stat. 862). The former Montana statute was directly derived from the 1918 amendment to the Espionage Act of 1917. In spite of the federal government's use of the language as a wartime provision, the statute remained intact in Montana for nearly half a century. There is an additional reason for re-

pealing the former sedition statute. In Commonwealth of Pennsylvania v. Nelson, 350 US 497, 100 L Ed 640, 76 S Ct 477 (1955) Chief Justice Warren, writing for the majority stated, "The Congress determined in 1940 that it was necessary for it to re-enter the field of antisubversive legislation which it had abandoned in 1921. In that year it enacted the Smith Act which proscribed advocacy of the overthrow of any government--federal, state or local--by force and violence and organization of and knowing membership in a group which so advocates." Referring further to the Internal Security Act of 1950 (50 U.S.C. § 781 et seq.), Warren went on to say, "We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of Sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the states to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law." The opinion also stated that "enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program."

Cross References

Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)

Library References

Insurrection and Sedition Key No. 1
C.J.S. Insurrection and Sedition, § 1

Law Review Commentaries

Comment. Due process, freedom of speech and right of assembly, conviction under state criminal syndicalism law for participation in communist meeting. 21 Minn. L. Rev. 744 (1937)

Enker. Impossibility in criminal attempts. 53 Minn. L. Rev. 665 (1969)

45-8-106. Bringing armed men into the state. (1) A person commits the offense of bringing armed men into the state when he knowingly brings or aids in bringing into this state an armed person or armed body of men for the purpose of engaging in criminal or socially disruptive activities or to usurp the powers of law enforcement authorities.

(2) A person convicted of the offense of bringing armed men into the state shall be imprisoned in the state prison for a term not to exceed 10 years.

Historical Note

Enacted: M.C.C. 1973, § 94-7-504, Sec. 1, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, §§ 94-3524, 94-3920

Prior Law: R.C.M. 1947, §§ 94-3524 and 94-3920, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section on Bringing Armed Men Into the State substantively varies from both R.C.M. 1947, § 94-3524 and § 94-3920 in that it covers all situations where the purpose of such importation is criminal or socially disruptive. The previous sections covered only importation for the purpose of discharging duties of peace officers in preserving the peace or suppressing violence. Also, this new section omits the exception in R.C.M. 1947, § 94-3524 for situations where the governor or legislature solicits and permits such importation.

Criminal Law Commission Comment

This is intended to deal with those individuals who would bring criminal and politically adverse elements into Montana to carry on criminal or socially disruptive activities, or to take over duties of law enforcement authorities.

Cross References

Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Library References

Insurrection and Sedition Key No. 2
C.J.S. Insurrection and Sedition, § 3

45-8-107 through 45-8-110 reserved.

45-8-111. Public nuisance. (1) "Public nuisance" means:

(a) a condition which endangers safety or health, is offensive to the senses, or obstructs the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or by any considerable number of persons;

(b) any premises where persons gather for the purpose of engaging in unlawful conduct; or

(c) a condition which renders dangerous for passage any public highway or right-of-way or waters used by the public.

(2) A person commits the offense of maintaining a public nuisance if he knowingly creates, conducts, or maintains a public nuisance.

(3) Any act which affects an entire community or neighborhood or any considerable number of persons (as specified in subsection (1)(a)) is no less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

(4) A person convicted of maintaining a public nuisance shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both. Each day of such conduct constitutes a separate offense.

Historical Note

Enacted:	M.C.C. 1973, § 94-8-107, Sec. 1, Ch. 513, Laws of Montana 1973
Amended:	Sec. 30, Ch. 559, Laws of Montana 1977
Source:	Cal. Pen. Code 1970, §§ 370 through 372
Prior Law:	R.C.M. 1947, §§ 94-1001 through 94-1011, 94-35-120, repealed, Sec. 32, Ch. 513, Laws of Montana 1973; R.C.M. 1947, § 57-101, et seq. (not repealed)

Annotator's Note

This section and § 45-8-112 were originally enacted as one statute. Former § 45-8-111(5) became § 45-8-112 under the recodification of the Montana Code Annotated of 1978. The abatement of nuisances and punishment for creating such conditions have presented continuing difficulty for law enforcement authorities. Certain activities, such as operating gambling establishments and houses of prostitution, have long been treated as criminal nuisances against whih public officials could bring legal actions. The criminal status of other activities and conditions has been less clear, although civil actions have been allowed. R.C.M. 1947, § 94-35-120, which did provide misdemeanor penalties for maintaining a nuisance was unsatisfactorily vague in defining what type of nuisance could be so punished. This new provision on public nuisance, which is quite similar to the California provision upon which it is

based, should alleviate many of the prior difficulties. The definition of "public nuisance," as provided in subsection (1) is sufficiently broad to encompass all activities specifically outlawed under prior statutes as well as conditions, such as noisy installations, polluting septic tanks, etc., which while offensive may be less certain in offensiveness than the activities traditionally banned. The remaining subsections provide that both civil and criminal penalties may be utilized and that anyone, public officer or private individual may bring the action. This provision permits the county attorney to bring an action in the name of the state where the general public interest is involved without depriving the individual of a remedy if the county attorney feels the situation is too limited or personal to require state intervention. It should be noted that this section does not repeal any of the portions of R.C.M. 1947, Title 57 [now M.C.A. 1978, Title 27, Chapter 30, which specifically provide civil remedies for nuisances.

The 1977 amendment made minor stylistic changes.

Criminal Law Commission Comment

The phrase "any considerable number of persons" as used in the provision will undoubtedly be subject to court interpretation. The phrase has not been interpreted by any Montana case to date. The New York Court of Appeals held that "The expression 'any considerable number of persons' is used solely for the purpose of differentiating a public nuisance, which is subject to indictment, from a private nuisance. But a considerable number of persons does not necessarily mean a very great or any particular number of persons." People v. Kings County Iron Foundry, 209 NY 530, 102 NE 598, 599 (1913).

The offense of "nuisance," in some ways, resembles disorderly conduct in its requirement that the proscribed conduct annoy, alarm or inconvenience the public or "a considerable number of persons" however disorderly conduct relates to existing acts or acts of brief duration while nuisance usually involves the creation or maintenance of a continuing condition. In practical application, most criminal nuisance cases fall into two categories: (1) the maintenance of manufacturing plants, entertainment resorts and the like, which by virtue of excessive noise, noxious gases, etc., annoy or offend groups or areas of the community; and (2) the conduct of resorts where people gather for illegal or immoral purposes. Subdivision (1)(a) deals with the first category. One difficulty of this offense is the fine balancing of the relative rights of plant operators or business people on the one hand and the residents of the vicinity on the other. The problem is accentuated by the fact that "public nuisance," as defined and construed, requires little if any criminal intent, being virtually a crime of absolute liability.

Cross References

Definition of "property" M.C.A. 1978, § 45-2-101(48)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Nuisances M.C.A. 1978, Title 27, Chapter 30

Library References

Nuisance Key Nos. 1, et seq.

C.J.S. Nuisances, §§ 1 et seq.

Law Review Commentaries

Berger. Private property rights. 8 Loy. L. Rev. 253 (1975)
Comment. Adult theater or bookstore: Public nuisance. 10 U.S.F. L. Rev. 115 (1975)
Comment. Enjoining a public nuisance. 19 Hast. L. J. 400 (1968)
Comment. Local regulation of pornography. 10 U. Cal.-D. L. Rev. 309 (1977)
Comment. Obscenity--right to protection under the first amendment. 10 Santa Clara L. Rev. 288 (1970)
Jacobs & Levine. Redevelopment and clearance of municipal slum areas. 8 Hast. L. J. 241 (1957)
Mathis. Urban noise: Insidious but escalating pollutant. 46 L.A. B. Bull. 438 (1971)

45-8-112. Action to abate a public nuisance. (1) Every public nuisance may be abated and the persons maintaining such nuisance and the possessor of the premises who permits the same to be maintained may be enjoined from such conduct by an action in equity in the name of the state of Montana by the county attorney or any resident of the state.

(2) Upon the filing of the complaint in such action, the judge may issue a temporary injunction.

(3) In such action evidence of the general reputation of the premises is admissible for the purpose of proving the existence of the nuisance.

(4) If the existence of the nuisance is established, an order of abatement shall be entered as part of the judgment in the case. The judge issuing the order may, in his discretion:

(a) confiscate all fixtures used on the premises to maintain the nuisance and either sell them and transmit the proceeds to the county general fund, destroy them, or return them to their rightful ownership;

(b) close the premises for any period not to exceed 1 year, during which period the premises shall remain in the custody of the court;

(c) allow the premises to be opened upon posting bond sufficient in amount to assure compliance with the order of abatement. The bond shall be forfeited if the nuisance is continued or resumed. The procedure for forfeiture or discharge of the bond shall be as provided in 46-9-502 and 46-9-503; or

(d) any combination of the above.

Historical Note

Enacted: M.C.C. 1973, § 94-8-107(5), Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 30, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: R.C.M. 1947, §§ 94-1001 through 94-1011, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section was originally enacted as R.C.M. 1947, § 94-8-107(5), but was made a section unto itself in the recodification process. The Annotator's Note and Criminal Law Commission Comments for § 45-8-111 are, therefore, relevant to this section as well. The 1977 amendment substituted "public nuisance" for "premises upon which a public nuisance is being maintained" and added "of the premises of another" in subsection (a) and made other minor changes in style and phraseology.

Criminal Law Commission Comment

See comment under M.C.A. 1978, § 45-8-111.

Cross References

Public nuisance M.C.A. 1978, § 45-5-111
Definition of "premises" M.C.A. 1978, § 45-2-101(47)
Conditions of bail--violation thereof M.C.A. 1978, §§ 46-9-501 through 46-9-505
Nuisances M.C.A. 1978, Title 27, Chapter 30

Library References

Nuisance Key Nos. 1, et seq.
C.J.S. Nuisances, §§ 1 et seq.

Law Review Commentaries

Berger. Private property rights. 8 Loy. L. Rev. 253 (1975)

Comment. Adult theater or bookstore: Public nuisance. 10 U.S.F. L. Rev. 115 (1975)
Comment. Enjoining a public nuisance. 19 Hast. L. J. 400 (1968)
Comment. Local regulation of pornography. 10 U. Cal.-D. L. Rev. 309 (1977)
Comment. Obscenity--right to protection under the first amendment. 10 Santa Clara L. Rev. 288 (1970)
Jacobs & Levine. Redevelopment and clearance of municipal slum areas. 8 Hast. L. J. 241 (1957)
Mathis. Urban noise: Insidious but escalating pollutant. 46 L.A. B. Bull. 438 (1971)

45-8-113. Creating a hazard. (1) A person commits the offense of creating a hazard if he knowingly:

(a) discards in any place where it might attract children a container having a compartment of more than 1 1/2 cubic feet capacity and a door or lid that locks or fastens automatically when closed and cannot easily be opened from the inside and fails to remove the door, lid, or locking or fastening device;

(b) being the owner or otherwise having possession of property upon which there is a well, cistern, cesspool, mine shaft, or other hole of depth of 4 feet or more and a top width of 12 inches or more, fails to cover or fence it with a suitable protective construction;

(c) tampers with an aircraft without the consent of the owner;

(d) being the owner or otherwise having possession of property upon which there is a steam engine or steam boiler, continues to use a steam engine or steam boiler which is in an unsafe condition;

(e) being a person in the act of game hunting, acts in a negligent manner or knowingly fails to give all reasonable assistance to any person whom he has injured; or

(f) deposits any hard substance upon or between any railroad tracks which will tend to derail railroad cars or other vehicles.

(2) A person convicted of the offense of creating a hazard shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6

months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-108, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 31, Ch. 359, Laws of Montana 1977

Source: Proposed Mich. C.C. 1967, § 7505

Prior Law: R.C.M. 1947, §§ 94-35-125, 94-35-211, 94-35-214, 94-35-265, 94-35-269, 94-35-271, 94-35-272, and 94-3569, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section encompasses offenses which were covered by eight prior Montana statutes. Subsection (b) is a recodification and expansion of R.C.M. 1947, § 94-35-125. Subsection (c) is a recodification of R.C.M. 1947, § 94-35-272. Subsection (d) is a consolidation of R.C.M. 1947, §§ 94-35-211 and 94-35-214. Subsection (d) covers conditions which may also be regulated by the boiler regulations in Title 70, Part 1. Subsection (e) is essentially a recodification of R.C.M. 1947, § 94-35-269. It should be noted that a negligent act under (e) might also be prosecuted under § 45-5-201 (b), negligently causing bodily injury to another, where bodily injury results from the negligent manner of hunting. Subsection (a) is much broader than the prior law on attractive nuisances. R.C.M. 1947, § 94-35-265 applied to only ice boxes and refrigerators which are dangerous to children, whereas this subsection applies to all dangerous containers. Subsection (f) is also much broader than prior law, which made it an offense to drive cattle onto railroad tracks. R.C.M. 1947, § 94-3569.

The purpose of the section is to prevent the creation or maintenance of conditions which are dangerous to people. Subsection (a) is designed primarily to protect children. Subsection (b) deals with conditions which are dangerous to unsuspecting or handicapped adults and children. The section deals with several unrelated problems in imposing criminal liability on aircraft tamperers, railroad derailers, and possessors of steam engines and steam boilers. Subsection (e) imposes criminal liability upon hunters who fail to aid a person whom they have injured. The mens rea requirement for each offense is "knowingly," defined at M.C.A. 1978, § 45-2-101(27).

The section covers situations which may also entail civil tort liability. The penalty for each offense is a misdemeanor. The 1977 amendment made minor changes in phraseology, punctuation and style.

Criminal Law Commission Comment

The section is designed primarily to protect children, unsuspecting or handicapped adults and injured hunting victims. In addition it deals with several unrelated and somewhat unique problems in imposing criminal liability on aircraft meddlers, railroad derailers and possessors of steam engines or steam boilers. The mens rea requirement for each offense is "knowingly" and the penalty is a misdemeanor only.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "tamper" M.C.A. 1978, § 45-2-101(61)
Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Definition of "negligent" M.C.A. 1978, § 45-2-101(31)
Assault--negligently causing bodily injury to another M.C.A. 1978, § 45-5-201(b)

Library References

Steam Key Nos. 1, 4
C.J.S. Steam, § 1

45-8-114. Failure to yield party line. (1) Any person who fails to relinquish a telephone party line or public pay telephone after he has been requested to do so to permit another to place an emergency call to a fire department or police department or for medical aid or ambulance service shall be imprisoned for a term not to exceed 10 days or fined not to exceed $25, or both.

(2) It is a defense to prosecution under subsection (1) that the accused did not know or did not have reason to know of the emergency in question or that the accused was himself using the telephone party line or public pay telephone for such an emergency call.

(3) Any person who requests another to relinquish a telephone party line or public pay telephone on the pretext that he must place an emergency call, knowing such pretext to be false, shall be imprisoned for a term not to exceed 10 days or fined not to exceed $25, or both.

(4) Every telephone company doing business in this state shall print a copy of subsections (1), (2), and (3) of this section in each telephone directory published by it after January 1, 1974.

Historical Note

Enacted: M.C.C. 1973, § 94-8-109, Sec. 1, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, §§ 94-35-221.1 through 94-35-221.4

Prior Law: R.C.M. 1947, §§ 94-35-221.1 through 94-35-221.4, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section is a recodification of old laws dealing with emergency telephone calls. The only change from prior law is the omission of "spiritual aid" as a basis for making an emergency call which is privileged.

Criminal Law Commission Comment

This section is a recodification of old laws dealing with party lines.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Part 2--Offensive, Indecent, and Inhumane Conduct

45-8-201. Obscenity. (1) A person commits the offense of obscenity when, with knowledge of the obscene nature thereof, he purposely or knowingly:

(a) sells, delivers, or provides or offers or agrees to sell, deliver, or provide any obscene writing, picture, record, or other representation or embodiment of the obscene to anyone under the age of 18;

(b) presents or directs an obscene play, dance, or other performance, or participates in that portion thereof which makes it obscene, to anyone under the age of 18;

(c) publishes, exhibits, or otherwise makes available anything obscene to anyone under the age of 18;

(d) performs an obscene act or otherwise presents an obscene exhibition of his body to anyone under the age of 18;

(e) creates, buys, procures, or possesses obscene matter or material with the purpose to disseminate it to anyone under the age of 18; or

(f) advertises or otherwise promotes the sale of obscene material or materials represented or held out by him to be obscene.

(2) A thing is obscene if:

(a)(i) it is a representation or description of perverted ultimate sexual acts, actual or simulated;

(ii) it is a patently offensive representation or description of normal ultimate sexual acts, actual or simulated; or

(iii) it is a patently offensive representation or description of masturbation, excretory functions, or lewd exhibition of the genitals; and

(b) taken as a whole the material:

(i) applying contemporary community standards, appeals to the prurient interest in sex;

(ii) portrays conduct described in (2)(a)(i), (ii), or (iii) of this section in a patently offensive way; and

(iii) lacks serious literary, artistic, political, or scientific value.

(3) In any prosecution for an offense under this section, evidence shall be admissible to show:

(a) the predominant appeal of the material and what effect, if any, it would probably have on the behavior of people;

(b) the artistic, literary, scientific, educational, or other merits of the material;

(c) the degree of public acceptance of the material in the community;

(d) appeal to prurient interest or absence thereof in advertising or other promotion of the material; or

(e) purpose of the author, creator, publisher, or disseminator.

(4) A person convicted of obscenity shall be fined at least $500 but not more than $1,000 or imprisoned in the county jail for a term not to exceed 6 months, or

both.

(5) Cities, towns, or counties may adopt ordinances or resolutions which are more restrictive as to obscenity than the provisions of this section and 45-8-202.

Historical Note

Enacted: M.C.C. 1973, § 94-8-110, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 407, Laws of Montana 1975; Sec. 1, Initiative No. 79, approved Nov. 7, 1978.

Source: Ill. C.C. 1961, Title 38, § 11-20

Prior Law: R.C.M. 1947, §§ 94-3601 through 94-3619, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

The 1975 amendment rewrote subsection (2), changed the punishment subsection (4) so as to provide for a minimum fine of five hundred dollars ($500)--the former maximum fine--and added subsection (5) which invalidated municipal ordinances more restrictive than this section and § 45-8-202 (Public Display of Offensive Sexual Material). The 1979 amendment changed the standard to be applied from a statewide standard to a community based standard by substituting "community" for "Montana" in subsection (2)(d)(i) and "the community" for "this state" in subsection (3)(c). Additionally, subsection (5) was completely changed to allow communities to adopt ordinances more restrictive as to obscenity than the state statutes.

As originally enacted subsection (2) was patterned after the Illinois provision and the proposal of the Model Penal Code 1962, section 251.4, both of which were designed to comport with the definition of obscenity set forth in Memoirs v. Massachusetts, 383 U.S. 413 (1965) which established the following three-part test: a thing is obscene if: (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) the material is patently offensive because it affronts community standards relating to the description or representation of sexual materials; and (3) the material is utterly without redeeming social value.

However, in Miller v. California, 413 U.S. 15 (1973) the Supreme Court discarded the Memoirs test and adopted a new test. Subsection (2) was rewritten to comply with the constitutional standards enunciated in Miller.

Subsections (1) (a) through (1) (e) are aimed at distribution of obscene materials to minors. Only subsection (f) is designed to apply to the adult community--and then, only for common pandering.

Criminal Law Commission Comment

This section closely follows section 11-20 of the Illinois Criminal Code,

which is essentially the same as the American Law Institute Model Penal Code Draft. Slight changes in wording were undertaken in recognition that today's society often condones literature, movies and other art which may incidentally provide erotic stimulation. The significant difference between this section and the prior provisions is that a violation cannot occur unless the obscene art is specifically directed to a person under the age of majority with the exception of subdivision (1)(f) which is aimed at "pandering," using its common definition.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)

Library References

Obscenity Key Nos. 1 et seq.
C.J.S. Obscenity, §§ 1-3

Law Review Commentaries

Comment. Community standards and the regulation of obscenity. 24 DePaul L. Rev. 185 (1974)

Comment. Dirty words and dirty politics: Cognitive dissonance in the first amendment. 34 U. Chi. L. Rev. 367 (1967)

Comment. Miller v. California: A cold shower for the first amendment. 48 St. John's L. Rev. 568 (1974)

Comment. Miller v. California: A mandate for new obscenity legislation. 45 Miss. L. J. 435 (1974)

Comment. Obscenity in the mails: Post office department procedures and the first amendment. 58 Nw. U. L. Rev. 664 (1963)

Gertz. The Illinois battle over "Tropic of Cancer." 46 Chi. B. Rec. 161 (1965)

Gillis. Obscenity: The man not the book. 55 Ill. B. J. 463 (1967)

Note. California v. LaRue: The Supreme Court's view of wine, women, and the first amendment. 68 Nw. U. L. Rev. 130 (1973).

Note. Illinois' obscenity statute after Miller v. California. 1976 Ill. L. F. 190 (1976)

Note. Miller v. California. 11 Houston L. Rev. 224 (1973)

Note. Obscenity--admissibility of evidence of contemporary community standards. 12 DePaul L. Rev. 337 (1963)

Note. People v. Butler: The proper community standard for judging obscenity remains unsettled. 66 Nw. U. L. Rev. 849 (1972)

Port. A new evaluation of judging obscenity. 47 Chi. B. Rec. 344 (1966)

Port. Standards of judging obscenity--who? what? where? 46 Chi. B. Rec. 405 (1965)

Rendleman. Civilizing obscenity: The case for an exclusive obscenity nuisance statute. 44 U. Chi. L. Rev. 509 (1977)

F. Schauer. The Law of Obscenity (1976)

Sheedy. Law and morals. 43 Chi. B. Rec. 373 (1962)

Solomon. The "new" test of obscenity--a brief revisitation. 47 Chi. B. Rec. 398 (1966)

U.S. Commission on Obscenity and Pornography. Report (1970)

Notes of Decisions

Constitutionality

This provision as amended in 1975 complies with the prevailing definition of obscene materials set forth in Miller v. California, 413 U.S. 15 (1973). Subsection (5) which prohibited municipalities from adopting provisions more restrictive than 94-8-110 (now 45-8-201) was upheld in U.S. Mfg. and Distributing Corp. v. City of Great Falls, ____ Mont. ____, 546 P.2d 522 (1976) [Note: subsection (5) has now been amended to allow more restrictive community ordinances relative to obscenity].

Construction and Application

The following cases have construed the Illinois obscenity statute, upon which the Montana provision has been based, in accordance with U.S. Supreme Court opinions which may no longer be authoritative after the decision in Miller v. California, 413 U.S. 15 (1973). See People v. Butler, 49 Ill.2d 435, 275 N.E.2d 400 (1971); People v. Brocic, 80 Ill. App.2d 65, 224 N.E.2d 572 (1967).

Obscene Materials

The test to be used in determining whether material is obscene has been significantly altered by the U.S. Supreme Court in Miller v. California, 413 U.S. 15 (1973), and may affect the value of the decisions listed below which applied older Supreme Court guidelines to determine the obscenity of various types of material: People v. Brocic, 80 Ill. App.2d 65, 224 N.E.2d 572 (1967); City of Chicago v. Universal Pub. & Distributing Corp., 34 Ill.2d 250, 214 N.E.2d 251 (1966); People v. Sikora, 32 Ill.2d 260, 204 N.E.2d 768 (1965); People v. Bruce, 31 Ill.2d 459, 202 N.E.2d 497 (1965); City of Chicago v. Geraci, 46 Ill.2d 576, 264 N.E.2d 153 (1970); Movies, Inc. v. Conlisk, 345 F. Supp. 780 (D. Ill. 1972); People v. Ridens, 51 Ill.2d 410, 282 N.E.2d 691 (1972); People v. Price, 8 Ill. App.3d 158, 289 N.E.2d 280 (1972).

45-8-202. Public display of offensive material. (1) A person is guilty of public display of offensive sexual material when:

(a) with knowledge of its character and content, he displays or permits to be displayed in or on any window, showcase, newsstand, display rack, wall, door, billboard, marquee, or similar place any pictorial, three-dimensional, or other visual representation of a person or a portion of the human body that predominantly appeals to prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors; and

(b) he does not:

(i) separate that material by an opaque structure from other materials displayed; and

(ii) establish by official identification that each person viewing the displayed material is at least 18 years of age.

(2) A theater may not display previews or projections advertising or promoting motion pictures if such previews or projections contain a display of offensive sexual or offensive violent material and if minors are permitted to attend the showing of the motion picture then being featured.

(3) A drive-in movie screen may not display any material prohibited by subsection (1) in such manner that the display is easily visible from any public street, sidewalk, thoroughfare, or transportation facility.

(4) A person convicted of the public display of offensive sexual material or convicted of otherwise violating this section shall be fined at least $500 but not more than $1,000 or imprisoned in the county jail for a term not to exceed 6 months, or both.

(5) For purposes of this section, "offensive violent material" means material which is so violent as to be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

Historical Note

Enacted: M.C.C. 1973, § 94-8-110.1, Secs. 1 to 3, Ch. 463, Laws of Montana 1973

Amended: Sec. 2, Ch. 407, Laws of Montana 1975; Sec. 1, Ch. 391, Laws of Montana 1977

Source: New

Prior Law: R.C.M. 1947, §§ 94-3624 through 94-3626

Annotator's Note

This section, though enacted in 1973, was not part of the criminal code of 1973. It was placed in the criminal code by the compiler for purposes of logical arrangement.

This provision is designed to prohibit public display of offensive materials rather than dissemination of such materials which is dealt with in § 45-8-201. Subsections (1)(b)(ii) and (2) are aimed at preventing the display of offensive materials to minors; subsections (1)(b)(i) and (3) are aimed at the adult community as well as minors. However, subsection (3), as amended in 1977, deals only with offensive sexual materials and not offensive violent materials. Furthermore, subsections (1)(b)(i) and (3) do not totally prohibit the display of offensive materials. Rather, they prohibit the display of such materials to the inadvertent viewer. Thus, as a general rule this provision prohibits the display of such materials to minors, the unwilling adult and the inadvertent viewer.

The 1975 amendments deleted "drive in movie screen" after "billboard" in subsection (1); deleted "in such manner that the display is easily visible from or in any public street, sidewalk, or thoroughfare or transportation facility" after "marquee or similar place" in subsection (1); added "and does not" in subsection (1), deleting the same from subsections (a) and (b); designated former subsection (3) as (4); and increased the fine from "not to exceed five hundred dollars ($500)" to "at least five hundred dollars ($500) but not more than one thousand dollars ($1,000)".

The 1977 amendment added "or offensive violent material" in subsection (2); added subsection (3) defining "offensive violent material"; redesignated former subsections (3) and (4) as subsections (4) and (5); and substituted "subsection (1)" for "this subsection" in subsection (4). Additionally, the 1977 amendment added "or convicted of otherwise violating this section" in the punishment provision in order to provide for punishment for the display of offensive violent materials.

Cross References

Definition of "person" M.C.A. 1978, § 45-2-101(44)
Definition of "misdemeanor" M.C.A. 1978, § 45-2-101(30)
Obscenity M.C.A. 1978, § 45-8-201

Library References

Obscenity Key Nos. 2, 5, 7-9
C.J.S. Obscenity §§ 4, 7

45-8-203. Certain motion picture theater employees not liable for prosecution.

(1) As used in this section, "employee" means any person regularly employed by the owner or operator of a motion picture theater if he has no financial interest other

than salary or wages in the ownership or operation of the motion picture theater, has no financial interest in or control over the selection of the motion pictures shown in the theater, and is working within the motion picture theater where he is regularly employed. "Employee" does not include a manager of the motion picture theater.

(2) No employee is liable to prosecution under 45-8-201 and 45-8-202 or under any city or county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employee is acting within the scope of his regular employment at a showing open to the public.

Historical Note

Enacted: § 94-8-110.3, Sec. 1, Ch. 76, Laws of Montana 1974

Source: New

Prior Law: None

Annotator's Note

This section was enacted in 1974 and is designed to exempt from prosecution under the obscenity statutes, 45-8-201 and 45-8-202, employees of a theater. This is a legislative enactment of the belief that such employees are just doing their job and should not be punished for doing so.

45-8-204. Sale and advertisement of contraceptive drugs and devices. (1) It is unlawful for any person, firm, corporation, partnership, or association to sell, offer for sale, or give away, by means of vending machines, personal or collective distribution, solicitation, or peddling or in any other manner whatsoever, contraceptive drugs or devices, prophylactic rubber goods, or other articles for the prevention of veneral diseases. This subsection does not apply to regularly licenced practitioners of medicine or osteopathy, other licensed persons practicing other healing arts, registered pharmacists, or wholesale drug jobbers or manufac-

turers who sell to retail stores only.

(2) It is unlawful to:

(a) exhibit or display prophylactics or contraceptives in any show window, upon the streets, or in any public place other than in the place of business of a licensed pharmacist;

(b) advertise such in any magazine, newspaper, or other form of publication originating in or published within the state of Montana;

(c) publish or distribute from house to house or upon the streets any circular, booklet, or other form of advertising of prophylactics or contraceptives; or

(d) advertise such by other visual means, auditory method, or radio broadcast or by the use of outside signs on stores, billboards, window displays, or other advertising visible to persons upon the streets or public highways.

(3) Nothing in this section prevents the advertising of prophylactics or contraceptives in the trade press, those magazines whose principal circulation is to the medical and pharmaceutical professions, or those magazines and other publications having interstate circulation or originating outside of the state of Montana where the advertising does not violate any United States law or federal postal regulation.

(4) Nothing in this section prevents the furnishing within the store or place of business of a licensed pharmacist to persons qualified to purchase, and then only upon their inquiry, such printed or other information as is requisite to proper use in relation to any merchandise coming within the provisions of this section.

(5) Nothing in this section prevents the dissemination of medically acceptable contraceptive information by printed or other method concerning the availability and use of any merchandise coming within the provisions of this section.

(6) Any officer of the law may cause the arrest of a person violating any provision of this section, seize stocks illegally held, and seize any mechanical device or vending machine containing any merchandise coming within the provisions of this section, holding the owner of the machine and the occupier and owner of the premises where seizure is made to be in violation of this section.

(7) Any person, any member of a firm or partnership, or the officers of a corporation or association who knowingly violate any of the provisions of this section are guilty of a misdemeanor and shall, upon conviction, be punished by a fine not to exceed $500 or by imprisonment not to exceed 6 months in the county jail, or both.

(8) Justice of the peace courts and the district courts of the state have concurrent jurisdiction in all prosecutions and causes arising under this section.

Historical Note

Enacted: Secs. 1-4, Ch. 430, Laws of Montana 1973

Amended: Sec. 32, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: §§ 94-3616 through 94-3619, repealed, Sec. 5, Ch. 430, Laws of Montana 1973

Annotator's Note

This section, although enacted in 1973, was not part of the criminal code of 1973 but was placed in the criminal code by the compiler for purposes of logical arrangement.

This section prohibits the dispensation of contraceptives. However, members of the medical community are exempted. Also prohibited is the public advertisement, by display or publication, of the sale of contraceptives. The medical community is not covered when the advertisement is in a trade magazine. Also exempted are publications originating outside of the state of Montana.

The constitutionality of this provision is in doubt due to a recent United States Supreme Court case, Carey v. Population Services International, 430 U.S. 584 (1977), which held unconstitutional a New York statute which made illegal the dissemination of contraceptives to persons under sixteen, except by licensed pharma-

cists, and the advertisement or display of contraceptives.

The 1977 amendment divided this section into numerous subsections and made minor changes in punctuation and phraseology.

Cross References

Definition of "public place" M.C.A. 1978, § 45-2-101(50)
Definition of "misdemeanor" M.C.A. 1978, § 45-2-101(30)
Definition of "premises" M.C.A. 1978, § 45-2-101(47)

Library References

C.J.S. Abortions § 12

45-8-205 through 45-8-210 reserved

45-8-211. Cruelty to animals. (1) A person commits the offense of cruelty to animals if without justification he knowingly or negligently subjects an animal to mistreatment or neglect by:

(a) overworking, beating, tormenting, injuring, or killing any animal;

(b) carrying any animal in a cruel manner;

(c) failing to provide an animal in his custody with proper food, drink, or shelter;

(d) abandoning any helpless animal or abandoning any animal on any highway, railroad, or in any other place where it may suffer injury, hunger, or exposure or become a public charge; or

(e) promoting, sponsoring, conducting, or participating in a horse race of more than 2 miles or promoting, sponsoring, conducting, or participating in any fight between any animals.

(2) A person convicted of the offense of cruelty to animals shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-106, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Proposed Mich. C.C. 1967, § 5565; M.P.C. 1962, § 250.11; R.C.M. 1947, § 94-35-258

Prior Law: R.C.M. 1947, §§ 94-1201 through 94-1209, 94-35-258, 94-35-259, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section consolidates an entire chapter plus two sections of prior law. The section is nearly identical in coverage with the old law. Notably, the mens rea for the offense may be either "knowingly" or "negligently," defined at M.C.A. 1978, § 45-2-101.

Criminal Law Commission Comment

Subdivision (1)(c) covers instances in which a person knowingly and negligently releases or abandons a wild or semi-wild animal in a populated area where it will not be able to fend for itself.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "negligently" M.C.A. 1978, § 45-2-101(31)

Library References

Animals Key Nos. 40 et seq.
C.J.S. Animals, §§ 7 et seq.

Law Review Commentaries

Comment. Cruelty to animals. Model Penal Code, Tent. Draft No. 13, § 250.6, p. 40 (April 19, 1961)

45-8-212. Criminal defamation. (1) Defamatory matter is anything which exposes a person or a group, class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or injury to his or its business or occupation.

(2) Whoever, with knowledge of its defamatory character, orally, in writing, or by any other means communicates any defamatory matter to a third person without the consent of the person defamed commits the offense of criminal defamation and may be sentenced to imprisonment for not more than 6 months in the county jail or a fine of not more than $500, or both.

(3) Violation of subsection (2) is justified if:

(a) the defamatory matter is true and is communicated with good motives and for justifiable ends;

(b) the communication is absolutely privileged;

(c) the communication consists of fair comment made in good faith with respect to persons participating in matters of public concern;

(d) the communication consists of a fair and true report or a fair summary of any judicial, legislative, or other public or official proceedings; or

(e) the communication is between persons each having an interest or duty with respect to the subject matter of the communication and is made with the purpose to further such interest or duty.

(4) No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of at least two other persons that they heard and understood the oral statement as defamatory or upon a plea of guilty.

Historical Note

Enacted: M.C.C. 1973, § 94-8-111, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Minn. Crim. Code 1962, § 609.765

Prior Law: R.C.M. 1947, Title 94, Ch. 28, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

Defamation was a criminal offense both at common law and under prior statutory law. In the past, the law of criminal defamation was based on two competing and often divergent policy considerations. The first of these was protection of personal reputation by punishing the communication of scandalous matter and the second was the prevention of breaches of the peace caused by communication of such materials. This section has taken as its main function the protection of personal reputation by adding to the common law requirement of communication the requirement that such communication be to a third party.

The definition of defamatory matter has remained essentially the same as it was under both the common law and prior Montana law in that the communication will be considered defamatory if it exposes a person to "hatred, contempt, ridicule, degradation or disgrace in society, or injury to his or its business or occupation." The new law represents a departure from the old law in that it specifically provides for the application of criminal sanctions to individuals who communicate defamatory matters concerning "a group, class or association" as well as those who defame individuals. This section is more limited than common or prior law in that it does not provide for the punishment of an individual who "blackens the memory of one who is dead."

As noted above, this section has modified the publication requirements of the common law with regard to criminal defamation. Under the common law there was no

requirement of communication to a third party and under prior Montana law there was no need to show that there had been an actual communication, only that the defendant had parted with libel under such circumstances that it was "exposed to be read or seen by any person other than himself." This section also expands prior law by expanding coverage to include any communication "orally, in writing, or by any other means" while prior law required a writing, printing or similar means to achieve publication. It should be noted in this context that while both written and oral defamation are treated alike for purposes of establishing the offense, the quantum of proof required to establish an oral defamation is specifically set out in subsection (4) as at least two witnesses or a plea of guilty.

Criminal defamation differs from the civil law torts of libel and slander in that the truth of the statement is not in and of itself a defense. To avoid punishment as an offense, a defamatory statement must be shown to fall within one of the specifically established exceptions to criminal defamation. These exceptions are set out in subsection (3). Subsection (3)(a) provides that if the material is true and communicated with "good motives and for justifiable ends" it will not be treated as criminal defamation. This defense has no precise counterpart in prior law although it was allowable under § 94-2804 to introduce the motive of the matter asserted as a factor for the jury's consideration in order to counteract the malice presumed from the fact of publication (§ 94-2803). Subsection (3)(b) tightens the common law exception for statements which are privileged to except only those statements which are absolutely privileged. This defense was also included in the prior law exception of privileged communications contained in § 94-2809. The third exception contained in subsection (3) is (3)(c) which preserves the constitutional right of free speech by excepting communications which are fair comment made in good faith with respect to individuals involved in public affairs. Part (d) of subsection (3) reenacts the privilege contained in § 94-2807 that a fair report of an event in which the public is interested is also privileged. Subsection (3)(e) continues the privilege extended to those having an interest or duty with regard to the subject matter of the communication when the communication is made in furtherance of that interest or duty--such as communications by parents concerning misbehavior of their children.

This section has reduced the penalties for criminal defamation to six months or $500 or both from the prior maximum of imprisonment for up to one year or a fine of five thousand dollars. The wording for the provision is substantially the same as the Minnesota statute from which it was taken.

Criminal Law Commission Comment

The law of criminal libel has been based upon two divergent, and often confused, policy considerations. The first is that personal reputations should be protected from injury by punishing the communication of scandalous matter. The second is that breaches of the peace which might be caused by the publication of such matter can be avoided by punishing the publication. This section has the main function of preserving personal reputations by assimilating the nearly one dozen statutes now involved in present provisions, and by clearing up the traditionally confusing language associated with the statutes.

Cross References

Definition of "defamatory matter" M.C.A. 1978, § 45-2-101(12)
Definition of "knowledge" M.C.A. 1978, § 45-2-101(27)
Definition of "person" M.C.A. 1978, § 45-2-101(44)
Definition of "official proceeding" M.C.A. 1978, § 45-2-101(38)

Library References

Libel and Slander Key Nos. 1 et seq.
C.J.S. Libel and Slander, §§ 1 et seq.

Law Review Commentaries

Donnelly. History of defamation. 1949 Wis. L. Rev. 98 (1949)
Donnelly. The law of defamation: Proposals for reform. 33 Minn. L. Rev. 609 (1949)
Evans. Legal immunity for defamation. 24 Minn. L. Rev. 607 (1940)
Hallen. Excessive publication in defamation. 16 Minn. L. Rev. 160 (1932)
Note. Libel--Defamation--Attack on reputation--Exposing to hatred, contempt or ridicule. 7 Minn. L. Rev. 352 (1923)

45-8-213. Privacy in communications. (1) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if he knowingly or purposely:

(a) with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with any person by telephone and uses any obscene, lewd, or profane language, suggests any lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of any person (the use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend);

(b) uses a telephone to attempt to extort money or any other thing of value from any person or to disturb by repeated telephone calls the peace, quiet, or right of privacy of any person at the place where the telephone call or calls are received;

(c) records or causes to be recorded any conversation by use of a hidden electronic or mechanical device which reproduces a human conversation without the knowledge of all parties to the conversation. Subsection (c) does not apply to duly elected or appointed public officials or employees when the transcription or recording

is done in the performance of official duty, to persons speaking at public meetings, or to persons given warning of the recording.

(d) by means of any machine, instrument, or contrivance or in any other manner:

(i) reads or attempts to read any message or learn the contents thereof while it is being sent over a telegraph line;

(ii) learns or attempts to learn the contents of any message while it is in a telegraph office or is being received thereat or sent therefrom; or

(iii) uses, attempts to use, or communicates to others any information so obtained;

(e) discloses the contents of a telegraphic message or any part thereof addressed to another person without the permission of such person, unless directed to do so by the lawful order of a court; or

(f) opens or reads or causes to be read any sealed letter not addressed to himself without being authorized to do so by either the writer of the letter or the person to whom it is addressed or, without the like authority, publishes any of the contents of the letter knowing the same to have been unlawfully opened.

(2) A person convicted of the offense of violating privacy in communications shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-114, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 33, Ch. 359, Laws of Montana 1977; Sec. 1, Ch. 356, Laws of Montana 1979

Source: See "prior law"

Prior Law: R.C.M. 1947, §§ 94-35-221.5, 94-35-274, 94-35-275, 94-35-220, 94-3320, 94-3322, 94-3323, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section recodifies prior Montana law. The use of obscene or threatening language is prima facie evidence of an intent to "terrify, intimidate, threaten, harass, annoy, or offend." The 1977 amendment reworded subsection (1)(a). As enacted, this subsection used the term "intent"; as amended the term "intent" was replaced with the term "purpose," and in doing so made the provision consistent with the rest of the Criminal Code of 1973. The 1977 amendment also placed the last sentence of subsection (1)(a) in parentheses; inserted "any conversation" in subsection (1)(c); and made other minor changes in wording and punctuation.

Subsection (1)(c) continues the blanket prohibition of R.C.M. 1947, § 94-35-274 on recording conversations without the consent of all the parties and the exceptions contained in R.C.M. 1947, § 94-35-275 for public officials in the course of their official duties and for public meetings.

Subsections (1)(d) and (1)(e) prohibit the interception of telegraph messages both by tapping the lines and by inspection in the telegraph office. Disclosure of a telegraphic message addressed to another without the other's permission is also prohibited. These provisions parallel prior law provisions R.C.M. 1947, §§ 94-3322, 94-3323, 94-35-220 and 94-3321.

Opening, reading or causing to read a sealed letter addressed to another without that other's authorization is prohibited by subsection (1)(f) which replaces prior law, R.C.M. 1947, § 94-3320. Also made punishable in conformity with prior law are those individuals who, without authority, publish the contents of an unlawfully opened letter.

The penalties for these various offenses have been made uniform as misdemeanors. This represents a reduction in most cases since under prior law penalties could range as high as 5 years in some instances (94-35-221.5, 94-3321, 3322, 3323, 94-35-220).

The 1979 amendment added the phrase, "except as provided in 69-6-104," in subsection (1). Section 69-6-104 was enacted at the same time to permit supervisory law enforcement personnel to control telephone communications to and from a person holding hostages and to limit the liability of telephone company officials.

In State v. Brackman, ____ Mont. ____, 582 P.2d 1216 (1978), the Montana Supreme Court struck down police use of warrantless consensual participant monitoring, i.e. the use of electronic surveillance equipment concealed on a police informant whose conversations with the defendant are simultaneously transmitted to concealed agents. The Court held that electronic interception by third parties of conversations between individuals who neither consent to nor know of the interception was a violation of the right to privacy guaranteed by the Montana Constitution. A "compelling state interest" was held to be required under Montana's constitutional right to privacy before participant electronic monitoring could be engaged in. In State v. Hanley, decided on March 14, 1980, (opinion after rehearing) the court approved of the procedure whereby officers obtained a search warrant prior to engaging in participant electronic monitoring. The court did not make clear what showing was required to obtain such a search warrant, whether of "probable cause" or "compelling state interest." However, it appears that even a compelling state interest showing requirement would not impose a terribly heavy burden on the state. In State ex rel. Zander v. District Court, ____ Mont. ____, 591 P.2d 656 (1979), the court held that there was no impermissible infringement of the right of privacy guaranteed under

article II, § 10 of Montana's constitution where an officer, informed by a neighbor of the defendant that he thought a burglary was in progress at defendant's trailer, entered defendant's trailer without a warrant (and inadvertently discovered some marijuana plants), since the state has a "compelling state interest" in protecting the home and property of its citizens from unlawful intrusion. It is, in light of this opinion, conceivable that the Court would find the state's interest in enforcing its laws to be a "compelling state interest" which would permit issuance of a search warrant to allow participant electronic monitoring.

Criminal Law Commission Comment

This statute is merely a recodification of the old Montana law. A comprehensive electronic surveillance proposal was defeated by the 1971 state legislature.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "threat" M.C.A. 1978, § 45-2-101(62)
Control of telephone communications to and from a person holding hostages--nonliability of telephone company officials M.C.A. 1978, § 69-6-104

Library References

Telecommunications Key Nos. 362, 491 et seq.
C.J.S. Telegraphs, Telephones, Radio & Television, §§ 115, 117, 121, 122

Notes of Decisions

In General

Montana's constitution, Art. II, Sec. 10, 1972 MONT. CONST., requires a showing of a "compelling state interest" rather than "probable cause," before the right of individual privacy may be infringed. State v. Brackman, ____ Mont. ____, 582 P.2d 1216 (1978).

Electronic Surveillance

Subsection (1)(c) of this statute does not make consensual participant monitoring a compelling state interest simply because it excepts public officials or employ es from its application when the transcription or recording is done in the performance of their official duty. State v. Brackman, ____ Mont. ____, 582 P.2d 1216 (1978). State v. Hanley, ____ Mont. ____, ____ P.2d ____, 36 St. Rptr. 2027 (1979), was reversed on the facts on rehearing (dated March 14, 1980). The original opinion held: (1) M.C.A. 1978, §§ 45-8-213 (Privacy in communications) and § 46-5-202 (Grounds for search warrants) fail to meet the minimum requirements of Title III or the standards enumerated by the U.S. Supreme Court in Berger v. New York, 388 U.S. 41 (1967) and Katz v. United States, 389 U.S. 347 (1967), in that, among other things, they fail to require a showing of exigent circumstances to overcome the defect of not giving prior notice, they fail to state what items of information should be included in the application for a warrant, and they fail to outline the general procedures by which law enforcement officials obtain warrants for electronic surveillance. (2) A search warrant will not suffice to allow electronic surveillance in Mon-

tana because our search warrant statute fails to comply with the minimum requirement of Title III and the standards of Berger v. New York, 388 U.S. 41 (1967) and Katz v. United States, 389 U.S. 347 (1967) and until the legislature adopts a statutory scheme which meets those minimum requirements and standards, electronic surveillance cannot be authorized in Montana. On rehearing the court found the rationale of its first opinion to be inapplicable to the facts of the case and held: (1) The fruit of the poisonous tree doctrine did not apply because the illegally recorded telephone conversation with defendant was not the only or primary source of police information regarding the illegal drug transaction. (2) Even if that phone conversation had been the source of police information relative to the drug sale, most of the information was obtained from the two other participants in the sale and conversation and defendant had no standing to raise their constitutional right of privacy. Additionally, the recording was not introduced into evidence. So, the Brackman right of privacy rationale did not apply, citing State v. Jackson, ____ Mont. ____, 589 P.2d 1009 (1979). (3) Electronic monitoring of the sale transaction, the tape of which was introduced into evidence was done with the consent of one of the participants (the undercover agent) and with a valid search warrant. (a) The general rule is that it is impermissible for police officers to intercept, transmit or record private conversations; however, if one of the parties to the conversation consents, even an informer, such actions are legal. (b) The consent of the participant must be voluntarily obtained. (c) Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 through 2520 does not pertain to, prohibit or regulate monitoring and recording conversations with the consent of one of the parties to the conversation. (d) United States v. White, 401 U.S. 745, 751 (1970) found participant monitoring without a warrant to be constitutional whether done by a simultaneous recording device or by simultaneous transmission to recording equipment or agents located elsewhere. (4) The practice of getting a court order allowing electronic interception or monitoring of criminal suspects beforehand is approved by the Montana Court.

Sufficiency of Evidence

No "compelling state interest" found where police had complaining witness engage defendant-lender in conversation while the complaining witness was bearing a bug which would carry the entire conversation to listening police and where police had no search warrant and were simply fishing for evidence to charge a crime, and not supporting evidence of a crime. State v. Brackman, ____ Mont. ____, 582 P.2d 1216 (1978).

45-8-214. Bribery in contests. (1) A person commits the offense of bribery in contests if he purposely or knowingly offers, confers, or agrees to confer upon another or solicits, accepts, or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's failure to use his best efforts in connection with any professional or amateur athletic contest, sporting event, or exhibition; or

(b) any benefit as consideration for a violation of a known duty as a person participating in, officiating, or connected with any professional or amateur athletic contest, sporting event, or exhibition.

(2) A person convicted of the offense of bribery in contests shall be fined not to exceed $5,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-112, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 29-1

Prior Law: None

Annotator's Note

This section is included on the theory that bribery of participants in sporting events in an activity sufficiently deceitful to justify the imposition of criminal sanctions. The general principles of this offense are the same as those involved in other bribery offenses which relate to public servants. The section prohibits both offering, conferring or agreeing to confer and soliciting, accepting or agreeing to accept, thus providing for the punishment of both the payor or potential payor and the payee or potential payee.

The phrase "failure to use his best efforts" in subsection (1)(a) is intended to cover any conduct which could affect either the outcome or the margin of victory. Subpart (1)(b) which prohibits the violation of a known duty as a participant or official is directed toward both the player who fails to perform and toward the official who deliberately misjudges, dishonestly referees or supervises, or otherwise unfairly attempts to influence the outcome of the contest. It should be noted that this section applies only to those directly involved in a sporting event and those individuals who deal with them directly. It would not, for example, cover an unrelated individual who is paid to slip into the barn and drug a race horse. It would reach the conduct if a trainer were paid to do so.

Criminal Law Commission Comment

The bribery of a participant in a sporting event constitutes an activity sufficiently deceitful to warrant criminal sanctions. The purpose of this section is twofold. First, by preventing the offer and acceptance of bribes it attempts to protect the moral character of participants and officials from influence and corruption. Second, through the use of criminal sanctions, the economic and psychological ill effects of "fixed" contests are sought to be avoided. The general phrase "failure to use his best efforts in connection with (a contest)" is intended to cover any conduct whereby a participant tries to lose the contest, lower the margin of victory, establish a point spread, etc., or, in the case of an official or other person, conduct whereby he deliberately misjudges, dishonestly referees or supervises, or otherwise unfairly attempts to influence the outcome of the contest. The section has no counterpart in the old Montana Criminal Code.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "pecuniary benefit" M.C.A. 1978, § 45-2-101(43)

Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "benefit" M.C.A. 1978, § 45-2-101(4)

Library References

Bribery Key No. 1(1)
C.J.S. Bribery, §§ 1, 2

45-8-215. Desecration of flags. (1) In this section "flag" means anything which is or purports to be the official flag of the United States, the United States shield, the United States coat of arms, the Montana state flag, or a copy, picture, or representation of any of them.

(2) A person commits the offense of desecration of flags if he purposely or knowingly:

(a) publicly mutilates, defiles, or casts contempt upon the flag;

(b) places on or attaches to the flag any work, mark, design, or advertisement not properly a part of such flag or exposes to public view a flag so altered;

(c) manufactures or exposes to public view an article of merchandise or a wrapper or receptacle for merchandise upon which the flag is depicted; or

(d) uses the flag for commercial advertising purposes.

(3) A person convicted of the offense of desecration of flags shall be imprisoned in the state prison for any term not to exceed 10 years.

(4) This section does not apply to flags depicted on written or printed documents or periodicals or on stationery, ornaments, pictures, or jewelry, provided there are not unauthorized words or designs on such flags and provided the flag is not connected with any advertisement.

Historical Note

Enacted: M.C.C. 1973, § 94-7-502, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Minn. Crim. Code 1963, § 609.40

Prior Law: R.C.M. 1947, §§ 94-3581 et seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

This section is a more concise statement of the former Montana law on Desecration of Flags. For a conviction under this section the state must prove that one of the four overt acts described in subsection (2) was committed by the defendant, that the act was done purposely or knowingly, and that the item desecrated fit the definition of flag as provided by subsection (1). The statute varies from the prior Montana law as follows:

(1) It pertains to the Montana flag as well as the flag of the United States;
(2) It does not except flag treatment under military regulations from its purview;
(3) It explicitly permits in subsection (4) the depiction of flags for ornamental purposes under certain conditions.

The wording for this section is identical to the Minnesota source.

Criminal Law Commission Comment

The section is not intended to prevent giving away flags to customers of a business enterprise as a patriotic gesture or placing the names of donors on flags by the Red Cross. United States Code, Title 36, Sections 170 and 171 and subsequent sections prescribe the formalities of using and displaying the flag on various occasions.

Cross References

Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)

Library References

United States Key Nos. 5-1/2 et seq.
C.J.S. Flags, § 2

Part 3--Weapons

45-8-301. Uniformity of interpretation. Sections 45-8-302 through 45-8-309 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them.

Historical Note

Enacted: R.C.M. 1935, § 11317.10, Sec. 11, Ch. 43, Laws of Montana 1935; reen. § 94-3110, R.C.M. 1947; redesignated M.C.C. 1973, § 94-8-209, Sec. 29, Ch. 513, Laws of Montana 1973

Source: Unifor Machine Gun Act of 1932

Prior Law: R.C.M. 1935, § 11317.10; R.C.M. 1947, § 94-3110

Annotator's Note

Sections 45-8-301 through 45-8-309 constitute the "Uniform Machine Gun Act" approved by the National Conference of Commissioners of Uniform State Laws in 1932 and adopted in the states of Maryland, South Dakota, Virginia, and Wisconsin. South Dakota and Wisconsin repealed the Act.

The entire original Uniform Act is no longer in the Code. Repealed in 1973 were § 94-3109, which dealt with obtaining a warrant to search for and seize machine guns, and § 94-3111, which stated that the short title for the act was the Uniform Machine Gun Act. Sec. 32, Ch. 513, Laws of Montana 1973.

Cross References

Uniform Machine Gun Act M.C.A. 1978, §§ 45-8-302 through 45-8-309

45-8-302. Definitions. In 45-8-303 through 45-8-309 the following definitions apply:

(1) "Machine gun" means a weapon of any description by whatever name known, loaded or unloaded, from which more than six shots or bullets may be rapidly, automatically, or semiautomatically discharged from a magazine by a single function of the firing device.

(2) "Crime of violence" means any of the following crimes or an attempt to commit any of the same: any forcible felony, robbery, burglary, and criminal trespass.

(3) "Person" includes a firm, partnership, association, or corporation.

Historical Note

Enacted: R.C.M. 1935, § 11317.1, Sec. 1, Ch. 43, Laws of Montana 1935; re-en. R.C.M. 1947, § 94-3101; redesignated M.C.C. 1973, § 94-8-201, Sec. 29, Ch. 513, Laws of Montana 1973

Amended: Sec. 34, Ch. 359, Laws of Montana 1977

Source: Uniform Machine Gun Act of 1932

Prior Law: R.C.M. 1935, § 11317.1; R.C.M. 1947, § 94-3101

Annotator's Note

The 1977 amendment inserted the numbered subdivision designation, and added the introductory phrase. The amendment also substituted "any forcible felony" in subdivision (2) for "murder, manslaughter, kidnapping, rape, mayhem, assault to do great bodily harm,'" substituted "and criminal trespass" in subdivision (2) for "housebreaking, breaking and entering, and larceny;" and made minor changes in style, phraseology and punctuation.

Cross References

Definition of "weapon" M.C.A. 1978, § 45-2-101(65)
Robbery M.C.A. 1978, § 45-5-401
Burglary M.C.A. 1978, § 45-6-204
Criminal trespass M.C.A. 1978, §§ 45-6-202, 45-6-203
Definition of "forcible felony" M.C.A. 1978, § 45-2-101(16)
Definition of "person" M.C.A. 1978, § 45-2-101(44)
Uniform Machine Gun Act M.C.A. 1978, §§ 45-8-301 through 45-8-309

Library References

Weapons Key No. 4
C.J.S. Weapons, § 1

Notes of Decisions

Federal statutes relating to notice requirements with respect to transportation of certain firearms were not invalid on ground that compliance therewith would require defendant to waive his Fifth Amendment right not to incriminate himself because compliance would subject him to prosecution under state statute. United States v. Young, 344 F. Supp. 1354 (E.D. Wisc. 1972).

45-8-303. Possession or use of machine gun in connection with a crime. Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than 20 years.

Historical Note

Enacted: R.C.M. 1935, § 11317.2, Sec. 2, Ch. 43, Laws of Montana 1935; re-en. R.C.M. 1947, § 94-3102; redesignated M.C.C. 1973, § 94-8-202, Sec. 29, Ch. 513, Laws of Montana 1973

Source: Uniform Machine Gun Act of 1932

Prior Law: R.C.M. 1935, § 11317.2; R.C.M. 1947, § 94-3102

Annotator's Note

This statute is merely a recodification of the original Uniform Machine Gun Act provision. The minimum 20 year sentence indicates the legislative view as to the seriousness of the offense.

Cross References

Uniform Machine Gun Act M.C.A. 1978, §§ 45-8-301 through 45-8-309
Aggravated assault M.C.A. 1978, § 45-5-202
Attempt M.C.A. 1978, § 45-4-103
Definitions, Uniform Machine Gun Act M.C.A. 1978, § 45-8-302
Definition of "possession" M.C.A. 1978, § 45-2-101(46)

Library References

Weapons, Key No. 4
C.J.S. Weapons, § 6

45-8-304. Possession or use of machine gun for offensive purpose. Possession or use of a machine gun for offensive or aggressive purpose is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than 10 years.

Historical Note

Enacted: R.C.M. 1935, § 11317.3, Sec. 3, Ch. 43, Laws of Montana 1935; re-en. R.C.M. 1947, § 94-3103; redesignated M.C.C. 1973, § 94-8-203, Sec. 29, Ch. 513, Laws of Montana 1973

Source: Uniform Machine Gun Act of 1932

Prior Law: R.C.M. 1935, § 11317.3; R.C.M. 1947, § 94-3103

Annotator's Note

This section is merely a recodification of the original Uniform Machine Gun Act provision. As in the preceding section, the severe penalty for mere possession of a machine gun reflects the degree of danger they represent to society in the eyes of the legislature.

Cross References

Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Uniform Machine Gun Act M.C.A. 1978, §§ 45-8-301 through 45-8-309

Library References

Weapons, Key No. 4
C.J.S. Weapons, § 6

45-8-305. Presumption of offensive or aggressive purpose. Possession or use of a machine gun shall be presumed to be for offensive or aggressive purpose:

(1) when the machine gun is on premises not owned or rented for bona fide permanent residence or business occupancy by the person in whose possession the machine gun may be found;

(2) when the machine gun is in the possession of or used by a person who has been convicted of a crime of violence in any court of record, state or federal, in

the United States of America or its territories or insular possessions;

(3) when the machine gun is of the kind described in 45-8-309 and has not been registered as required in that section; or

(4) when empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of being used in the machine gun are found in the immediate vicinity thereof.

Historical Note

Enacted: R.C.M. 1935, § 11317.4, Sec. 4, Ch. 43, Laws of Montana 1935; re-en. R.C.M. 1947, § 94-3104; redesignated M.C.C. 1973, § 94-8-204, Sec. 26, Ch. 513, Laws of Montana 1973

Amended: Sec. 26, Ch. 513, Laws of Montana 1973; Sec. 35, Ch. 359, Laws of Montana 1977

Source: Uniform Machine Gun Act of 1932

Prior Law: R.C.M. 1935, § 11317.4; R.C.M. 1947, § 94-3104

Annotator's Note

Statutory presumptions in the criminal law aid the proof of certain crimes which otherwise would be very difficult to establish. The statute provides that a combination of "suspicious" facts will give rise to the presumption of possession or use of a machine gun for offensive or aggressive purpose. This reflects the policy of the law, which is to ease the task of law enforcement officers in effectively hindering the use of highly dangerous machine guns.

The 1973 amendment renumbered the section and redesignated § 94-3108(c) as § 94-3-208.

The 1977 amendment changed subsections (a) through (d) to (1) through (4) and deleted "an unnaturalized foreign born person, or" before "a person" in subsection (2). The amendment also made minor changes in phraseology and punctuation.

Cross References

Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Definition of "premises" M.C.A. 1978, § 45-2-101(47)
Definition of "conviction" M.C.A. 1978, § 45-2-101(9)
Definitions, Uniform Machine Gun Act M.C.A. 1978, § 45-8-302
Possession or use of a machine gun for offensive or aggressive purpose M.C.A. 1978, § 45-8-304

Library References

Weapons, Key No. 17(2)
C.J.S. Weapons, § 13

Law Review Commentaries

Clark. Statutory and common law presumptions in Montana. 37 Mont. L. Rev. 91, 101 (1976)

45-8-306. Presence of gun as evidence of possession or use. The presence of a machine gun in any room, boat, or vehicle shall be evidence of the possession or use of the machine gun by each person occupying the room, boat, or vehicle where the weapon is found.

Historical Note

Enacted: R.C.M. 1935, § 11317.5, Sec. 5, Ch. 43, Laws of Montana 1935; re-en. R.C.M. 1947, § 94-3105; redesignated M.C.C. 1973, § 94-8-205, Sec. 29, Ch. 513, Laws of Montana 1973

Source: Uniform Machine Gun Act of 1932

Prior Law: R.C.M. 1935, § 11317.5; R.C.M. 1947, § 94-3105.

Annotator's Note

This statute is merely a recodification of the original Uniform Machine Gun Act provision. Note the difference between this and the preceding section. Here the presence of a machine gun is merely evidence of its possession or use, while in § 45-8-305, possession or use under certain conditions gives rise to a presumption of offensive or aggressive purpose.

Cross References

Definition of "weapon" M.C.A. 1978, § 45-2-101(65)
Definition of "vehicle" M.C.A. 1978, § 45-2-101(64)
Presumption of offensive or aggressive purpose M.C.A. 1978, § 45-8-305
Definitions, Uniform Machine Gun Act M.C.A. 1978, § 45-8-302

45-8-307. Exceptions. Nothing contained in 45-8-301 through 45-8-309 shall prohibit or interfere with:

(1) the manufacture of machine guns for and sale of machine guns to the military forces or the peace officers of the United States or of any political subdivision thereof or the transportation required for that purpose;

(2) the possession of a machine gun for scientific purpose or the possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament, or keepsake;

(3) the possession of a machine gun other than one adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber for a purpose manifestly not aggressive or offensive.

Historical Note

Enacted: R.C.M. 1935, § 11317.6, Sec. 6, Ch. 43, Laws of Montana 1935; Re-en. R.C.M. 1947, § 94-3106; redesignated M.C.C. 1973, § 94-8-206, Sec. 29, Ch. 513, Laws of Montana 1973

Source: Uniform Machine Gun Act of 1932

Prior Law: R.C.M. 1935, § 11317.6; R.C.M. 1947, § 94-3106

Annotator's Note

This section is simply a recodification of the original Uniform Machine Gun Act provision. It allows the possession of machine guns within the collection or hobby context, as long as they are rendered inoperable. The section also necessarily allows the military to use machine guns; to prohibit their use by the military would probably render the act unconstitutional under the supremacy clause.

It is not clear what "scientific purpose" a machine gun may be put to, but if one exists, it also exempts the user from the operation of 45-8-301 through 45-8-309.

Cross References

Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Definitions, Uniform Machine Gun Act M.C.A. 1978, § 45-8-302

Notes of Decisions

Classes of machine guns enumerated in this section, except those used by military forces and officers of the United States, were not exempted from registra-

tion under the Uniform Machine Gun Act. 22 Op. Atty. Gen. 330 (Wisc. 1933).

45-8-308. Manufacturer's register of machine guns. (1) Every manufacturer shall keep a register of all machine guns manufactured or handled by him.

(2) This register shall show, for every machine gun:

(a) the model and serial number;

(b) the date of manufacture, sale, loan, gift, delivery, or receipt;

(c) the name, address, and occupation of the person to whom the machine gun was sold, loaned, given, or delivered or from whom it was received; and

(d) the purpose for which it was acquired by the person to whom the machine gun was sold, loaned, given, or delivered or from whom received.

(3) Upon demand every manufacturer shall permit any marshal, sheriff, or police officer to inspect his entire stock of machine guns, parts, and supplies therefor and shall produce the register herein required for inspection.

(4) A violation of any provision of this section shall be punishable by a fine of not less than $100.

Historical Note

Enacted: R.C.M. 1935, § 11317.7, Sec. 7, Ch. 43, Laws of Montana 1935; re-en. R.C.M. 1947, § 94-3107; redesignated M.C.C. 1973, § 94-8-207, Sec. 29, Ch. 513, Laws of Montana 1973

Source: Uniform Machine Gun Act of 1932

Prior Law: R.C.M. 1935, § 11317.7; R.C.M. 1947, § 94-3107

Annotator's Note

This section is a recodification of the original Uniform Machine Gun Act provision.

Cross References

Purchase of rifle or shotgun in contiguous state by Montana resident M.C.A. 1978, § 45-8-341

Purchase of rifle or shotgun in Montana by resident of contiguous state M.C.A. 1978, § 45-8-342

45-8-309. Registration of machine guns--presumption from failure to register. (1) Every machine gun not in this state adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber shall be registered with the department of justice annually on February 20. If acquired hereafter it shall be registered within 24 hours after its acquisition.

(2) Blanks for registration shall be prepared by the department and furnished upon application.

(3) To comply with this section the application as filed must show the model and serial number of the gun, the name, address, and occupation of the person in possession, and from whom and the purpose for which the gun was acquired.

(4) The registration data shall not be subject to inspection by the public.

(5) Any person failing to register any gun as required by this section shall be presumed to possess the same for offensive or aggressive purpose.

Historical Note

Enacted: R.C.M. 1935, § 11317.8, Sec. 8, Ch. 43, Laws of Montana 1935; re-en. R.C. . 1947, § 94-3108; redesignated M.C.C. 1973, § 94-8-208, Sec. 29, Ch. 513, Laws of Montana 1973

Source: Uniform Machine Gun Act of 1932

Prior Law: R.C.M. 1935, § 11317.8; R.C.M. 1947, § 94-3108

Annotator's Note

The registration function was transferred to the Department of Justice from the office of the Secretary of State by R.C.M. 1947, § 82A-1203. This provision was not recodified in the Montana Code Annotated, 1978, because its purpose had been accomplished.

Note that failure to register gives rise to a presumption of offensive or aggressive purpose similar to that found in § 45-8-305.

Cross References

Presumption of offensive or aggressive purpose M.C.A. 1978, § 45-8-305

Library References

Weapons, Key Nos. 12, 17(2)
C.J.S. Weapons, §§ 11, 13

45-8-310 through 45-8-314 reserved.

45-8-315. Definition. "Concealed weapon" shall mean any weapon mentioned in 45-8-316 through 45-8-319 which shall be wholly or partially covered by the clothing or wearing apparel of the person so carrying or bearing the weapon.

Historical Note

Enacted: Sec. 6., Ch. 74, Laws of Montana 1919; re-en. R.C.M. 1921, § 11307, R.C.M. 1935, § 11307, R.C.M. 1947, § 94-3530; redesignated M.C.C. 1973, § 94-8-215, Sec. 29, Ch. 513, Laws of Montana 1973

Source: Sec. 6, Ch. 35, Laws of Montana 1903

Prior Law: R.C.M. 1921, § 11307; R.C.M. 1935, § 11307; R.C.M. 1947, § 94-3530

Annotator's Note

This section is simply a recodification of prior Montana law. No comparable section was found in any of the criminal laws of New York, California, Pennsylvania, or Illinois, but cases from those states which have defined the term do so in a way very similar to Montana's definition. For example, see People v. Colson, 14 Ill. App.3d 375, 302 N.E.2d 409, 410 (1973); People v. May, 33 C.A.3d 888, 109 Cal. Rptr. 396 (1973).

Cross References

Definition of "weapon" M.C.A. 1978, § 45-2-101(65)
Permits to carry concealed weapons, M.C.A. 1978, § 45-8-319

Library References

Words and Phrases (Perm. Ed.) "Concealed Weapon"
Weapons, Key No. 8
C.J.S. Weapons, § 6

45-8-316. Carrying concealed weapons. (1) Every person who carries or bears concealed upon his person a dirk, dagger, pistol, revolver, slingshot, sword cane, billy, knuckles made of any metal or hard substance, knife having a blade 4 inches long or longer, razor, not including a safety razor, or other deadly weapon shall be punished by a fine not exceeding $500 or imprisonment in the county jail for a period not exceeding 6 months, or both.

(2) A person who has previously been convicted of an offense, committed on a different occasion than the offense under this section, in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed and who carries or bears concealed upon his person any of the weapons described in subsection (1) shall be punished by a fine not exceeding $1,000 or imprisoned in the state prison for a period not exceeding 5 years, or both.

Historical Note

Enacted: Sec. 1, Ch. 74, Laws of Montana 1919; re-en. R.C.M. 1921, § 11302, R.C.M. 1935, § 11302, R.C.M. 1947, § 94-3525; redesignated M.C.C. 1973, § 94-8-210, Sec. 29, Ch. 513, Laws of Montana 1973

Amended: Sec. 36, Ch. 359, Laws of Montana 1977; Sec. 1, Ch. 411, Laws of Montana 1977. Parent stat. amended Sec. 758, Pen. C. 1895; Sec. 1, Ch. 58, Laws of Montana 1911

Source: Sec. 1, p. 62, Laws of Montana 1883

Prior Law: Sec. 66, 4th Div. Comp. Stat. 1887; Rev. C. 1907, § 8582; R.C.M. 1921, § 11302; R.C.M. 1935, § 11302; R.C.M. 1947, § 94-3525

Annotator's Note

The section, as it existed before the 1977 amendments, was enacted in 1919. A very similar version had been in effect since 1887. In 1977, two amendments to this section were passed. The Code Commissioner made a composite section embodying the changes made by both amendments since they did not appear to be in conflict.

The amendments substituted "prison" for "penitentiary" and minor changes in phraseology, punctuation and style were adopted by Chapter 359. Chapter 411 deleted

"within the limits of any city or town" after "every person who" at the beginning of the section; deleted "or may be punished by imprisonment in the state prison for a period not exceeding five years" at the end of the former section; designated the former section as subsection (1); and added subsection (2).

Formerly this statute only proscribed carrying concealed weapons in town, while R.C.M. 1947, § 94-3526 forbade carrying concealed weapons outside the city limits. The 1977 amendment combined the two and § 94-3526 was repealed by Sec. 2, Ch. 411, Laws of Montana 1977.

Cross References

Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Definition of "concealed weapon" M.C.A. 1978, § 45-8-315

Library References

Weapons, Key Nos. 5-10
C.J.S. Weapons, §§ 3-9

Law Review Commentaries

Annot. Forfeiture of weapon unlawfully carried, before trial of individual offender. 3 A.L.R.2d 752 (1949)

Annot. Offense of carrying concealed weapon as affected by manner of carrying or place of concealment. 43 A.L.R.2d 492 (1955)

Notes of Decisions

Constitutionality

Where power to classify violation of R.C.M. 1947, § 94-8-210 (now M.C.A. 1978, § 45-8-316) as a felony or misdemeanor was given to trial court, through sentence imposed, rather than to prosecutor, defendant's constitutional right to equal protection of the laws was not violated. State v. Maldonado, ____ Mont. ____, 578 P.2d 296 (1978). R.C.M. 1947, § 94-8-210 (now M.C.A. 1978, § 45-8-316) was not constitutionally vague because judge could impose sentence as either a felony or a misdemeanor without statutory guidelines as to when each grade of sentence should be imposed. Id.

In General

Reasons for defendant's concealing weapons on his person were irrelevant to issue of criminal intent, though those reasons may have been a relevant consideration in sentencing. State v. Maldonado, ____ Mont. ____, 578 P.2d 296 (1978).

Instructions

In second degree assault prosecution, instruction that it was a crime to carry

a concealed weapon without a permit was not erroneous, even though there was no evidence proving defendant did not have a permit, since fact of having permit would be an affirmative defense which was not pleaded by defendant. State v. Lewis, 157 Mont. 452, 486 P.2d 863 (1971).

45-8-317. Exceptions. Section 45-8-316 does not apply to:

(1) any peace officer of the state of Montana;

(2) any officer of the United States government authorized to carry a concealed weapon;

(3) a person in actual service as a national guardsman;

(4) a person summoned to the aid of any of the persons named in subsections (1) through (3);

(5) a civil officer or his deputy engaged in the discharge of official business;

(6) a person authorized by a judge of a district court of this state to carry a weapon; or

(7) the carrying of arms on one's own premises or at one's home or place of business.

Historical Note

Enacted: Sec. 3, Ch. 74, Laws of Montana 1919; re-en. R.C.M. 1921, § 11304, R.C.M. 1935, § 11304, R.C.M. 1947, § 94-3527; redesignated M.C.C. 1973, § 94-8-212, Sec. 29, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 63, Laws of Montana 1969; Sec. 1, Ch. 54, Laws of Montana 1971; Sec. 37, Ch. 359, Laws of Montana 1977

Source: See statutes under "prior law"

Prior Law: R.C.M. 1921, § 11304; R.C.M. 1935, § 11304; R.C.M. 1947, § 94-3527

Annotator's Note

This statute, as originally enacted, contained fifteen exceptions. The 1969 amendment added one pertaining to United States Immigration and Naturalization Service officers. The 1971 amendment added an exception for National Park Service rangers. The 1977 amendment consolidated all of the subdivisions into the seven current exceptions. Upon comparison, it becomes evident that in consolidating the legis-

lature did not intend to exclude any of the formerly authorized exceptions. The most recent amendment also substituted "sections 94-8-210 and 94-8-211" (now M.C.A. 1978, § 45-8-316) at the beginning of the section for "The preceding sections," and made minor changes in phraseology and punctuation.

Cross References

Permits to carry concealed weapons--records--revocation M.C.A. 1978, § 45-8-319

Library References

Weapons, Key No. 11
C.J.S. Weapons, § 9

Law Review Commentaries

Annot. Who is entitled to permit to carry concealed weapons. 51 A.L.R.3d 504 (1973)

Annot. Scope and effect of exception in statute forbidding carrying of weapons, as to person on his own permises or at his place of business. 57 A.L.R.3d 938 (1974)

45-8-318. Possession of deadly weapon by prisoner. (1) Every prisoner committed to the Montana state prison who, while at such state prison, while being conveyed to or from the Montana state prison, while at a state prison farm or ranch, while being conveyed to or from any such place, or while under the custody of prison officials, officers, or employees, possesses or carries upon his person or has under his custody or control without lawful authority a dirk, dagger, pistol, revolver, slingshot, sword cane, billy, knuckles made of any metal or hard substance, knife, razor not including a safety razor, or other deadly weapon is guilty of a felony.

(2) He shall be punished by imprisonment in the state prison for a term not less than 5 years or more than 15 years, such term of imprisonment to commence from the time he would otherwise have been released from said prison.

Historical Note

Enacted: R.C.M. 1947, § 94-3527.1, Sec. 1, Ch. 131, Laws of Montana 1961,

redesignated M.C.C. 1973, § 94-8-213, Sec. 29, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, § 94-3527.1

Prior Law: R.C.M. 1947, § 94-3527.1

Annotator's Note

This section is merely a re-enactment of pre-existing Montana law. It appears to be derived from California. Cal. Penal Code, § 4502 (West). The present section was enacted after the killing of the Deputy Warden at the state prison in 1959. A companion statute, also enacted in reaction to the events at the prison, made it a felony for a prisoner to hold a hostage. Under the new code this provision is incorporated in the aggravated kidnapping section, M.C.A. 1978, § 45-5-303.

Cross References

Definition of "felony" M.C.A. 1978, § 45-2-101(15)
Transferring illegal articles or unauthorized communication M.C.A. 1978, § 45-7-307
Definition of "illegal article" M.C.A. 1978, § 45-2-101(22)
Aggravated kidnapping, M.C.A. 1978, § 45-5-503

Library References

Convicts, Key No. 5
Criminal Law, Key No. 412.2(3)
C.J.S. Convicts, § 8

Notes of Decisions

In General

Violation of this section does not depend on proof of guilty intent; its prohibition is absolute. People v. Evans, 2 C.A.3d 877, 82 Cal. Rptr. 877 (1969). California statutes providing for enhanced penalty for prisoners found guilty of possession of a deadly weapon or convicted of assault with a deadly weapon while undergoing life sentence, require only that prisoner be serving a sentence, and it is not necessary that conviction and sentence be a valid one. Wells v. California, 352 F.2d 439 (9th Cir. 1969). Proof of knowing possession is sufficient for conviction under this section, and proof of intent or purpose for which the instrument was possessed is not necessary. People v. Steely, 266 C.A.2d 591, 72 Cal. Rptr. 368 (1968). Prison disciplinary measures taken against prisoner who allegedly possessed a knife did not bar subsequent prosecution under this section. People v. Vatelli, 15 C.A.3d 54, 92 Cal. Rptr. 763 (1971).

Admissibility and Sufficienty of Evidence

Incriminating statements made by state prison inmate during prison disciplin-

ary hearing concerning possession of knife, in response to questions posed by inmate lay advisor, without prior caution to inmate of his Miranda rights, were not admissible at trial in subsequent prosecution for possession of weapon by prisoner. State v. Harris, ____ Mont. ____, 576 P.2d 257 (1978). Where there was no evidence that defendant possessed a weapon except during an assault, he can't properly be sentenced both under conviction for assault with a deadly weapon and under conviction for possession of same. People v. Duran, 16 Cal.3d 282, 27 Cal. Rptr. 618, 545 P.2d 1322 (1976).

Burden of Proof

In prosecution under § 4502, defendant has burden of proving as matter of defense that he did not carry weapon in violation of this section. People v. Wells, 68 C.A.2d 476, 156 P.2d 979 (1945).

45-8-319. Permits to carry concealed weapons--records--revocation. (1) Any judge of a district court of this state may grant permission to carry or bear, concealed or otherwise, a pistol or revolver for a term not exceeding 1 year.

(2) All applications for such permission must be made by petition filed with the clerk of the district court. No charge may be made for the filing of the petition.

(3) The applicant shall, if personally unknown to the judge, furnish proof by a credible witness of his good moral character and peaceable disposition.

(4) No such permission shall be granted any person who is not a citizen of the United States and who has not been an actual bona fide resident of the state of Montana for 6 months immediately next preceding the date of such application.

(5) A record of permission granted shall be kept by the clerk of the court. The record shall state the date of the application, the date of the permission, the name of the person to whom permission is granted, the name of the judge granting the permission, and the name of the person, if any, by whom good moral character and peaceable disposition are proved. The record must be signed by the person who is granted such permission.

(6) The clerk shall thereupon issue under his hand and the seal of the court a

certificate, in a convenient card form so that the same may be carried in the pocket, stating:

"Permission to . . . . authorizing him to carry or bear, concealed or otherwise, a pistol or revolver for the period of . . . . from the date hereof has been granted by . . . . , a judge of the district court of the . . . . judicial district of the state of Montana, in and for the county of . . . . .

Witness the hand of the clerk and the seal of said court this . . . . day of . . . . . , 19 . . .

. . . . . .

Clerk"

(7) The date of the certificate shall be the date of the granting of such permission. The certificate shall bear upon its face the signature of the person receiving the same.

(8) Upon good cause shown the judge granting such permission may, in his discretion without notice to the person receiving such permission, revoke the same. The date of the revocation shall be noted by the clerk upon the record kept by him.

(9) All permissions to carry or bear concealed weapons granted before March 3, 1919, are hereby revoked.

Historical Note

Enacted: Sec. 5, Ch. 74, Laws of Montana 1919; re-en. R.C.M. 1921, § 11306, R.C.M. 1935, § 11306, R.C.M. 1947, § 94-3529; redesignated M.C.C. 1973, § 94-8-214, Sec. 29, Ch. 513, Laws of Montana 1973

Amended: Sec. 38, Ch. 359, Laws of Montana 1977

Source: See "prior law"

Prior Law: R.C.M. 1921, § 11306; R.C.M. 1935, § 11306; R.C.M. 1947, § 94-3529

Annotator's Note

This section is merely a recodification of pre-existing Montana law. The

amendment in 1977 inserted the subsection numbers; replaced "heretofore granted" near the end of the statute with "granted before March 3, 1919"; and made minor stylistic changes.

Cross References

Definition of "concealed weapon" M.C.A. 1978, § 45-8-315
Exceptions M.C.A. 1978, § 45-8-317

Library References

Weapons, Key No. 12
C.J.S. Weapons § 11

Law Review Commentaries

Annot. Who is entitled to a permit to carry concealed weapons. 51 A.L.R.3d 504 (1973).

45-8-320. Repealed. Sec. 1, Ch. 312. Laws of Montana 1979.

45-8-321 through 45-8-330 reserved.

45-8-331. Switchblade knives. (1) Every person who carries or bears upon his person, who carries or bears within or on any motor vehicle or other means of conveyance owned or operated by him, or who owns, possesses, uses, stores, gives away, sells, or offers for sale a switchblade knife shall be punished by a fine not exceeding $500 or by imprisonment in the county jail for a period not exceeding 6 months or by both such fined and imprisonment.

(2) A bona fide collector whose collection is registered with the sheriff of the county in which said collection is located is hereby exempted from the provisions of this section.

(3) For the purpose of this section a switchblade knife is defined as any knife which has a blade 1 1/2 inches long or longer which opens automatically by

hand pressure applied to a button, spring, or other device in the handle of the knife.

Historical Note

Enacted: R.C.M. 1947, § 94-35-273, Sec. 1, Ch. 243, Laws of Montana 1957; redesignated M.C.C. 1973, § 94-8-226, Sec. 29, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, § 94-35-273

Prior Law: R.C.M. 1947, § 94-8-226

Annotator's Note

This section is simply a recodification of pre-existing Montana law.

Cross References

Definition of "person" M.C.A. 1978, § 45-2-101(44)
Definition of "vehicle" M.C.A. 1978, § 45-2-101(64)

Library References

Weapons, Key No. 4
C.J.S. Weapons, §§ 3 et. seq.

45-8-332. Definitions. (1) "Destructive device", as used in this chapter, includes but is not limited to the following weapons:

(a) a projectile containing an explosive or incendiary material or any other similar chemical substance, including but not limited to that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns;

(b) a bomb, grenade, explosive missle, or similar device or a launching device therefor;

(c) a weapon of a caliber greater than .60 caliber which fires fixed ammunition or any ammunition therefor, other than a shotgun or shotgun ammunition;

(d) a rocket, rocket-propelled projectile, or similar device of a diameter greater than 0.60 inch or a launching device therefor and a rocket, rocket-propelled projectile, or similar device containing an explosive or incendiary material or any other similar chemical substance other than the propellant for the device, except devices designed primarily for emergency or distress signaling purposes;

(e) a breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and which has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.

(2) "Explosive", as used in this chapter, means any explosive defined in 50-38-101.

Historical Note

Enacted: R.C.M. 1947, § 69-1931, Sec. 1, Ch. 304, Laws of Montana 1971, redesignated R.C.M. 1947, § 94-8-209.1, Sec. 72, Ch. 359, Laws of Montana 1977

Amended: Sec. 72, Ch. 359, Laws of Montana 1977

Source: R.C.M. 1947, § 69-1931

Prior Law: R.C.M. 1947, § 69-1931

Annotator's Note

Statutes relative to the non-criminal regulation of explosives are now in M.C.A. 1978, Title 50, Chapter 38. This section and § 45-8-334 were formerly a part of that chapter [formerly Title 69, Chapter 19, R.C.M. 1947], but were transferred to the criminal code in 1973. At the same time, R.C.M. 1947, § 94-6-105 [now M.C.A. 1978, § 45-8-335], dealing with possession of explosives, was amended and transferred to this section of the criminal code. Two new statutes, R.C.M. 1947, §§ 94-8-209.4 and 94-8-209.5 [now M.C.A. 1978, §§ 45-8-336 and 45-8-337], on possession of a silencer and possession as evidence of unlawful purpose, were enacted and former R.C.M. §§ 94-8-223 through 94-8-225 were repealed. Those statutes dealt with sale and manufacture of silencers and explosives and the presumption to be derived from possession thereof, and were, therefore, substantively similar to statutes transferred or added to the code at that time. These sections are, therefore, essentially a recodification of prior Montana law on the subject.

1977 amendment added "similar" before "chemical substance" in (1)(a) and (1)(d), and made minor stylistic changes.

Cross References

Definition of "weapon" M.C.A. 1978, § 45-2-101(65)
Reckless or malicious use of explosives M.C.A. 1978, § 45-8-333
Possession of a destructive device M.C.A. 1978, § 45-8-334
Possession of explosives M.C.A. 1978, § 45-8-335
Explosives M.C.A. 1978, Title 50, Chapter 38

Library References

Weapons, Key No. 3
C.J.S. Weapons §§ 2, 24

Law Review Commentaries

Annot. Possession of bomb, molotov cocktail, or similar device as criminal offense, 42 A.L.R.3d 1230 (1972)

45-8-333. Reckless or malicious use of explosives. Every person who shall recklessly or maliciously use, handle, or have in his or her possession any blasting powder, giant or Hercules powder, giant caps, or other highly explosive substance whereby any human being is intimidated, terrified, or endangered shall be guilty of a misdemeanor.

Historical Note

Enacted: Sec. 713, Penal Code 1895; re-en. Rev. C. 1907, § 8551, R.C.M. 1921, § 2812, R.C.M. 1935, § 2812, R.C.M. 1947, § 69-1927

Source: See "prior law"

Prior Law: R.C.M. 1907, § 8551, R.C.M. 1921, § 2812; R.C.M. 1935, § 2812; R.C.M. 1947, § 69-1927

Annotator's Note

This section was not part of the criminal code of 1973, and did not become part of it until the recodification of the Montana Code Annotated in 1978. For-

merly found in Title 69, Chapter 19 of R.C.M. 1947, it is merely a recodification of pre-existing Montana law.

Cross References

Definition of "person" M.C.A. 1978, § 45-2-101(44)
Possession of a destructive device M.C.A. 1978, § 45-8-334
Possession of explosives M.C.A. 1978, § 45-8-335
Definitions M.C.A. 1978, § 45-8-332
Definition of "misdemeanor" M.C.A. 1978, § 45-2-101(30)
Definition of "possession" M.C.A. 1978, § 45-2-101(46)

Library References

Explosives, Key No. 2
C.J.S. Const. Law, § 679

Notes of Decisions

In General

Fact that employer may have violated this section did not affect his immunity from common-law action for death of employee covered by workmen's compensation without a showing of intentional injury by employer. Engberg v. Anaconda Co., 158 Mont. 135, 489 P.2d 1036 (1971).

45-8-334. Possession of a destructive device. (1) A person who, with the purpose to commit a felony, has in his possession any destructive device on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in, on, or near any aircraft, railway passenger train, car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings is guilty of the offense of possession of a destructive device.

(2) A person convicted of the offense of possession of a destructive device shall be imprisoned in the state prison for a period of not more than 10 years.

Historical Note

Enacted: R.C.M. 1947, § 69-1932, Sec. 2, Ch. 304, Laws of Montana 1971; redesignated R.C.M. 1947, § 94-8-209.2, Sec. 73, Ch. 359, Laws of Montana 1977

Amended: Sec. 73, Ch. 359, Laws of Montana 1977

Source: R.C.M. 1947, § 69-1932

Prior Law: R.C.M. 1947, § 69-1932

Annotator's Note

This statute is merely a recodification of pre-existing Montana law, formerly codified in the section of the code dealing with non-criminal regulation of explosives, R.C.M. 1947, Title 69, Chapter 19 [now M.C.A. 1978, Title 50, Chapter 38]. It is substantially similar to Cal. Penal Code, § 12303.2 (West).

The amendment by the 1977 legislature removed "or any explosive" after "destructive device" in subsection (1); replaced "the offense of possession of a destructive device" at the end of subsection (1) with "a felony"; added "(2)" before the penalty clause; added "A person convicted of the offense of possession of a destructive device" to subsection (2); replaced "imprisoned" in subsection (2) with "punishable by imprisonment"; and made minor stylistic changes.

Cross References

Definition of "destructive device" M.C.A. 1978, § 45-8-332
Definition of "person" M.C.A. 1978, § 45-2-101(44)
Definition of "felony" M.C.A. 1978, § 45-2-101(15)
Definition of "purpose" M.C.A. 1978, § 45-2-101(52)
Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Reckless or malicious use of explosives M.C.A. 1978, § 45-8-333
Possession of explosives M.C.A. 1978, § 45-8-334
Possession prima facie evidence of unlawful purpose M.C.A. 1978, § 45-8-337
Explosives M.C.A. 1978, Title 50, Chapter 38

Library References

Explosives, Key No. 5
C.J.S. Explosives § 12

Law Review Commentaries

Annot. Possession of a bomb, molotov cocktail, or similar device as criminal offense. 42 A.L.R.3d 1230 (1972)

45-8-335. Possession of explosives. (1) A person commits the offense of possession of explosives if he possesses, manufactures, transports, buys, or sells an explosive compound, flammable material, or timing, detonating, or similar device

for use with an explosive compound or incendiary device and:

(a) has the purpose to use such explosive, material, or device to commit an offense; or

(b) knows that another has the purpose to use such explosive, material, or device to commit an offense.

(2) A person convicted of the offense of possession of explosives shall be imprisoned in the state prison for any term not to exceed 20 years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-105, Sec. 1, Ch. 513, Laws of Montana 1973

Amended: Sec. 74, Ch. 359, Laws of Montana 1977 (and redesignated § 94-8-209.3)

Source: Ill. C.C. 1962, Ch. 38, Sec. 20-2.

Prior Law: R.C.M. 1947, § 94-8-209.3

Annotator's Note

This section was amended in 1977. The amendment added "buys, or sells" and "flammable material" in subsection (1); added "similar" before "device" in subsection (1); added "material" in subsections (1)(a) and (1)(b); and made minor stylistic changes. Former section 69-1916 prohibited the possession of shells or bombs for unlawful use.

Criminal Law Commission Comment

This section is intended to consolidate R.C.M. 1947, section 94-3304, "Destruction of buildings by explosive--punishment," and the various applicable provisions included in Title 69, chapter 19 [now M.C.A. 1978, Title 50, Chapter 38], Explosives, Regulation of Manufacture, Storage and Sale. The act is prohibited only when it is done with the intent to commit an offense or with knowledge that another intends to use the explosives to commit an offense.

Cross References

Explosives M.C.A. 1978, Title 50, Chapter 38
Possession of a destructive device M.C.A. 1978, § 45-8-334
Reckless or malicious use of explosives M.C.A. 1978, § 45-8-333
Definitions, M.C.A. 1978, § 45-8-332
Possession prima facie evidence of unlawful purpose M.C.A. 1978, § 45-8-337
Definition of "person" M.C.A. 1978, § 45-2-101(44)

Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Definition of "purposely" M.C.A. 1978, § 45-2-101(52)
Definition of "knowingly" M.C.A. 1978, § 45-2-101(27)
When accountability exists, M.C.A. 1978, § 45-2-302
Definition of "offense" M.C.A. 1978, § 45-2-101(36)

Library References

Explosives, Key Nos. 2, 4
C.J.S. Explosives §§ 1, 3, 4, 12

Law Review Commentaries

Annot. Possession of a bomb, molotov cocktail or similar device as criminal offense. 42 A.L.R.3d 1230 (1972)

Notes of Decisions

In General

Possession of explosives with intent to use them for unlawful purpose gives rise to presumption that explosives were procured for that purpose. People v. Catuara, 358 Ill. 414, 193 N.E. 199 (1935).

Constitutionality

R.C.M. 1947, § 94-8-223 which dealt with the possession, sale or manufacture of silencers and explosives, and which is in substance similar to M.C.A. 1978, §§ 45-8-335 and 45-8-336, was held not to be unconstitutionally vague because it did not specify that the destruction of person or property be without consent of the victim. State v. McBenge, ____ Mont. ____, 574 P.2d 260, 264 (1978).

Admissibility and Sufficienty of Evidence

Sale of bombs where seller had reasonable grounds to believe buyer intended unlawful use, completed offense, though buyer's intention be lawful. People v. Ficke, 343 Ill. 367, 175 N.E. 543 (1931).

Information or Indictment

When the state charges that on a certain day at a certain time, defendant had possession of explosives with intent that the same be used for the destruction of named persons and property, clearly the facts constituting the offense are stated so that a person of common understanding would know what is intended and the information is therefore sufficient and should not have been quashed. State v. McBenge, ____ Mont. ____, 574 P.2d 260 (1978).

45-8-336. Possession of a silencer. (1) A person commits the offense of possession of a silencer if he possesses, manufactures, transports, buys, or sells

of silencers and explosives, and which is in substance similar to M.C.A. 1978, §§ 45-8-335 and 45-8-336, was held not to be unconstitutionally vague because it did not specify that the destruction of person or property be without consent of the victim. State v. McBenge, ____ Mont. ____, 574 P.2d 260, 264 (1978).

45-8-337. Possession prima facie evidence of unlawful purpose. Possession of a silencer or of a bomb or similar device charged or filled with one or more explosives is prima facie evidence of a purpose to use the same to commit an offense.

Historical Note

Enacted: M.C.C. 1973, § 94-8-209.5, Sec. 76, Ch. 359, Laws of Montana 1977

Source: R.C.M. 1947, § 94-35-186, redesignated M.C.C. 1973, § 94-8-225

Prior Law: R.C.M. 1947, § 94-8-225, repealed, Sec. 77, Ch. 359, Laws of Montana 1973; R.C.M. 1947, § 94-8-209.5

Annotator's Note

This section replaces former section 94-8-225 which provided that possession of any Maxim silencer or bomb gave rise to a presumption that it was to be used for an unlawful purpose. Section 94-8-225 was a recodification of prior Montana law. It was first passed by Sec. 3, Ch. 6, Laws of Extraordinary Legislative Session, 1918.

Cross References

Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Definition of "purpose" M.C.A. 1978, § 45-2-101(52)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Reckless or malicious use of explosives M.C.A. 1978, § 45-8-333
Possession of a destructive device M.C.A. 1978, § 45-8-334
Possession of explosives M.C.A. 1978, § 45-8-335
Possession of a silencer M.C.A. 1978, § 45-8-336
Definitions M.C.A. 1978, § 45-8-332.

Library References

Explosives Key No. 8
Weapons, Key No. 17(2)
C.J.S. Explosives, §§ 3, 12
C.J.S. Weapons, §§ 3, 4, 5, 6

Notes of Decisions

Constitutionality

R.C.M. 1947, § 94-8-225 which made possession of a silencer or explosives presumptive evidence of intent to use them in the destruction of or injury to property or life, and which was substantively similar to this section and was repealed when this section was enacted, was held not to be constitutionally invalid in that it shifted the burden of proof of lack of intent to the defendant and offended due process. If the existence of the proven fact would convince a rational juror of the existence of the inferred fact beyond a reasonable doubt, the statute comports with due process. State v. McBenge, ____ Mont. ____, 574 P.2d 260 (1978).

45-8-338 through 45-8-340 reserved.

45-8-341. Purchase of rifle or shotgun in contiguous state by Montana resident. Residents of Montana may purchase any rifle or rifles and shotgun or shotguns in a state contiguous to Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968 and regulations thereunder, as administered by the United States secretary of the treasury, and provided futher that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which the purchase is made.

Historical Note

Enacted: R.C.M. 1947, § 94-3578.1, Sec. 1, Ch. 87, Laws of Montana 1969; redesignated M.C.C. 1973, § 94-8-219, Sec. 29, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, § 94-3578.1

Prior Law: R.C.M. 1947, § 94-3578.1, redesignated R.C.M. 1947, § 94-8-219

Annotator's Note

This section is merely a recodification of pre-existing Montana law. The Federal Gun Control Act of 1968, referred to in the statute, may be found at 18 U.S.C. §§ 921-928.

Cross References

Purchase of rifle or shotgun in Montana by resident of contiguous state M.C.A. 1978, § 45-8-342
Federal Gun Control Act of 1968, 18 U.S.C. §§ 921-928

Library References

Weapons, Key No. 4
C.J.S. Weapons, §§ 2, 5, 22

45-8-342. Purchase of rifle or shotgun in Montana by resident of contiguous state. Residents of a state contiguous to Montana may purchase any rifle or rifles and shotgun or shotguns in Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968 and regulations thereunder, as administered by the United States secretary of the treasury, and provided further that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which such persons reside.

Historical Note

Enacted: R.C.M. 1947, § 94-3578.2, Sec. 2, Ch. 87, Laws of Montana 1969; redesignated M.C.C. 1973, § 94-8-220, Sec. 29, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, § 94-3578.2

Prior Law: R.C.M. 1947, § 94-3578.2

Annotator's Note

This section is merely a recodification of pre-existing Montana law. The federal Gun Control Act of 1968 may be found at 18 U.S.C. §§ 921-928

Cross References

Purchase of rifle or shotgun in contiguous state by Montana resident M.C.A. 1978, § 45-8-342
Federal Gun Control Act of 1968, 18 U.S.C. §§ 921-928

Library References

Weapons, Key No. 4
C.J.S. Weapons, §§ 2, 5, 22

45-8-343. Firing firearms. Every person who willfully shoots or fires off a gun, pistol, or any other firearm within the limits of any town or city or of any private enclosure which contains a dwelling house is punishable by a fine not exceeding $25.

Historical Note

Enacted: Secs. 1, 2, p. 46, Ex. L. of Montana 1873; re-en. 4th Div. Rev. Stat. 1879, § 185, 4th Div. Comp. Stat. 1887, § 228, Rev. C. 1907, § 8834, R.C.M. 1921, § 11530, R.C.M. 1935, § 11530, R.C.M. 1947, § 94-3578; redesignated M.C.C. 1973, § 94-8-218, Sec. 29, Ch. 513, Laws of Montana 1973

Amended: Sec. 1161, Penal Code 1895; Sec. 39, Ch. 359, Laws of Montana 1977

Prior Law: 4th Div. Rev. Stat. 1879, § 185; 4th Div. Comp. Stat. 1887, § 228; Rev. C. 1907, § 8834; R.C.M. 1921, § 11530; R.C.M. 1935, § 11530; R.C.M. 1947, § 94-3578

Annotator's Note

This statute is merely a recodification of a very old Montana law. The 1895 amendment consolidated former subdivision (1) and (2); eliminated "that all fines collected under the provisions of this act shall be paid into the county treasury, for the benefit of the school fund"; eliminated the reference to the effective date, and made stylistic changes. The 1977 amendment added "other" before "firearm," and made minor stylistic changes.

Cross References

Disorderly conduct M.C.A. 1978, § 45-8-101

Library References

Weapons, Key No. 15
C.J.S. Weapons, §§ 16-18

Notes of Decisions

Indefinite use of "city or town" by legislature does not mean only incorporated cities or towns are meant. State ex rel. Powers v. Dale, 47 Mont. 227, 131 P. 670 (1913).

45-8-344. Use of firearms by children under fourteen prohibited. It is unlawful for a parent, guardian, or other person having charge or custody of a minor child under the age of 14 years to permit the minor child to carry or use in public any firearms of any description loaded with powder and lead, except when the child is accompanied by a person having charge or custody of the child or under the supervision of a qualified firearms safety instructor who has been authorized by the parent or guardian.

Historical Note

Enacted: R.C.M. 1907, § 8879, Sec. 1, Ch. 111, Laws of Montana 1907; re-en. R.C.M. 1921, § 11565, R.C.M. 1935, § 11565, R.C.M. 1947, § 94-3579; redesignated M.C.C. 1973, § 94-8-221, Sec. 29, Ch. 513, Laws of Montana 1973

Amended: Sec. 1, Ch. 139, Laws of Montana 1963; Sec. 40, Ch. 359, Laws of Montana 1977

Source: R.C.M. 1947, § 94-3579

Prior Law: Rev. C. 1907, § 8879; R.C.M. 1921, § 11565; R.C.M. 1935, § 11565; R.C.M. 1947, § 94-3579; M.C.C. 1973, § 94-8-221

Annotator's Note

This section is merely a recodification of pre-existing Montana law. The 1963 amendment added "or under the supervision of a qualified firearms safety instructor, who has been duly authorized by such parent or guardian" at the end of the section. The 1977 amendment replaced "in the company of such parent or guardian" with "accompanied by a person having charge or custody of the child."

Cross References

Criminal liability of parent or guardian--prosecution M.C.A. 1978, § 45-8-345

Library References

Infants, Key No. 20
C.J.S. Infants, § 16
Weapons, Key No. 1
C.J.S. Weapons, § 2

45-8-345. Criminal liability of parent or guardian--prosecution. (1) Any parent, guardian, or other person violating the provision of 45-8-344 shall be guilty of a misdemeanor.

(2) The county attorney, on complaint of any person, must prosecute violations of 45-8-344.

Historical Note

Enacted: Rev. C. 1907, § 8880, Sec. 2, Ch. 111, Laws of Montana 1907, re-en. R.C.M. 1921, § 11566, R.C.M. 1935, § 11566, R.C.M. 1947, § 94-3580; redesignated M.C.C. 1973, § 94-8-222, Sec. 29, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, § 94-3580

Prior Law: Rev. C. 1907, § 8880; R.C.M. 1921, § 11566; R.C.M. 1935, § 11566, R.C.M. 1947, § 94-3580; M.C.C. 1973, § 94-8-222

Annotator's Note

This section is simply a recodification of pre-existing Montana law.

Cross References

When accountability exists M.C.A. 1978, § 45-2-302
Use of firearms by children under 14 prohibited M.C.A. 1978, § 45-8-344

Library References

Infants, Key No. 20
C.J.S. Infants, § 16

Chapter IX--DANGEROUS DRUGS

Part 1--Offenses Involving Dangerous Drugs

45-9-101. Criminal sale of dangerous drugs. (1) A person commits the offense of criminal sale of dangerous drugs if he sells, barters, exchanges, gives away, or offers to sell, barter, exchange, or give away or manufactures, prepares, cultivates, compounds, or processes any dangerous drug, as defined in 50-32-101.

(2) A person convicted of criminal sale of an opiate, as defined in 50-32-101(18), shall be imprisoned in the state prison for a term of not less than 2 years or more than life, except as provided in 46-18-222.

(3) A person convicted of criminal sale of a dangerous drug included in Schedule I or Schedule II pursuant to 50-32-222 or 50-32-224, except marijuana or tetrahydrocannabinols, who has a prior conviction for criminal sale of such a drug shall be imprisoned in the state prison for a term of not less than 5 years or more than life, except as provided in 46-18-222. Upon a third or subsequent conviction for criminal sale of such a drug, he shall be imprisoned in the state prison for a term of not less than 10 years or more than life, except as provided in 46-18-222. Whenever a conviction under this subsection is for criminal sale of such a drug to a minor, the sentence shall include the restriction that the defendant be ineligible for parole and participation in the prisoner furlough program while serving his time.

(4) A person convicted of criminal sale of dangerous drugs not otherwise provided for in subsection (2) or (3) shall be imprisoned in the state prison for a term of not less than 1 year or more than life.

(5) Practitioners and agents under their supervision acting in the course of a professional practice, as defined by 50-32-101, are exempt from this section.

Historical Note

Enacted: R.C.M. 1947, § 54-132, Sec. 4, Ch. 314, Laws of Montana 1969

Amended: Sec. 1, Ch. 55, Laws of Montana 1973; Sec. 24, Ch. 412, Laws of Montana 1973; Sec. 1, Ch. 258, Laws of Montana 1974; Sec. 1, Ch. 359, Laws of Montana 1977; Sec. 1, Ch. 584, Laws of Montana 1977; Sec. 1, Ch. 587, Laws of Montana 1979

Source: New

Prior Law: R.C.M. 1947, §§ 54-102, 54-103, repealed, Sec. 14, Ch. 314, Laws of Montana 1969

Annotator's Note

The law in Montana dealing with drug offenses was originally not part of the criminal code at all, but was rather included within the section of the code dealing with the regulation of narcotic drugs. See R.C.M. 1947, Title 54. From 1937 to 1969, Montana's narcotic drug law was essentially the Uniform Narcotic Drug Act which was also adopted by a majority of the states. The Act became outmoded with the passage of time and in 1969, a new act was drafted and enacted, Montana's Dangerous Drug Act, R.C.M. 1947, §§ 54-129 through 54-138. Within a year, a new uniform law was also promulgated by the National Conference of Commissioners on Uniform Laws, the Uniform Controlled Substances Act of 1970. Montana's Dangerous Drug Act was amended in 1973 to adopt substantially the definitions, procedures, standards, schedules and regulatory provisions of the Uniform Controlled Substances Act, which has also been substantially adopted by a majority of the states. The Act, as recodified, is now found in M.C.A. 1978, Title 50, Chapter 32, Controlled Substances, which is primarily regulatory in nature, but which also defines the drugs to which the criminal provisions, Title 45, Chapter 9, refer. The criminal provisions were retained to a great extent, as originally drafted and enacted in 1969, with modifications being made to harmonize that portion of Montana's drug laws with the newly passed regulatory and definitional sections of the Uniform Controlled Substances Act. Title 45, Chapter 9, uses the same terms as are used throughout Title 45, but makes reference to Title 50, Chapter 32, for the definition of the prohibited narcotic drugs.

This section was originally enacted as R.C.M. 1947, § 54-132. It has been amended several times since then. Chapter 55, Laws of Montana of 1973, deleted from subsection (b) a second sentence reading "Any person of age twenty-one years or under convicted of a first violation under this section shall be presumed to be entitled to a deferred imposition of sentence"; and made a minor change in style. Chapter 412, Laws of Montana of 1973, deleted "and does not come within the exceptions of section 3" from the end of subsection (a); and deleted from subsection (b) the same sentence deleted by Ch. 55. The 1974 amendment inserted in subsection (2) "barters, exchanges, gives away, or offers to sell, barter, exchange or give away"; and added subsection (c). Chapter 359, Laws of Montana of 1977, redesignated subsections (a) to (c) as subsections (1) to (3); substituted "54-301" at the end of subsection (1) for "this act"; inserted "as defined by 54-301" in subsection (3); and made minor changes in phraseology, punctuation and style. Chapter 584, Laws of Montana of 1977, redesignated subsection (a) as subsection (1); inserted subsection (2); redesignated subsections (b) and (c) as subsections (3) and (4); inserted "not otherwise provided for in subsection (2)" in subsection (3); and made minor changes in phraseology, punctuation and style. Chapter 587, Laws of Montana of 1979 enacted

subsection (3) in its present form to provide increased penalties for second and third offenses of criminal sale of dangerous drugs and for sales to minors. Former subsection (3) became subsection (4) with an addition of the words "or (3)" following "subsection (2)," and former subsection (4) became subsection (5).

Although this section is entitled "Criminal Sale of Dangerous Drugs," it includes all types of transfers and activities preparatory to actual sale, such as manufacture, preparation, cultivation, compounding or processing of dangerous drugs. This section consolidates two statutes under prior Montana law: R.C.M. 1947, § 54-103, prohibited the manufacture, compounding, mixing, cultivating and growing of narcotic drugs and R.C.M. 1947, § 54-102, overlapped somewhat but also prohibited the possession and sale of narcotic drugs. This statutory expansion of the offense entitled "criminal sale" was approved and held to be constitutionally permissible. State ex rel. LeMieux v. District Court, 166 Mont. 115, 531 P.2d 665, appeal dismissed, 422 U.S. 1030 (1975). However, that decision was overruled in State ex rel. Zander v. District Court, ____ Mont. ____, 591 P.2d 656 (1979), at least as to its approval of the inclusion of "cultivation" as an act prohibited as criminal "sale." The Court held that in defining sale to include cultivation, the legislature had created a conclusive presumption of criminal sale from the cultivation of a dangerous drug. That presumption was held to be constitutionally impermissible because the fact proved (cultivation of marijuana) bears no rational connection to the fact presumed (sale of marijuana); the presumption was held to be arbitrary and violative of due process and that part of the statute was, therefore, held to be unconstitutional on its face. It therefore appears that a separate statute must again be enacted prohibiting the cultivation of dangerous drugs if the intent of the legislature is to be carried out, or that the title of this section must be amended to prohibit criminal sale, transfer, preparation, cultivation, etc. of dangerous drugs. The enactment of a separate statute would probably most clearly counteract the effect of the Zander decision.

Cross References

Definition of "dangerous drug" M.C.A. 1978, § 50-32-101(6)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Controlled substances M.C.A. 1978, Title 50, Chapter 32
Criminal jurisdiction of justices' courts M.C.A. 1978, § 3-10-303
Jurisdiction M.C.A. 1978, § 45-9-201
Definition of "marijuana" M.C.A. 1978, § 50-32-101(16)
Definition of "opiate" M.C.A. 1978, § 50-32-101(18)

Library References

Drugs and Narcotics Key Nos. 29 to 31, 68 to 78
C.J.S. Drugs and Narcotics, §§ 84 to 90, 100 to 109, 164 to 174

Law Review Commentaries

D. Bernheim. Defense of Narcotics Cases (1972)

R. King. Defense of a drug abuse case. 3 Criminal Defense Techniques, Ch. 57 (R. Sypes ed., 1969)

practicing Law Institute. Defending a Narcotics Case (1972)

Notes of Decisions

In General

Knowledge is an essential element of unlawfully selling a stimulant drug, and such knowledge may not be implied from fact of possession alone. State v. Anderson, 159 Mont. 344, 498 P.2d 295 (1972). Whether defendant, who was charged with sale of dangerous drugs and who allegedly represented that substance he sold to undercover agent was crystal methamphetamine, knew that the subject powder was actually caffeine rather than the controlled substance was for jury. State v. Hendricks, 171 Mont. 7, 555 P.2d 743 (1976). In prosecution for wilfully, unlawfully and feloniously selling a stimulant drug, whether defendant had knowledge of the nature of the prohibited substance was for jury determination. State v. Anderson, 159 Mont. 344, 498 P.2d 295 (1972). Defendant could be convicted of unlawful sale of drug which he possessed lawfully as having been dispensed by physician. State v. Karathanos, 158 Mont. 461, 493 P.2d 326 (1972). Statute which provides that a person commits the offense of criminal sale of dangerous drugs if, inter alia, he "manufactures, prepares, cultivates, compounds or processes any dangerous drug" does not create a presumption, constitutional or otherwise, that anyone who manufactures or cultivates a dangerous drug is guilty of selling the drug but rather merely broadly defines the term "sale." State ex rel. LeMieux v. District Court, 166 Mont. 115, 531 P.2d 665, appeal dismissed, 422 U.S. 1030 (1975), overruled in State ex rel. Zander v. District Court, ____ Mont. ____, 591 P.2d 656 (1979). In defining "sale" to include "cultivation" the legislature created a conclusive presumption of criminal sale from the cultivation of a dangerous drug which violates due process. State ex. rel. Zander v. District Court, ____ Mont. ____, 591 P.2d 656 (1979). Montana does not have two separate drug acts in force; sections 54-301 through 54-327 [now M.C.A. 1978, Title 50, Chapter 32] were intended to amend and be included as part of Montana Dangerous Drug Act and term "dangerous drug" as used in this section and 54-133 [now M.C.A. 1978, § 45-9-102] is defined in 54-301 [now M.C.A. 1978, § 50-32-101]. State ex rel. Lance v. District Court, 168 Mont. 297, 542 P.2d 1211 (1975). Federal Controlled Substances Act, 21 U.S.C. § 903, does not preempt Montana law in narcotic drugs. Id.

Constitutionality

This statute is not unconstitutional just because the legislature defined the offense of criminal sale of dangerous drugs in terms of several types of conduct that might constitute that offense, and although the Montana legislature could have set forth a separate statute prohibiting the cultivation of marijuana and could have labeled it accordingly, defendant who cultivated marijuana was guilty of the offense of criminal sale of dangerous drugs. State ex rel. LeMieux v. District Court, 166 Mont. 115, 531 P.2d 665, appeal dismissed, 422 U.S. 1030 (1975), overruled in State ex rel. Zander v. District Court, ____ Mont. ____, 591 P.2d 656, 662 (1979). In defining "sale" to include "cultivation" the legislature created a conclusive presumption of criminal sale from the cultivation of a dangerous drug. That presumption was held to be violative of due process because the fact proved (cultivation) bore no rational connection to the fact presumed (sale) and the statute allowed no proof to the contrary. That portion of the statute which was held to have created a conclusive presumption of sale from cultivation was held to be unconstitutional on its face. State ex rel. Zander v. District Court, ____ Mont. ____, 591 P.2d 656 (1979). Under general statutory savings clause, repeal of Uniform Drug Act did not bar prosecution thereunder filed after its repeal covering crime committed before its repeal, and as so construed savings clause did not constitute ex post facto legislation. State ex rel. Huffman v. District Court, 154 Mont. 201, 461 P.2d 847 (1969).

Information and Indictment

Information charging that petitioner sold mescaline to John Doe, an informant, did not state sufficient facts to protect petitioner from double jeopardy; hence, State would be required to disclose identity of purchaser of the dangerous drugs unless information could be amended so as to disclose sufficient facts. State ex rel. Offerdahl v. District Court, 156 Mont. 432, 481 P.2d 338 (1971). Alternative motion to amend information from preparation of drugs to sale of drugs in order to conform with the affidavit, or to dismiss and refile charges, would have been tantamount to amending the charge as a matter of substance and was properly denied by the trial court. State v. Tropf, 166 Mont. 79, 530 P.2d 1158 (1975). Where defendant was charged with selling narcotics in violation of former section 54-102, and between date of commission of crime and time information was filed legislature repealed former section 54-102 and passed this section of Dangerous Drug Act, such repeal did not bar prosecution under former section since general statutory saving clause, section 43-514 [now M.C.A. 1978, § 1-2-205], operated to sustain jurisdiction of subject matter in district court. State ex rel. Huffman v. District Court, 154 Mont. 201, 461 P.2d 847 (1969).

Admissibility and Sufficiency of Evidence

The testimony of witnesses was held sufficient to support the act of giving or transferring marijuana, which without even considering evidence of a cash transfer, establishes the crime beyond a reasonable coubt. State v. Thomas, 166 Mont. 265, 532 P.2d 405 (1975). Evidence that victims hallucinated following ingestion of drugs furnished by defendant and described by him as "acid" held to establish dangerous nature of drugs to support conviction, despite absence of proof of exact type of drug, and the possibility that hallucinations might have been flashback from previous trips did not necessarily create reasonable doubt. State v. Dunn, 155 Mont. 319, 472 P.2d 288 (1970). Fact that pills in question had been ingested by recipients and were consequently unavailable for precise chemical analysis would not render evidence insufficient to sustain defendant's conviction for criminal sale of dangerous drugs. State v. Dunn, 155 Mont. 370, 472 P.2d 288 (1970). Defendant's extraordinary side trip to city, act of approaching students and act of making verbal offer to sell drugs were sufficient acts to constitute crime of attempted sale of dangerous drugs. State v. Ribera, ____ Mont. ____, 597 P.2d 1164 (1979). Evidence, in prosecution for sale of dangerous drugs, was sufficient to support conviction of defendant who, according to buyer and other witnesses, transferred marijuana to the student for $15. State v. Thomas, 166 Mont. 265, 532 P.2d 405 (1975). Evidence identifying defendant as seller of hashish was sufficient to sustain conviction for criminal sale of a dangerous drug. State v. Hoskins, 163 Mont. 36, 514 P.2d 1331 (1973). Knowledge as essential element of unlawfully selling a stimulant drug, may be proved by direct evidence or by evidence of acts, declarations, or conduct of the accused from which an inference of knowledge may be drawn. State v. Anderson, 159 Mont. 344, 498 P.2d 295 (1972). Evidence which included direct testimony by principal in narcotics transaction that defendant had provided the pound of marijuana which was ultimately given to a police informant and defendant's admission that he had intended to sell the informant an additional 14 pounds of marijuana was sufficient to support conviction for selling and possession of marijuana. State v. Hill, 170 Mont. 71, 550 P.2d 390 (1976).

Instructions

Trial court's instruction to jury that law implies knowledge that drug was a prohibited drug from mere possession of the drug was an incorrect statement of the

law, confusing to the jury, and entitled defendant to new trial. State v. Anderson, 159 Mont. 344, 498 P.2d 295 (1972). State was entitled in prosecution for criminal sale of dangerous drugs to instruction on statute that term dangerous drug meant any depressant, stimulant, hallucinogenic or narcotic drug, and any error in giving instruction when there was no evidence of existence of narcotic or depressant was harmless. State v. Dunn, 155 Mont. 370, 472 P.2d 288 (1970). Court did not err in modifying instruction that term dangerous drug included specific drugs named in statute and none others by striking words "and none others" where statute did not include the stricken words. Id.

45-9-102. Criminal possession of dangerous drugs. (1) A person commits the offense of criminal possession of dangerous drugs if he possesses any dangerous drug, as defined in 50-32-101.

(2) Any person convicted of criminal possession of marijuana or its derivatives in an amount the aggregate weight of which does not exceed 60 grams of marijuana or 1 gram of hashish is, for the first offense, guilty of a misdemeanor and punishable by a fine not to exceed $1,000 or imprisonment in the county jail for a term not to exceed 1 year or both such fine and imprisonment. A person convicted of a second or subsequent offense under this subsection is punishable by a fine not to exceed $1,000 or imprisonment in the county jail for a term not to exceed 1 year or in the state prison for a term not to exceed 3 years or both such fine and imprisonment.

(3) A person convicted of criminal possession of an opiate, as defined in 50-32-101(18), shall be imprisoned in the state prison for a term of not less than 2 years or more than 5 years, except as provided in 46-18-222.

(4) A person convicted of criminal possession of dangerous drugs not otherwise provided for in subsection (2) or (3) shall be imprisoned in the state prison for a term not to exceed 5 years.

(5) A person of the age of 21 years or under convicted of a first violation under this section shall be presumed to be entitled to a deferred imposition of sentence.

(6) Ultimate users and practitioners and agents under their supervision acting in the course of a professional practice, as defined by 50-32-101, are exempt from this section.

Historical Note

Enacted: R.C.M. 1947, § 54-133, Sec. 5, Ch. 314, Laws of Montana 1969

Amended: Sec. 1, Ch. 228, Laws of Montana 1971; Sec. 26, Ch. 412, Laws of Montana 1973; Sec. 1, Ch. 174, Laws of Montana 1974; Sec. 2, Ch. 359, Laws of Montana 1977; Sec. 2, Ch. 584, Laws of Montana 1977

Source: New

Prior Law: R.C.M. 1947, § 54-102, repealed, Sec. 14, Ch. 314, Laws of Montana 1969

Annotator's Note

For general background on the law in Montana as to drug offenses, see the Annotator's Note following M.C.A. 1978, § 45-9-101. This section has also been the subject of numerous amendments.

The 1971 amendment inserted "other than criminal possession of marijuana and its derivatives as hereinafter provided" in the first sentence of subsection (b); added new second and third sentences to subsection (b); redesignated the former second sentence of subsection (b) as the first sentence of subsection (d); added the second sentence of subsection (d); and made minor changes in phraseology. The 1973 amendment deleted "and does not come within the exceptions of section 3" from the end of subsection (a). The 1974 amendment deleted from the beginning of subsection (b) "A person convicted of criminal possession of dangerous drugs, other than criminal possession of marijuana and its derivatives as hereinafter provided, shall be imprisoned by imprisonment in the state prison not to exceed five (5) years"; inserted subsection (c); and redesignated former subsection (c) as subsection (d). Chapter 359, Laws of 1977, redesignated former subsections (a) through (d) as subsections (1) through (4); deleted a former final sentence which read "Jurisdiction under this section shall be exclusively in the district courts"; added a subsection now designated subsection (6); and made minor changes in phraseology, punctuation and style. Chapter 584, Laws of Montana 1977, redesignated former subsections (a) and (b) as subsections (1) and (2); inserted subsection (3); redesignated former subsections (c) and (d) as subsections (4) and (5); substituted "subsection (2) or (3)" in subsection (4) for "subsection (b)"; and made minor changes in punctuation and style.

To establish an offense under this section, the state must prove (1) knowing (2) control of a (3) dangerous drug for a sufficient time to be able to terminate control. The mental state element of the offense, "knowingly" is included as part of the definition of "possession" as used in the code. M.C.A. 1978, § 45-2-101(46). This section distinguishes between possession of marijuana or hashish in relatively

small amounts and possession of opiates or other dangerous drugs. A lesser penalty is provided for offenses involving small amounts of hashish and marijuana and a distinction is made as to the penalty to be imposed for a first offense and that to be imposed for subsequent offenses. Subsection (5) also provides a presumption in favor of deferred imposition of sentence where an under-21 year old is prosecuted for a first offense under this section. This provision allows youthful first offenders to wipe the slate clean and avoid a criminal record by complying with the conditions of the deferred sentence and avoiding subsequent charges for an offense under this section. M.C.A. 1978, § 46-18-204. Additionally, it should be noted that an offender under this section who is shown to be an excessive or habitual user of dangerous drugs, may, in lieu of imprisonment, be committed to the custody of any institution for rehabilitative treatment for not less than six months nor more than two years under M.C.A. 1978, § 45-9-202.

Cross References

Definition of "knowing" M.C.A. 1978, § 45-2-101(27)
Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Dismissal after deferred imposition of sentence M.C.A. 1978, § 46-18-204
Definition of "dangerous drug" M.C.A. 1978, § 50-32-101(6)
Definition of "opiate" M.C.A. 1978, § 50-32-101(18)
Definition of "marijuana" M.C.A. 1978, § 50-32-101(16)
Alternative sentencing authority M.C.A. 1978, § 45-9-202

Library References

Drugs and Narcotics, Key Nos. 29-31, 61-67, 76-78, 115-121
C.J.S. Drugs and Narcotics, §§ 84-90, 154-162, 192-195

Law Review Commentaries

D. Bernheim. Defense of Narcotics Cases (1972)
R. King. Defense of a drug abuse case. 3 Criminal Defense Techniques, Ch. 57 (R. Sypes ed., 1969)
Practicing Law Institute. Defending a Narcotics Case (1972)

Notes of Decisions

In General

Montana does not have two separate drug acts in force; sections 54-301 through 54-327 [now M.C.A. 1978, Title 50, Chapter 32] were intended to amend and be included as part of Montana Dangerous Drug Act and term "dangerous drug" as used in 54-132 [now M.C.A. 1978, § 45-9-101] and this section is defined in 54-301 [now M.C.A. 1978, § 50-32-101]. State ex rel. Lance v. District Court, 168 Mont. 297, 542 P.2d 1211 (1975). Possession of baggage claim tag which defendant received from airline employee when she checked suitcase containing marijuana constituted constructive possession of contraband. State v. Trowbridge, 157 Mont. 527, 487 P.2d 530 (1971). Actual physical possession is not essential to constitute possession of a dangerous

drug under this section; constructive possession suffices and is established when it is shown that the person charged with possession has dominion and control over the contraband. Id. Exclusive, immediate personal possession is not essential to establish constructive possession of contraband. Id. Possession may be implied when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. State v. Meader, ____ Mont. ____, 601 P.2d 386 (1979). Whether several ingredients besides amphetamine are present within a pill is immaterial in a prosecution under Dangerous Drug Act. State v. Hull, 158 Mont. 6, 487 P.2d 1314 (1971).

Constitutionality

This section is not unconstitutionally vague and uncertain due to its failure to require knowledge and intent in relation to possession of dangerous drugs since meaning of term "possession" has been so well defined that it cannot be considered ambiguous. State ex rel. Glantz v. District Court, 154 Mont. 132, 461 P.2d 193 (1969). Under general statutory savings clause, repeal of Uniform Drug Act did not bar prosecution thereunder filed after its repeal covering crime committed before its repeal, and as so construed savings clause did not constitute ex post facto legislation. State ex rel. Huffman v. District Court, 154 Mont. 201, 461 P.2d 847 (1969).

Probable Cause For Arrest

Where relators were arrested and charged under this section, allegation that probable cause did not exist for their arrest without warrant was without merit in regard to three who were present and lived in house where drugs were found; but probable cause did not exist concerning fourth party arrested who was present on premises but did not live there, notwithstanding later finding of drugs on this party, since mere presence in place where search was made without further proof of probable cause was insufficient to justify arrest. State ex rel. Glantz v. District Court, 154 Mont. 132, 461 P.2d 193 (1969), distinguished in State v. Hull, 158 Mont. 6, 487 P.2d 1314, 1320 (1971).

Information and Indictment

Defendant in drug prosecution could be charged and convicted of separate offense for each type of prohibited drug found in his possession during same transaction or occurrence. State v. Meadors, ____ Mont. ____, 580 P.2d 903 (1978).

Admissibility and Sufficiency of Evidence

Test of relevancy of evidence to crime of criminal possession of drugs is whether such evidence tends to establish the inference for which it is offered. State v. Ruona, 159 Mont. 507, 499 P.2d 797 (1972). Evidence was sufficient to support finding of constructive possession of dangerous drugs on part of defendant who was stopped for traffic offenses, who slid over to passenger side of his vehicle and crawled out of passenger side on his hands and knees, whose hands touched the ground, who was taken to police station for booking on traffic offenses and who was returned to area by police officer who then found beneath automobile on passenger side a bottle and bag, which contained drugs and which were not frost-covered like surrounding area. Id. In prosecution for felony possession of marijuana, analysis of random samples from each of 15 one-pound packages was suffi-

cient to establish that the amount involved in transaction which led to arrest was in excess of 60 grams and thus that a felony charge was warranted, despite contention that conviction was improper because less than 60 grams were tested. State v. Hill, 170 Mont. 71, 550 P.2d 390 (1976). Testimony of station manager for airline that defendant presented him with passenger copy of her flight ticket, together with baggage claim tag, was in and of itself sufficient to establish possession of contraband in suitcase within meaning of statute making it unlawful to possess dangerous drugs. State v. Trowbridge, 157 Mont. 527, 487 P.2d 530 (1971). In prosecution for possessing dangerous drugs, it was not necessary to show that defendant was in actual physical possession, or had exclusive control over the drugs; it was sufficient that it be shown, by either direct or circumstantial evidence, that the defendant had right to exercise control over the contraband. Id. Evidence showing that defendant was present in same room where drugs were found and evidence that connected defendant with the premises (i.e. mail addressed to defendant at the premises, personalized license plates bearing defendant's nickname, men's clothing which would fit defendant, and belief of landlady that defendant resided at the premises) held sufficient to establish constructive possession of the drugs. State v. Meader, ____ Mont. ____, 601 P.2d 386 (1979). As the Dangerous Drug Act does not require proof of any specific quantity of a dangerous drug in order to constitute violation, it was unnecessary for the jury to find that the defendant possessed an amphetamine pill in sufficient quantity to be dangerous. State v. Hull, 158 Mont. 6, 487 P.2d 1314 (1971). Defendant's conviction for criminal possession of dangerous drugs was not improper because State failed to prove that defendant possessed exact amount of drugs alleged in information. State v. Meadors, ____ Mont. ____, 580 P.2d 903 (1978). Burden of showing that defendant knew prohibited substance was in his possession can be met by evidence of acts, declarations, or conduct from which inference may be drawn that he knew of existence of prohibited substance at place where it was found. State ex rel. Glantz v. District Court, 154 Mont. 132, 461 P.2d 193 (1969). Jury in prosecution for possession of controlled substance was not required to find that marijuana admitted into evidence was hallucinogenic, but only that it met statutory definition of marijuana, notwithstanding that marijuana was grouped with hallucinogenic drugs in schedules of controlled substances. State v. Petko, ____ Mont. ____, 581 P.2d 425 (1978). Evidence justified jury's decision that the substance possessed by defendant was actually among those prohibited by statute in that it was cannabis sativa l, in prosecution for criminal possession of marijuana. State v. Paulson, 167 Mont. 310, 538 P.2d 339 (1975). Testimonial proof of possession of dangerous drug is sufficient to sustain a conviction, and there is no requirement that alleged dangerous drug be introduced at trial. State v. Hull, 158 Mont. 6, 487 P.2d 1314 (1971).

Instructions

Instruction, in prosecution for criminal possession of dangerous drugs, defining "constructive possession" was not improper. State v. Ruona, 159 Mont. 507, 499 P.2d 797 (1972). Theory of abandonment was not applicable in prosecution for criminal possession of dangerous drugs against defendant who was stopped for traffic offenses and crawled on his hands and knees from passenger side of automobile, under which officer later found bag and bottle of drugs and instruction thereon was properly refused. Id.

Sentence

Trial court improperly sentenced 21-year-old defendant to three years impri-

sonment for violation of this section where there was no evidence to overcome the statutory presumption that defendant was entitled to deferred sentence. State v. Simtob, 154 Mont. 286, 462 P.2d 873 (1969). Under subsection (5), a defendant may not be sentenced to a term in jail; and at the termination of the time of deferment or stayed imposition, the sentencing statute,(now M.C.A. 1978, § 46-18-204), authorizes the court to accept a plea withdrawal or to stike the verdict of guilty and order the charge dismissed. State v. Drew, 158 Mont. 214, 490 P.2d 230 (1971), distinguished in State ex rel. Woodbury v. District Court, 159 Mont. 128, 495 P.2d 1119, 1123 (1972). Once the presumption provided for in subsection (5) has been found by the trial judge not to have been overcome, the court's discretion is limited by this act to defer the imposition of sentence as provided under section 95-2206, now M.C.A. 1978, § 46-18-201 through 46-18-203. State v. Drew, 158 Mont. 214, 490 P.2d 230 (1971) distinguished in State ex rel. Woodbury v. District Court, 159 Mont. 128, 495 P.2d 1119, 1123 (1972).

45-9-103. Criminal possession with intent to sell. (1) A person commits the offense of criminal possession with intent to sell if he possesses with intent to sell any dangerous drug as defined in 50-32-101. No person commits the offense of criminal possession with intent to sell marijuana unless he possesses 1 kilogram or more.

(2) A person convicted of criminal possession of an opiate, as defined in 50-32-101(18), with intent to sell shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years, except as provided in 46-18-222.

(3) A person convicted of criminal possession with intent to sell not otherwise provided for in subsection (2) shall be imprisoned in the state prison for a term of not more than 20 years.

(4) Practitioners and agents under their supervision acting in the course of a professional practice as defined by 50-32-101 are exempt from this section.

Historical Note

Enacted: R.C.M. 1947, § 54-133.1, Sec. 545, Laws of Montana 1975

Amended: Sec. 3, Ch. 584, Laws of Montana 1977

Source: New

Prior Law: None

Annotator's Note

This section was not part of the original Dangerous Drug Act, enacted in 1969, but was rather enacted in 1975. The penalties provided under this section are greater than those for mere possession and less than those for criminal sale, at least as to maximum potential sentence. Although an offender under this section could also be charged and sentenced under § 45-9-102, this section provides an alternative with relatively heavy sentences aimed primarily at offenders who are in the business of selling dangerous drugs but are apprehended before evidence of any act which could be charged under § 45-9-101 is available. Conviction of the offense requires proof of (1) knowing (2) control of a (3) dangerous drug for a sufficient time to be able to terminate control, as well as (4) intent to sell the drug. There is a conclusive presumption of no intent to sell where marijuana is possessed in amounts less than one kilogram. There is a mandatory minimum sentence where an opiate, as defined in § 50-32-101(18), is involved.

The 1977 amendment inserted subsection (2); redesignated former subsections (2) and (3) as subsections (3) and (4); inserted "not otherwise provided for in subsection (2)" in subsection (3); and made minor changes in style.

Cross References

Definition of "knowing" M.C.A. 1978, § 45-2-101(27)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Controlled substances M.C.A. 1978, Title 50, Chapter 32
Definition of "dangerous drug" M.C.A. 1978, § 50-32-101(6)
Definition of "marijuana" M.C.A. 1978, § 50-32-101(16)
Definition of "opiate" M.C.A. 1978, § 50-32-101(18)

Library References

Drugs and Narcotics, Key Nos. 118, 29-31, 61-70, 76-78, 115 et seq.
C.J.S. Drugs and Narcotics, § 163

Law Review Commentaries

D. Bernheim. Defense of Narcotics Cases (1972)

R. King. Defense of a drug abuse case. 3 Criminal Defense Techniques, Ch. 57 (R. Sypes ed., 1969)

Practicing Law Institute. Defendant a Narcotics Case (1972)

45-9-104. Fraudulently obtaining dangerous drugs. A person commits the offense of fraudulently obtaining dangerous drugs if he obtains or attempts to obtain a dangerous drug, as defined in 50-32-101, by:

(1) fraud, deceit, misrepresentation, or subterfuge;

(2) falsely assuming the title of or representing himself to be a manufacturer, wholesaler, practitioner, pharmacist, owner of a pharmacy, or other person authorized to possess dangerous drugs;

(3) the use of a forged, altered, or fictitious prescription;

(4) the use of a false name or a false address on a prescription; or

(5) the concealment of a material fact.

Historical Note

Enacted: R.C.M. 1947, § 54-134, Sec. 6, Ch. 314, Laws of Montana 1969

Amended: Sec. 3, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: R.C.M. 1947, § 54-122, repealed, Sec. 14, Ch. 314, Laws of Montana 1969

Annotator's Note

For general background regarding the law in Montana as to drug offenses and the Dangerous Drug Act of 1969 of which this was a part, see the Annotator's Note following § 45-9-101. This section prohibits the obtaining of dangerous drugs by means of fraud, misrepresentation, impersonation, etc. It should be noted that "obtains," as defined in § 45-2-101(32) includes the bringing about of a transfer of interest or possession, whether to the offender or another. So, facilitating the fraudulent obtaining of drugs classified as dangerous in Title 50, Chapter 32, is also prohibited under this statute. Although the acts prohibited under this section might well also be prohibited under §§ 45-9-101 or 45-9-102, fraudulent activity was segregated from those offenses because of its effect, regardless of the drug involved, on the integrity of the regulatory system. The penalty for a violation of this section is found in § 45-9-106.

The 1977 amendment inserted "as defined in 54-301"; and mande minor changes in phraseology, punctuation and style.

Cross References

Definition of "obtain" M.C.A. 1978, § 45-2-101(32)
Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Controlled substances M.C.A. 1978, Title 50, Chapter 32
Definition of "dangerous drug" M.C.A. 1978, § 50-32-101(6)
Penalty for fraudulently obtaining dangerous drugs or altering the labels of dangerous drugs. M.C.A. 1978, § 45-9-106

Library References

Drugs and Narcotics, Key Nos. 61, 71, 75
C.J.S. Drugs and Narcotics, §§ 149, 151-153, 163, 169, 170
U.L.A. Uniform Controlled Substances Act of 1970, § 403

Law Review Commentaries

D. Bernheim. Defense of Narcotics Cases (1972)
R. King. Defense of a drug abuse case. 3 Criminal Defense Techniques, Ch. 57 (R. Sypes ed., 1969)
Practicing Law Institute. Defending a Narcotics Case (1972)

45-9-105. Altering labels on dangerous drugs. A person commits the offense of altering labels on dangerous drugs if he affixes a false, forged, or altered label to or otherwise misrepresents a package or receptacle containing a dangerous drug, as defined in 50-32-101.

Historical Note

Enacted: R.C.M. 1947, § 54-135, Sec. 7, Ch. 314, Laws of Montana 1969

Amended: Sec. 4, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: R.C.M. 1947, § 54-122(6), repealed, Sec. 14, Ch. 314, Laws of Montana 1969

Annotator's Note

The offense proscribed by this statute was included as a subsection of the former statute on fraud or deceit. This section must be read in conjunction with § 45-9-106 which sets the penalty for an offense under this section. The 1977 amendment added "as defined in 54-301" to the end of the section; and made minor changes in phraseology.

Cross References

Definition of "offense" M.C.A. 1978, § 45-2-101(36)
Definition of "dangerous drug" M.C.A. 1978, § 50-32-101(6)
Controlled substances M.C.A. 1978, Title 50, Chapter 32
Penalty for fraudulently obtaining dangerous drugs or altering the labels of dangerous drugs M.C.A. 1978, § 45-9-106

Library References

Drugs and Narcotics, Key Nos. 73, 77
C.J.S. Drugs and Narcotics, § 175

Law Review Commentaries

D. Bernheim. Defense of Narcotics Cases (1972)
R. King. Defense of a drug abuse case. 3 Criminal Defense Techniques, Ch. 57 (R. Sypes ed., 1969)
Practicing Law Institute. Defending a Narcotics Case (1972)

45-9-106. Penalty for fraudulently obtaining dangerous drugs or altering the labels of dangerous drugs. A person convicted of fraudulently obtaining dangerous drugs or altering labels on dangerous drugs shall be imprisoned in the county jail for a term not to exceed 6 months.

Historical Note

Enacted: R.C.M. 1947, § 54-136, Sec. 8, Ch. 314, Laws of Montana 1969

Source: New

Prior Law: R.C.M. 1947, § 54-125, repealed, Sec. 14, Ch. 314, Laws of Montana 1969

Annotator's Note

This section makes the offenses proscribed by §§ 45-9-104 and 45-9-105, Fraudulently Obtaining Dangerous Drugs and Altering Labels on Dangerous Drugs, misdemeanors punishable only by imprisonment in the county jail for a term not to exceed six months. This section should, however, be read in conjunction with § 45-9-202 which allows the court to commit one convicted under those sections, who is shown to be an excessive or habitual user of dangerous drugs, to the custody of any institution for rehabilitative treatment for not less than six months nor more than two years.

Cross References

Fraudulently obtaining dangerous drugs M.C.A. 1978, § 45-9-104
Altering labels on dangerous drugs M.C.A. 1978, § 45-9-105

Library References

Poisons Key No. 9
C.J.S. Poisons, § 7
Drugs and Narcotics Key No. 133
C.J.S. Drugs and Narcotics, §§ 225-229

45-9-107. Criminal possession of precursors to dangerous drugs. (1) A person commits the offense of criminal possession of precursors to dangerous drugs if he possesses:

(a) both phenyl-2-propanone (phenylacetone) and formamide or hydroxylamine at the same time with the intent to manufacture amphetamine;

(b) both phenyl-2-propanone (phenylacetone) and methylamine or N-methylformamide at the same time with the intent to manufacture methamphetamine;

(c) both piperidine and cyclohexanone at the same time, or a combination product thereof, with the intent to manufacture phencyclidine (PCP).

(2) A person convicted of criminal possession of precursors to dangerous drugs shall be imprisoned in the state prison for a term not less than 2 years or more than 20 years.

Historical Note

Enacted: Sec. 1, Ch. 291, Laws of Montana 1979

Source: New

Prior Law: None

Annotator's Note

This section had no counter part under prior law and was enacted in 1979. It prohibits the possession of the chemical precursors of various dangerous drugs with intent to manufacture the drug. Conviction under this section requires proof of (1) possession, as that term is defined in § 45-2-101, of (2) any of the named combinations of chemicals, as well as (3) intent to manufacture. A mandatory minimum sentence of two years is imposed by subsection (2) with a potential twenty-year maximum sentence upon conviction. This section was enacted as a companion to § 45-9-108 which sets forth certain exemptions to the operation of this section.

Cross References

Definition of "possession" M.C.A. 1978, § 45-2-101(46)
Definition of "dangerous drug" M.C.A. 1978, § 50-32-101(6)
Exemptions M.C.A. 1978, § 45-9-108

Library References

Drugs and Narcotics Key Nos. 62, 66, 111
C.J.S. Drugs and Narcotics, §§ 108, 161, 165-166, 179, 202

45-9-108. Exemptions. (1) The provisions of 45-9-107 do not apply to:

(a) a drug manufacturer licensed by the state;

(b) a person authorized by rules adopted by the board of pharmacists to possess the combination of substances;

(c) a person employed by or enrolled as a student in a college or university within the state who possesses any combination of substances listed in 45-9-107 for the purposes of teaching or research which is authorized by the college or university.

(2) The board of pharmacy shall adopt, amend, or repeal rules in accordance with the Montana Administrative Procedure Act to authorize the processing of any combination of the substances listed in 45-9-107 whenever it determines that there is a legitimate need and that the substances will be used for a lawful purpose.

Historical Note

Enacted: M.C.A. 1978, § 45-9-108, Secs. 2, 3, Ch. 291, Laws of Montana 1979

Source: New

Prior Law: None

Annotator's Note

This section and § 45-9-107, both of which were enacted by the 1979 legislature, operate together to generally prohibit the possession of certain named combinations of chemical substances with intent to manufacture dangerous drugs (§ 45-9-107) while allowing possession with intent to manufacture by licensed drug manufacturers as well as university students or employees who use the chemicals in the furtherance of teaching or research authorized by the college or university. This

section also delegates rulemaking authority to the board of pharmacists to authorize others to possess the chemical substances with intent to manufacture.

The statement of intent adopted by the legislature with the chapter enacting these two statutes sets forth the legislative purpose in delegating this task to the board of pharmacists: "A statement of intent is required for this bill in that in section 3 it delegates authority to the Board of Pharmacy to adopt rules.

"House Bill 422 defines the offense of criminal possession of precursors to certain dangerous drugs. The bill provides that its provisions do not apply to those persons or businesses which have a legitimate reason for possessing the precursors. It is possible that certain persons, businesses or research facilities may now or at a later date have a legitimate need for these precursors. The purpose for giving rulemaking authority to the Board of Pharmacy is that it can best determine whether a person, business or research facility has a legitimate need for the precursors. It will also alleviate having to amend the statute in future sessions if it appears that someone is entitled to be exempted from the criminal provisions of the statute."

Cross References

Criminal possession of precursors to dangerous drugs M.C.A. 1978, § 45-9-107
Montana Administrative Procedure Act M.C.A. 1978, Title 2, Chapter 4

Part 2--Procedural Provisions

45-9-201. Jurisdiction. The district court has exclusive trial jurisdiction over all prosecutions commenced under this chapter.

Historical Note

Enacted: R.C.M. 1947, § 54-138, Sec. 10, Ch. 314, Laws of Montana 1969

Amended: Sec. 6, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: None

Annotator's Note

This section establishes exclusive trial jurisdiction over prosecutions commenced under this chapter in the district court. M.C.A. 1978, § 3-10-303, which establishes the criminal jurisdiction of the justices' courts, expressly excludes jurisdiction in cases commenced under this chapter, but allows those courts to act

as examining and committing courts and to conduct preliminary hearings relative to offenses charged under this chapter.

The 1977 amendment substituted "this chapter" for "the Montana Dangerous Drug Act"; and made a minor change in phraseology.

Cross References

Criminal jurisdiction of justices' courts M.C.A. 1978, § 3-10-303

Notes of Decisions

In General

The use of the term "trial jurisdiction" constitutes a legislative acknowledgement that other types of jurisdiction exist in these cases which are not vested exclusively in the district courts. The present act does not limit the issuance of search warrants to district judges as formerly required, and accordingly warrant issued by justice of the peace was valid. State v. Snider, 168 Mont. 220, 541 P.2d 1204 (1975).

45-9-202. Alternative sentencing authority. A person convicted of criminal possession of dangerous drugs, fraudulently obtaining dangerous drugs, or altering labels on dangerous drugs, if he is shown to be an excessive or habitual user of dangerous drugs, as defined in 50-32-101, either from the face of the record or by a presentence investigation, may, in lieu of imprisonment, be committed to the custody of any institution for rehabilitative treatment for not less than 6 months or more than 2 years.

Historical Note

Enacted: R.C.M. 1947, § 54-137, Sec. 9, Ch. 314, Laws of Montana 1969

Amended: Sec. 5, Ch. 359, Laws of Montana 1977

Source: New

Prior Law: None

Annotator's Note

This section provides alternative rehabilitative sentencing authority where

defendants are convicted under §§ 45-9-102 (Criminal Possession of Dangerous Drugs), 45-9-104 (Fraudulently Obtaining Dangerous Drugs) and 45-9-105 (Altering Labels on Dangerous Drugs) and are shown to be excessive or habitual users of dangerous drugs. The legislative purpose is to provide a curative, rather than purely punitive, sentencing possibility where the drug use by the defendant approaches or amounts to addiction. The 1977 amendment inserted "as defined in 54-301" near the middle of the section; and made minor changes in phraseology, punctuation and style.

Cross References

Criminal possession of dangerous drugs M.C.A. 1978, § 45-9-102
Fraudulently obtaining dangerous drugs M.C.A. 1978, § 45-9-104
Altering labels on dangerous drugs M.C.A. 1978, § 45-9-105

Library References

Drugs and Narcotics Key Nos. 49, 72, 133
Chemical Dependents Key Nos. 10-12, 22-24
C.J.S. Drugs and Narcotics, §§ 225-240