

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ORIGINAL
Motion filed
FILED *OMC*
AUG 07 2007

ERIC WINFREY,)
)
 Movant/Appellant,)
)
 v.)
)
 STATE OF MISSOURI,)
)
 Respondent.)

LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED89408

88825

FILED

SEP 25 2007

Thomas F. Simon
CLERK, SUPREME COURT

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY
THE HONORABLE TED HOUSE, JUDGE
AT PLEA, SENTENCING, AND POST-CONVICTION PROCEEDINGS

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

Jessica M. Hathaway
Missouri Bar No. 49671
Office of the State Public Defender
1000 St. Louis Union Station, #300
St. Louis, Missouri 63103
(314) 340-7662
(314) 340-7685
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR APPELLANT

MICROFILMED

INDEX

TABLE OF AUTHORITIES 2

JURISDICTIONAL STATEMENT 5

STATEMENT OF FACTS..... 6

POINTS RELIED ON

1. No factual basis for this plea because Section 313.830.4(9) does not encompass Mr. Winfrey's conduct 9

2. If Section 313.830.4(9) encompasses Mr. Winfrey's conduct, then the statute is unconstitutionally vague as applied. 10

ARGUMENT

1. No factual basis for this plea because Section 313.830.4(9) does not encompass Mr. Winfrey's conduct 11

2. If Section 313.830.4(9) encompasses Mr. Winfrey's conduct, then the statute is unconstitutionally vague as applied. 26

CONCLUSION 29

CERTIFICATE OF SERVICE AND COMPLIANCE 30

APPENDIX 31

TABLE OF AUTHORITIES

Missouri Cases

Anthony v. Kaiser, 350 Mo. 748, 169 S.W.2d 47 (1943) 21

City of Charleston ex rel. Brady v. McCutcheon, 360 Mo. 157, 227 S.W.2d 736
(banc 1950) 20

Fainter v. State, 174 S.W.3d 718 (Mo. App. W.D. 2005) 9, 14, 15, 24

Flores v. State, 186 S.W.3d 398 (Mo. App. E.D. 2006) 25

J.S. v. Beard, 28 S.W.3d 875 (Mo. banc 2000)20, 25

Moss v. State, 10 S.W.3d 508 (Mo. banc 2000)11, 26

Prokopf v. Whaley, 592 S.W.2d 819 (Mo. banc 1980) 26

Saffold v. State, 982 S.W.2d 749 (Mo. App. W.D. 1998) 12

Spier v. State, 174 S.W.3d 539 (Mo. App. E.D. 2005)9, 25

Spradlin v. City of Fulton, 982 S.W.2d 255 (Mo. banc 1998) 23

State v. Allen, 905 S.W.2d 874 (Mo. banc 1995)10, 27

State v. Becker, 938 S.W.2d 267 (Mo. banc 1997) 25

State v. Bristow, 190 S.W.3d 479 (Mo. App. S.D. 2006) 15

State v. Brown, 140 S.W.3d 51 (Mo. banc 2003) 10, 27, 28

State v. Daniel, 103 S.W.3d 822 (Mo. App. W.D. 2003) 16

State v. Fredrickson, 689 S.W.2d 58 (Mo. App. E.D. 1984) 21

State v. Gibson, 122 S.W.3d 121 (Mo. App. W.D. 2003) 18

State v. Henry, 88 S.W.3d 451 (Mo. App. W.D. 2002) 14

<u>State v. Johnson</u> , 148 S.W.3d 338 (Mo. App. W.D. 2004)	15
<u>State v. Jones</u> , 172 S.W.3d 48 (Mo. App. W.D. 2005).....	9, 21, 22
<u>State v. Jones</u> , 899 S.W.2d 126 (Mo. App. W.D. 1995)	9, 21, 24
<u>State v. Lancaster</u> , 506 S.W.2d 403 (Mo. 1974)	21
<u>State v. Rowe</u> , 63 S.W.3d 647(Mo. banc 2002)	20
<u>State v. Sibley</u> , 131 Mo. 519, 33 S.W. 167 (1895)	21
<u>United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy</u> , 208 S.W.3d 907 (Mo. banc 2006)	20
<u>U.S. v. National Dairy Product Corp.</u> , 372 U.S. 29 (1963)	27
<u>Vernor v. State</u> , 894 S.W.2d 209 (Mo. App. E.D. 1995)	11, 26
<u>Woods v. State</u> , 176 S.W.3d 711 (Mo. banc 2005)	20

Rules, Statutes, Constitutional Provisions

Section 313.800	9, 13, 14, 15, 16, 17, 22
Section 313.830	9, 13, 14, 15, 16, 17, 18, 19, 20, 22, 28
Section 477.050	5
Section 570.030	24
Rule 24.02	9, 11, 12, 14
Rule 24.035	11
U.S. Const. Amend. V	9, 10, 11
U.S. Const. Amend. XIV	9, 10, 11
Mo. Const. Art. I, Section 10	9, 10, 11

JURISDICTIONAL STATEMENT

In the Circuit Court of St. Charles County, Cause No.0511-CR00608-01, the State of Missouri charged that appellant, Eric Winfrey, committed the crime of "attempt to commit prohibited acts on an excursion gambling boat" in violation of Section 313.830.¹ Appellant pleaded guilty to this charge on September 30, 2005. On November 18, 2005, the Honorable Ted House sentenced Appellant to five years of imprisonment in the Missouri Department of Corrections to be served consecutively with a sentence of 7 years of imprisonment on another charge.²

Appellant timely filed his pro se motion for post-conviction relief on March 27, 2006. The court appointed counsel and subsequently granted an additional 30 days to file an amended motion under Rule 24.035. The transcript of the guilty plea and sentencing hearing was filed on July 12, 2006. Counsel timely filed an amended motion on October 10, 2006. On January 26, 2007, the motion court issued findings

¹ All statutory references are to RSMo 2000 unless otherwise indicated. This brief will cite to the Legal File as "L.F." The guilty plea and sentencing transcript, an original copy of which will be filed separately, will be cited as "GP Tr."

² Appellant was also charged and pleaded guilty to the charge of tampering in the first degree (Count 1), for which he received a consecutive seven-year sentence. That conviction is not at issue in this appeal.

of fact and conclusions of law denying Mr. Winfrey's post-conviction claims. Mr. Winfrey filed a timely Notice of Appeal on March 1, 2007.

The underlying Rule 24.035 motion raises the question of the constitutionality of a state statute, but this appeal does not at this time directly involve any issues reserved for the exclusive jurisdiction of the Supreme Court of Missouri; at this time, jurisdiction lies in the Missouri Court of Appeals, Eastern District. Mo. Const., Art. V, Section 3; Section 477.050, RSMo.

STATEMENT OF FACTS

Appellant, Mr. Winfrey, was charged on February 1, 2005 with one count of tampering in the first degree (Section 569.080) (Count 1) and one count of "attempt to commit prohibited acts on an excursion gambling boat" (Section 313.830) (Count 2). L.F. 25, 28. He pleaded guilty to these charges on September 30, 2005. L.F. 26. On November 18, 2005 Mr. Winfrey was sentenced to a term of imprisonment of seven years (Count 1) and five years (Count 2), to run consecutively. L.F. 32-33.

This appeal concerns only the guilty plea to Count 2, "attempt to commit prohibited acts on an excursion gambling boat." L.F. 6-15. For that charge, the state alleged in its information that "the defendant paid \$180 to a cashier . . . received \$180 in casino chips, then, with the intent to defraud, cashed out the \$180 in casino chips and collected \$595 without having made a wager contingent upon winning a gambling game." L.F. 29.

At the guilty plea hearing on September 30, 2005, as to Count 2, the prosecutor said that Mr. Winfrey's girlfriend worked as a cashier at a casino in St. Charles County. GP Tr. 7. Mr. Winfrey went to his girlfriend's window and gave her \$180 in chips that he had just purchased from another cashier, and his girlfriend exchanged the chips for \$595 in cash. GP Tr. 7. Mr. Winfrey, with the assistance of his girlfriend, stole \$415 in cash from the casino company. GP Tr. 7. The prosecutor alleged that Mr. Winfrey took the money "for the purpose of committing this crime of a prohibited act on an excursion boat." GP Tr. 7.

Mr. Winfrey affirmed that he went to his girlfriend's window with chips that he had purchased from another window, and his girlfriend gave him \$415 more in cash than the value of the chips. GP Tr. 14. When the court asked, "Was that done for the purpose of committing the prohibited act on a gambling boat," Mr. Winfrey responded affirmatively. GP Tr. 15. On November 18, 2005, the court sentenced Mr. Winfrey as a persistent felony offender to consecutive terms of 7 years of imprisonment (Count 1) and 5 years of imprisonment (Count 2) for a total of 12 years of imprisonment. L.F. 32-33.

On March 27, 2006, Mr. Winfrey filed a timely pro se post-conviction relief motion under Rule 24.035. L.F. 1, 3. On April 7, 2006, the court appointed counsel. L.F. 1. Transcripts of the guilty plea and sentencing were prepared and filed on July 12, 2006. L.F. 1. On October 10, 2006, appointed counsel filed a timely amended post-conviction motion. L.F. 1, 10. In that amended motion, Mr. Winfrey pleaded that there was no factual basis supporting the plea of guilty to "attempt to commit prohibited acts on an excursion gambling boat" (Count 2) charged under Section 313.830, which reads that one is guilty of a Class D felony if a person:

Claims, collects, or takes, or attempts to claim, collect, or take, money or anything of value in or from the gambling games, with intent to defraud, without having made a wager contingent on winning a gambling game, or claims, collects, or takes an amount of money or thing of value of greater value than the amount won.

Section 313.830.4(9); L.F. 7-11. Mr. Winfrey also alleged that if his conduct fell under this gaming statute, then the statute is unconstitutionally vague as applied to him because it did not give him or a reasonable person notice that his conduct was included under that statute. L.F. 11-12.

The motion court entered findings of facts and conclusions of law denying the claims without an evidentiary hearing on January 26, 2007. L.F. 2, 16. In relevant part, the motion court found:

As for Movant's assertion that the offense did not involve a gambling game, this Court finds that the purchase and cashing in of chips is an integral part of the gambling process. Further Section 313.830 includes prohibited acts which [sic] would be impossible, or at least unlikely, to be committed at a gaming table or anywhere in a casino. For example[,] Section 313.830.4(5) prohibits the manufacture of cards, chips or dice intended to be used to violate any provision of the statute.

L.F. 17.

Movant timely filed a Notice of Appeal of this judgment. L.F. 2, 21.

Additional facts will be set forth in the Argument portion of this brief to minimize repetition.

POINTS RELIED ON

I - The motion court clearly erred in denying Mr. Winfrey's Rule 24.035 post-conviction motion without a hearing, in violation of Mr. Winfrey's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because Mr. Winfrey's guilty plea to "attempt to commit prohibited acts on an excursion gambling boat," lacked a factual basis in violation of Rule 24.02, in that Mr. Winfrey's conduct of buying chips from a change window, going to his girlfriend's change window, and accepting \$412 more in cash than the value of the chips, was not criminalized under a plain reading of Section 313.830.4(9), in that Mr. Winfrey did not attempt to "take . . . money or anything of value in or from the gambling games," defined as "games of skill or games of chance on an excursion gambling boat."

Fainter v. State, 174 S.W.3d 718 (Mo. App. W.D. 2005);

Spier v. State, 174 S.W.3d 539 (Mo. App. E.D. 2005);

State v. Jones, 172 S.W.3d 48 (Mo. App. W.D. 2005);

State v. Jones, 899 S.W.2d 126 (Mo. App. W.D. 1995)

Section 313.800.1(12);

Section 313.830.4(9);

Rule 24.02;

U.S. Const. Amend. V, OIV; Mo. Const. Art. I, Section 10.

II - The motion court clearly erred in finding that Section 313.830.4(9), under the facts of this case, is not unconstitutional, violating the due process protections of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, section 10 of the Missouri Constitution, because the statute criminalizing his conduct, Section 313.830.4(9), fails to give a person of common intelligence fair notice that committing an act of stealing on an excursion gambling boat outside of a "gambling game" is criminal conduct constituting a D felony under Section 313.830.

State v. Allen, 905 S.W.2d 874 (Mo. banc 1995);

State v. Brown, 140 S.W.3d 51 (Mo. banc 2003);

U.S. Const. Amend. V, IV; Mo. Const. Art. I, Section 10.

ARGUMENT

I - The motion court clearly erred in denying Mr. Winfrey's Rule 24.035 post-conviction motion without a hearing, in violation of Mr. Winfrey's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because Mr. Winfrey's guilty plea to "attempt to commit prohibited acts on an excursion gambling boat," lacked a factual basis in violation of Rule 24.02, in that Mr. Winfrey's conduct of buying chips from a change window, going to his girlfriend's change window, and accepting \$412 more in cash than the value of the chips, was not criminalized under a plain reading of Section 313.830.4(9), in that Mr. Winfrey did not attempt to "take . . . money or anything of value in or from the gambling games," defined as "games of skill or games of chance on an excursion gambling boat."

Preservation and Standard of Review

Appellate review of the denial of a Rule 24.035 motion is limited to whether the findings, conclusions, and judgment of the motion court are clearly erroneous. Vernor v. State, 894 S.W.2d 209, 210 (Mo. App. E.D. 1995); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the definite and firm impression that a mistake has been made. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). This claim was included in Mr. Winfrey's timely filed amended motion under Rule 24.035

and addressed in the motion court's findings of fact and conclusions of law denying that motion. L.F. 8-11, 16-18. A claim that the plea court failed to comply with the Rule 24.02 requirement of establishing on the record a factual basis for the plea is cognizable in a post-conviction relief motion. Saffold v. State, 982 S.W.2d 749, 752 (Mo. App. W.D. 1998). The claim is preserved for appellate review.

Relevant Facts

The state charged that Mr. Winfrey "paid \$180 to a cashier and received \$180 in casino chips, then, with the intent to defraud, cashed out the \$180 in casino chips and collected \$595 without having made a wager contingent upon winning a gambling game." L.F. 29. The state alleged that such conduct "was a substantial step toward the commission of the crime of prohibited acts on an excursion gambling boat, and was done for the purpose of committing such prohibited acts on an excursion gambling boat." L.F. 29.

The prosecutor supplied the facts behind this charge at the guilty plea hearing, specifically, that Mr. Winfrey's girlfriend worked as a cashier at a casino in St. Charles County. GP Tr. 7. Mr. Winfrey went to his girlfriend's window and gave her \$180 in chips that he had just purchased from another cashier, and his girlfriend exchanged the chips for \$595 in cash. GP Tr. 7. Mr. Winfrey, with the assistance of his girlfriend, took \$415 in cash from the casino. G.P. Tr. 7.

The prosecutor alleged that Mr. Winfrey took the \$415 in cash "for the purpose of committing this crime of a prohibited act on an excursion boat." GP Tr. 7.

Mr. Winfrey affirmed that he went to his girlfriend's window with chips that he had purchased from another window, and his girlfriend gave him \$415 more in cash than the value of the chips. GP Tr. 14. The court asked, "Was that done for the purpose of committing the prohibited act on a gambling boat?" and Mr. Winfrey responded affirmatively. GP Tr. 15.

No Factual Basis for the Charge

Mr. Winfrey was charged with "attempt to commit prohibited acts on an excursion gambling boat" under Section 313.830.4(9), which is found under Chapter 313, governing, "Licensed Gaming Activities." A person is guilty of a prohibited act under this section if a person:

Claims, collects, or takes, or attempts to claim, collect, or take, money or anything of value in or from the gambling games, with intent to defraud, without having made a wager contingent on winning a gambling game, or claims, collects, or takes an amount of money or thing of value of greater value than the amount won.

Section 313.830.4(9). "Gambling game" is defined by Section 313.800.1. That section states that, "as used in sections 313.800 to 313.850, unless the context clearly requires otherwise, . . . 'gambling game' includes games of skill or games of chance on an excursion gambling boat . . ." Section 313.800.1(12).³

³ That section then further defines "games of chance" as "any gambling game in which the player's expected return is not favorably increased by his or her

Rule 24.02(e) says, "The court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea." A factual basis for a guilty plea is necessary to ensure that the guilty plea was intelligently and voluntarily entered, thereby satisfying due process requirements. State v. Henry, 88 S.W.3d 451, 457 (Mo. App. W.D. 2002). Before accepting a guilty plea, the circuit court must "determine facts which defendant admits by his plea and that those facts would result in defendant being guilty of the offense charged." Fainter v. State, 174 S.W.3d 718, 719 (Mo. App. W.D. 2005). "If the facts presented to the court during the guilty plea hearing do not establish the commission of the offense, the court should reject the guilty plea." Id.

There was an insufficient factual basis for Mr. Winfrey's guilty plea to this obscure charge that the state called, "attempt to commit prohibited acts on an

reason, foresight, dexterity, sagacity, design, information or strategy," and defines "games of skill" as "any gambling game in which there is an opportunity for the player to use his or her reason, foresight, dexterity, sagacity, design, information or strategy to favorably increase the player's expected return; including, but not limited to, the gambling games known as 'poker', 'blackjack' (twenty-one), 'craps', 'Caribbean stud', 'pai gow poker', 'Texas hold'em', 'double down stud', and any video representation of such games." Section 313.800.1(13)(14).

excursion gambling boat." L.F. 28. The facts presented at the guilty plea hearing do not constitute an offense under Section 313.830. The motion court clearly erred in broadly reading this penal statute to encompass Mr. Winfrey's actions. Fainter , 174 S.W.3d at 719.

Does the Statute Have a Plain Meaning?

The statute's language is that a person is guilty of a Class D felony if that person:

Claims, collects, or takes, or attempts to claim, collect, or take, money or anything of value in or from the gambling games, with intent to defraud, without having made a wager contingent on winning a gambling game . . .

Section 313.830.4(9).

This section is not a model of clarity. Arguably, one has to guess at the exact conduct it is attempting to criminalize. But enough plain meaning can be ascertained from the statute to show that it does not proscribe Mr. Winfrey's conduct. In ascertaining the meaning of a statute, the intent of the General Assembly should be "gleaned from the plain and ordinary meaning of the statute's language." State v. Bristow, 190 S.W.3d 479, 485 (Mo. App. S.D. 2006). Where the words chosen by the legislature are clear and unambiguous, courts "apply the plain meaning of the words used in the statute, understood in the context that they appear." State v. Johnson, 148 S.W.3d 338, 340 (Mo. App. W.D. 2004).

First, to be guilty under this section, it is clear that money or anything of value must be taken "in or from the gambling games." Section 313.830.4(9).

Alternatively, one can "attempt" to take money or anything of value from the gambling games. Id. Courts are bound by the definitions of terms supplied by the legislature. State v. Daniel, 103 S.W.3d 822, 826 (Mo. App. W.D. 2003). The term "gambling game" has been defined by the legislature. Section 313.800 states that "as used in sections 313.800 to 313.850, unless the context clearly requires otherwise, . . . 'gambling game' includes games of skill or games of chance on an excursion gambling boat" Section 313.800.1(12).

Under a plain reading of Section 313.830.4(9), Mr. Winfrey is not guilty of an offense under this section, because he did not attempt to take money "in or from the gambling games" defined as "games of skill or chance on an excursion gambling boat." Section 313.830.4(9); Section 313.800.1(12). The state did not offer or elicit facts at the guilty plea hearing that Mr. Winfrey attempted to take something "in," or while participating in, a game of skill or chance. Id. Similarly, there were also no facts suggesting that Mr. Winfrey took money or anything of value "from" a game of skill or chance. Mr. Winfrey took cash from his girlfriend's employer, a casino company, with her assistance at the cashier window where she worked. G.P. Tr. 7, 13, 14. Under a plain reading of this statute, he clearly did not take money or anything else "in or from" a game, and thus is not guilty of an offense under Section 313.830.4(9).

Is This Statute Ambiguous?

The legislature's definition of the term "gambling game" lends a degree of clarity to an otherwise ambiguous statute. The statute, again, reads that a person is guilty of an offense if one:

Claims, collects, or takes, or attempts to claim, collect, or take, money or anything of value in or from the gambling games, with intent to defraud, without having made a wager contingent on winning a gambling game . . .

Section 313.830.4(9).

To be guilty under this section, first, the person must "claim[] , collect[] or take[]" or attempt to do so, "money or anything of value." Id. Mr. Winfrey admitted to taking money. GP Tr. 7, 14.

The ambiguity arises at the second element, when discerning what it means to take something "in or from" the "gambling games." Section 313.830.4(9). This element can be read at least two ways. First, with the aid of the legislative definition of "gambling game," it can be read as a requirement that a person take money, chips, or anything of value while playing a game ("in"), or as a nonplayer observer of ("from"), a game on an excursion gambling boat. Section 313.800(12). This would include behavior such as surreptitiously taking the chips of the person at the table next to you, or stealing the coins of a neighbor while sitting at a slot machine. Given the specific definition of "gambling game," this is arguably the statute's plain meaning. Mr. Winfrey did not take anything in or from a gambling game. GP Tr. 14.

The meaning of “in or from” the “gambling games” could also be read more broadly—as the motion court did—to encompass any taking of money or things of value from the casino company, under a theory that the property the casino company owns is derived from “gambling games” by implication, since casino companies make their money from gambling games. The motion court’s specific reasoning was that taking money from the casino by purchasing and cashing in chips is an “integral part of the gambling process” and thus, by implication, “in or from the gambling games.” L.F. 17. But this reading is clearly erroneous for at least two reasons.

First, a narrow reading of “in or from the gambling games” as requiring taking from an actual game, not from the casino company at large, is supported by a contextual reading of subsection (9). State v. Gibson, 122 S.W.3d 121, 128 (Mo. App. W.D. 2003). Section 4 of 313.830 and its fifteen subsections, including subsection (9) at issue, criminalize various forms of cheating or gaining an unfair advantage *from or in the context of playing or influencing an actual game*. None criminalize conduct that is only marginally or tangentially related to the act of gambling or games of skill or chance.

For example, subsection 1 criminalizes bribing an employee with the intent of influencing a gambling game. Section 313.830.4(1). Subsection 2 criminalizes an employee taking a bribe with the intent of influencing a gambling game. Section 313.830.4(2). Subsections 3 and 4 prohibit using various devices to cheat or gain an

unfair advantage at a gambling game, and "cheating" generally. Section 313.830.4(3) and (4). Subsection 5 prohibits manufacturing, selling, or distributing items that will be used to cheat or affect the outcome of a game. Section 313.830.4(5). Subsection 6 prohibits instructing a person on how to cheat at a game or use a device to cheat. Section 313.830.4(6). Subsection 7 involves altering or misrepresenting the outcome of a gambling game. Section 313.830.4(7). Subsection 8 criminalizes yet another form of cheating by "acquiring knowledge, not available to all players, of the outcome of the gambling game." Section 313.830.4(8). Subsection 10 involves enticing another to be involved in an illegal gambling game, and subsection 11 prohibits using counterfeit chips in a gambling game. Section 313.830.4(10) and (11). Subsection 12 criminalizes using legal tender of the United States of America where prohibited, or the wrong type of coin in a slot machine. Section 313.830.4(12). Subsection 13 prohibits possessing a "device" intended to be used to cheat. Section 313.830.4(13). Subsection 14 criminalizes possessing "any key or device" designed for the purpose of affecting the operation of a gambling game or mechanical device connected to the gambling game. Section 313.830.4(14). Subsection 15 makes it a felony to make a false statement to the state gaming commission. Section 313.830.4(15)

Each subsection of Section 313.830 involves cheating or gaining an unfair advantage in some manner in the context of a game of skill or game of chance. None, including subsection 9 at issue in this case, criminalize conduct that simply takes

place somewhere in or on a riverboat casino, outside of the context of cheating or gaining an unfair advantage in or from a gambling game. Clearly, not all stealing or other criminal activity on a casino is criminalized under Section 313.830. Clearly, not all stealing where the casino company is a victim is criminalized under Section 313.830. The statute's clear intent is to criminalize activities such as cheating, stealing, or gaining an unfair advantage in the context of a gambling game—not any act of stealing or other crime on the casino generally.

The same result is reached when any ambiguity in the term, “in or from the gambling games” is strictly construed, as this Court must do when confronted with penal statutes that can be reasonably read more than one way. Penal statutes are those “defining criminal behavior and providing for sentencing” or civil statutes that have penal consequences. State v. Rowe, 63 S.W.3d 647, 650 (Mo. banc 2002); Woods v. State, 176 S.W.3d 711, 712-713 (Mo. banc 2005); J.S. v. Beard, 28 S.W.3d 875, 877 (Mo. banc 2000). Contrary to what the motion court did, “[s]tatutes of a penal nature . . . are always strictly construed, and can be given no broader application than is warranted by [their] plain and unambiguous terms.” United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy, 208 S.W.3d 907, 914 (Mo. banc 2006) (Stith, concurring), citing City of Charleston ex rel. Brady v. McCutcheon, 360 Mo. 157, 227 S.W.2d 736, 738 (banc 1950) (emphasis supplied).

This rule of strict construction means that “statutes defining crimes will not be interpreted as embracing any but those acts or omissions clearly described in the

statute both within the letter and spirit of the law.” State v. Jones, 172 S.W.3d 448, 456 (Mo. App. W.D. 2005) (citing State v. Fredrickson, 689 S.W.2d 58, 61 (Mo. App. E.D. 1984). “Such statutes may not be extended or enlarged by judicial interpretation.” Id. “This . . . has been the law of Missouri for over a century.” Id., (citing State v. Jones, 899 S.W.2d 126, 127 (Mo. App. E.D. 1995); Anthony v. Kaiser, 350 Mo. 748, 169 S.W.2d 47, 48 (1943); State v. Sibley, 131 Mo. 519, 33 S.W. 167, 171 (1895)).

In Jones, 172 S.W.3d 448, the dispute was over what the legislature meant by the word “leaves” in the statute criminalizing the abandonment of a corpse. Id., at 454. The Court found that, in context, “leaves” has at least two plain and ordinary meanings. Id. The ambiguity in the statute, as well as prior case law construing the word narrowly, required that the statute be construed in favor of the defendant to exclude his conduct. Id., at 456. “It is a fixed rule that [criminal] statutes must be strictly construed against the State and liberally in favor of the defendant, and that no one is to be made subject to criminal prosecution by implication.” Id., citing State v. Lancaster, 506 S.W.2d 403, 404 (Mo. 1974).

The statute simply cannot be read as broadly as the motion court did either under a plain reading of the statute, or in accordance with well-established rules of statutory construction. The plea only established that Mr. Winfrey went to one cashier and exchanged money for plastic chips. GP Tr. 7, 14. He then went to his girlfriend's cashier window without having gambled, and she overpaid him in U.S.

currency for those chips. GP Tr. 7, 14. Mr. Winfrey, with an accomplice, stole \$418 in currency from this casino company. Under a plain reading of this statute, Mr. Winfrey did not take this money in or from a “gambling game.” Even if subsection (9) is ambiguous as to what exact conduct it includes, it must be read in its larger context. And further, if its meaning could be reasonably read more than one way, it must be strictly construed. In any event, Mr. Winfrey’s conduct is not criminalized by the gaming statute under which he was charged. Section 313.830.4(9); Section 313.800.1(12).

The Motion Court Clearly Erred

The motion court did not take a strict constructionist’s approach to this statute. Jones, 172 S.W.3d 448. Instead, it enlarged the meaning of the statute through judicial interpretation. Id. Reading the statute as broadly as possible, the motion court found that plastic gambling chips, which were used as a means to steal U.S. currency from the casino company, are an “integral part of the gambling process” and thus Mr. Winfrey stole money “in or from the gambling games” as the statute requires. L.F. 17.

This finding ignores that Mr. Winfrey did not steal gambling chips—he took money from the casino company from the cashier window. G.P. Tr. 7. The motion court also ignored the definition of “gambling games” supplied by the legislature, and in effect, substituted its own judgment on what the term should mean. This is impermissible. There was never any suggestion that Mr. Winfrey took money (or

attempted to do so) in the context of a "game of skill or chance" as the statute requires. Section 313.830.4(9); Section 313.800.1(12). Mr. Winfrey and his girlfriend stole \$415 in cash from the casino company. They did not steal or attempt to steal chips, or anything of value, from a game of skill or chance. L.F. 29.

To reach the motion court's result, the phrase, "in or from the gambling games" must be stretched far beyond its legislatively-supplied meaning, read out of the statute, or taken out of the context. When interpreting a statute, courts are required to give meaning to every word of the legislative enactment. Spradlin v. City of Fulton, 982 S.W.2d 255, 262 (Mo. banc 1998). As for the requirement that the act occur "on an excursion gambling boat," the motion court addressed that by stating, "[c]learly, the term 'boat' in the context of gaming in the State of Missouri is a legal fiction utterly without meaning." L.F. 17. The motion court also declared: "Massive casino buildings under this section are considered gaming 'boats,' even though they sit on dry land." L.F.17. Even if these "facts" supplied by the motion court are correct, they were made from whole cloth after the guilty plea hearing, and do not address the larger problem of the motion court having liberally stretched the meaning of "gambling game" beyond all reasonable meaning. It is undisputable that Mr. Winfrey never participated "in" or took anything "from" a gambling game, and thus is guilty only of the Class A misdemeanor of stealing, not this Class D felony. Section 570.030.3(1) (Cum. Supp. 2004) (stealing more than \$500 but less than

\$25,000 is a Class C felony); Section 570.030.8 (Cum. Supp. 2004) (all stealing not otherwise specified is a Class A misdemeanor).

In Fainter v. State, the defendant pleaded guilty to stealing a motor vehicle, a Class C felony, having admitted to taking a riding lawn mower. 174 S.W.3d at 720. In his post-conviction motion, Fainter alleged that there was no factual basis for his plea because a riding lawn mower is not a “motor vehicle” under Section 570.030.3. Id. The legislature did not define “motor vehicle” in that section, and the State urged the Court to read the definition broadly to encompass a riding lawn mower. Id., at 721. Consulting a dictionary, the Court noted that the primary function of a riding lawn mower is to cut grass, not transport people, and noted that any ambiguity in the term “motor vehicle” must be resolved in favor of the defendant. Id. “Any doubt as to whether the act charged and proved is embraced within the prohibition must be resolved in favor of the accused.” Id., (citing State v. Jones, 899 S.W.2d 126, 127 (Mo. App. W.D. 1995)). The rule of lenity requires “strict construction” in favor of the accused where the language is clear, or where the court can do no more than guess at what the legislature intended. Id.

The remedy in this case is to reverse the motion court’s judgment and remand for an evidentiary hearing, or remand for further proceedings with a finding that the motion court erred in not vacating this conviction. In Fainter, the Court remanded for an evidentiary hearing. 174 S.W.3d at 720. This Court, in similar circumstances, has remanded for further proceedings with a finding that the motion

court clearly erred in not vacating the conviction. Spier v. State, 174 S.W.3d 539 (Mo. App. E.D. 2005); Flores v. State, 186 S.W.3d 398 (Mo. App. E.D. 2006).

Conclusion

The motion court's reading of section 313.830.1(9) is clearly erroneous. The motion court clearly erred in ignoring the plain meaning of the relevant statutes, and in reading any ambiguity in favor of the State instead of Mr. Winfrey. "Any ambiguity in a penal statute should be read against the State and in favor of persons on whom such penalties are sought to be imposed." Beaird, 28 S.W.3d at 877. The motion court did the opposite. Through judicial interpretation, it read the statute as broadly as possible to include Mr. Winfrey's conduct. It is incorrect to liberally construe penal statutes in this manner. This Court must give effect to the statute as written. State v. Becker, 938 S.W.2d 267, 269(Mo. banc 1997).

Because there was an insufficient factual basis for the court to accept Mr. Winfrey's plea of guilty to "attempt to commit prohibited acts on an excursion gambling boat," Mr. Winfrey respectfully requests that this Court reverse the judgment of the motion court and remand the underlying criminal case with a finding that the sentence and judgment as to Count 2 ("attempt to commit prohibited acts on an excursion gambling boat") should be vacated.

II - The motion court clearly erred in finding that Section 313.830.4(9), under the facts of this case, is not unconstitutional, violating the due process protections of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, section 10 of the Missouri Constitution, because the statute criminalizing his conduct, Section 313.830.4(9), fails to give a person of common intelligence fair notice that committing an act of stealing on an excursion gambling boat outside of a "gambling game" is criminal conduct constituting a D felony under Section 313.830.

Preservation

Appellate review of the denial of a Rule 24.035 motion is limited to whether the findings, conclusions, and judgment of the motion court are clearly erroneous. Vernor v. State, 894 S.w.2d 209, 210 (Mo. App. E.D. 1995); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leave this Court with the definite and firm impression that a mistake has been made. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). This claim was included in Mr. Winfrey's timely filed amended motion under Rule 24.035 and addressed in the motion court's findings of fact and conclusions of law overruling that motion. L.F. 11-12, 18. The claim is preserved for appellate review.

Standard of Review

On a challenge that a statute is unconstitutionally vague, the language is to be treated by applying it to the facts at hand. Prokopf v. Whaley, 592 S.W.2d 819, 825

(Mo. banc 1980). “A statute that fails to clearly define proscribed conduct violates the Due Process Clause and is void for vagueness.” State v. Allen, 905 S.W.2d 874, 876 (Mo. banc 1995). “The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct.” State v. Brown, 140 S.W.3d 51, 54 (Mo. banc 2003). “A criminal statute must be sufficiently focused to warn of both its reach and coverage.” U.S. v. National Dairy Product Corp., 372 U.S. 29, 33 (1963). The test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct “when measured by common understanding and practices.” Brown, 140 S.W.3d at 54.

Statute is Unconstitutionally Vague as Applied

Mr. Winfrey was charged under Section 313.830.4(9), RSMo, which states that one is guilty of a class D felony if one:

(9) Claims, collects, or takes, or attempts to claim, collect, or take, money or anything of value in or from the gambling games, with intent to defraud, without having made a wager contingent on winning a gambling game, or claims, collects, or takes an amount of money or thing of value of greater value than the amount won.

The question is whether this language gives a person of ordinary intelligence a sufficiently definite warning that stealing on a riverboat casino outside of the context of a gambling game is a crime under this section. State v. Brown, 140 S.W.3d

at 54. The statute prohibits taking money or anything of value "in or from the gambling games." Section 313.830.4(9).

If applied to Mr. Winfrey, this language did not give Mr. Winfrey fair and adequate notice that stealing on a riverboat casino but not "in or from" a gambling game is prohibited conduct. Measured by common understanding and practices, Mr. Winfrey was not reasonably on notice that his conduct was illegal under section 313.830.4(9), which enhances the class and range of punishment for this conduct beyond misdemeanor stealing. Section 570.030.8. If applied to Mr. Winfrey, the language of section 313.830 does not give a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct. Brown, 140 S.W.3d at 54.

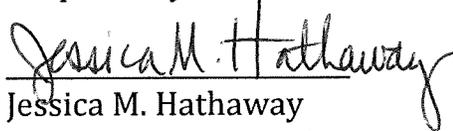
If this Court finds that Mr. Winfrey's conduct is proscribed by Section 313.830.4(9), then Mr. Winfrey was not reasonably on notice under any reasonable reading of this statute that his conduct was proscribed. If the statute applies, then this Court should address the due process issue and address whether this statute is void for vagueness as applied to these facts.

CONCLUSION

Because there was an insufficient factual basis for the court to accept Mr. Winfrey's plea of guilty to "attempt to commit prohibited acts on an excursion gambling boat," Mr. Winfrey's plea was without a factual basis and thus involuntary and unknowing, in violation of his right to due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 of the Missouri Constitution. Alternatively, if Mr. Winfrey is guilty of an offense under that section, then it is an unconstitutionally overbroad statute, depriving Mr. Winfrey of the same rights.

Mr. Winfrey respectfully requests that this Court reverse the judgment of the motion court and remand the underlying case for an evidentiary hearing, with a finding that the sentence and judgment as to Count 2 ("attempt to commit prohibited acts on an excursion gambling boat") should be vacated.

Respectfully submitted,

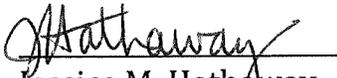


Jessica M. Hathaway
Missouri Bar No. 49671
Office of the State Public Defender
1000 St. Louis Union Station, Suite 300
St. Louis, Missouri 63103
(314) 340-7662
(314) 340-7685
jessica.hathaway@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this 1st day of August 2007, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the office of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65103. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Georgia 13 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains **6,749** words, excluding the cover page, signature block, and certificates of service and of compliance. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software and found virus-free.


Jessica M. Hathaway
Missouri Bar No. 49671
Assistant Public Defender
1000 St. Louis Union Station #300
St. Louis, Missouri 63103
(314) 340-7662
(314) 340-7685
jessica.hathaway@mspd.mo.gov

FINDINGS OF FACT & CONCLUSIONS OF LAW

Claim 3(a)

Movant pleaded guilty to a violation of RSMo. 313.830.4(9) "in that he paid \$180.00 to a cashier and received \$180.00 in casino chips, then with the intent to defraud, cashed out the \$180.00 in casino chips and collected \$595.00, without having made a wager, contingent upon winning a gambling game and such conduct was a substantial step toward the commission of the crime of prohibited acts on an excursion gambling boat." Movant accomplished this fraud with the help of his co-defendant who worked at the boat as a cashier. Movant alleges that because the offense occurred at the cashier windows and not "in or from gambling games or an excursion gambling boat" the act was not included in §313.830 and, therefore, the plea of guilty lacked a factual basis. Clearly, the term "boat" in the context of gaming in the State of Missouri is a legal fiction utterly without meaning. Massive casino buildings under this section are considered gambling "boats", even though they sit on dry land. As for Movant's assertion that the offense did not involve a gambling game, this Court finds that the purchase and cashing in of chips is an integral part of the gambling process. Further, §313.830 includes prohibited acts which would be impossible, or at least unlikely, to be committed at a gaming table or anywhere in a casino. For example §313.830.4(5) prohibits the manufacture of cards, chips or dice intended to be used to violate any provision of the statute.

Through fraud, the Movant obtained cash "without having made a wager contingent on winning a game" by collecting money to which he was not entitled

from a cashier. The requirements of the statute are met exactly. The transcript clearly shows that a more than adequate factual basis was made during the guilty plea. Accordingly, this claim is DENIED without an evidentiary hearing.

Claim 8(b)

Movant next asserts that the statute under which the defendant was convicted was unconstitutional because it did not give a person of common intelligence fair notice that a stealing outside of a gambling game is criminal conduct. This Court has already concluded that purchasing and cashing in casino chips is in fact an integral part of a gambling game so this Court does not accept the premise of Movant's argument. Further, as previously mentioned, that same statute prohibits other acts, including manufacturing dice or other items for use in cheating, which are acts that do not require the offender to be involved in a gambling game. Thus, a person of ordinary intelligence is on notice that physical presence at a gambling table is not necessarily required under §313.830. This claim is DENIED.

NOW THEREFORE, Movant's Amended Rule 24.035 Motion is DENIED without an evidentiary hearing. Pursuant to Missouri Supreme Court Rule 24.035(h), the files and records of this case conclusively show that Movant is entitled to no relief.

SO ORDERED:



HON. TED C. HOUSE
CIRCUIT JUDGE, DIVISION NO. 1

DATE: _____

1/26/07

RECORDED & INDEXED
JAN 27 2007
2007118
[Handwritten initials and signatures]

receive and such funds as the general assembly may provide. Any gift or bequest shall be credited to such account as the donor or devisee may provide. If no specific account is provided by the donor or designee, such gift or bequest shall be divided equally among the three accounts.

3. The Missouri breeders fund shall be administered by the commission, with the advice and assistance of advisory committees designated for that purpose by the rules of the commission. The commission shall, at least biennially, carry out such audits as provided by rule. The costs of administration shall be borne by the fund. The commission shall have authority to promulgate such rules as may be necessary or desirable for the efficient operation of the Missouri breeders fund and to provide incentives for breeders and owners of Missouri bred horses.

4. The Missouri breeders fund shall not lapse and the interest earned on such fund shall be credited to the fund. The provisions of section 33.080, RSMo, to the contrary notwithstanding, funds in the Missouri breeders fund shall not be transferred and placed to the credit of the general revenue fund at the end of each biennium.

(S. 1987 S.B. 384, A.L. 1995 H.B. 574)

EXCURSION GAMBLING BOATS

Cross References

- Gaming proceeds for education, transfer to state school money fund, RSMo 160.534
- Gaming revenues to be used solely for public education, Const. Art. III, Sec. 39(d)
- Real property tax abatement not to apply to excursion gaming boats, RSMo 333.190
- River on the Missouri and Mississippi, authorized for riverboat gambling, Const. Art. III, Sec. 39(e)

313.800. Definitions — additional games of skill, commission approval, procedures. — 1. As used in sections 313.800 to 313.850, unless the context clearly requires otherwise, the following terms mean:

(1) **"Adjusted gross receipts"**, the gross receipts from licensed gambling games and services less winnings paid to wagerers;

(2) **"Applicant"**, any person applying for a license authorized under the provisions of sections 313.800 to 313.850;

(3) **"Bank"**, the elevations of ground which border the waters of the Mississippi or Missouri Rivers at the ordinary high water mark as defined by common law;

(4) **"Cheat"**, to alter the selection of criteria which determine the result of a gambling game or the amount or frequency of payment in a gambling game;

(5) **"Commission"**, the Missouri gaming commission;

(6) **"Dock"**, the location in a city or county authorized under subsection 10 of section 313.812 which contains any natural or artificial space, inlet, hollow, or basin, in or adjacent to a bank of the Mississippi or Missouri Rivers, next to a wharf or landing devoted to the embarking of passengers on and disembarking of passengers from a gambling excursion but shall not include any artificial space created after May 20, 1994, and is located more than one thousand feet from the closest edge of the main channel of the river as established by the United States Army Corps of Engineers;

(7) **"Excursion gambling boat"**, a boat, ferry or other floating facility licensed by the commission on which gambling games are allowed;

(8) **"Floating facility"**, any facility built or originally built as a boat, ferry or barge licensed by the commission on which gambling games are allowed;

(9) **"Gambling excursion"**, the time during which gambling games may be operated on an excursion gambling boat whether docked or during a cruise;

(10) **"Gambling game"** includes, but is not limited to, games of skill or games of chance on an excursion gambling boat but does not include gambling on sporting events; provided such games of chance are approved by amendment to the Missouri Constitution;

(11) **"Games of chance"**, any gambling game in which the player's expected return is not favorably increased by his or her reason, foresight, dexterity, sagacity, design, information or strategy;

(12) **"Games of skill"**, any gambling game in which there is an opportunity for the player to use his or her reason, foresight, dexterity, sagacity, design, information or strategy to favorably increase the player's expected return; including, but not limited to, the gambling games known as "poker", "blackjack" (twenty-one), "craps", "Caribbean stud", "pai gow poker", "Texas

within the twenty days. Except as provided in this section, on and after April 29, 1993, all functions incident to the administration, collection, enforcement, and operation of the tax imposed by sections 144.010 to 144.525, RSMo, shall be applicable to the taxes and fees imposed by this section.

(1) Each excursion gambling boat shall designate a city or county as its home dock. The home dock city or county may enter into agreements with other cities or counties authorized pursuant to subsection 10 of section 313.812 to share revenue obtained pursuant to this section. The home dock city or county shall receive ten percent of the adjusted gross receipts tax collections, as levied pursuant to this section, for use in providing services necessary for the safety of the public visiting an excursion gambling boat. Such home dock city or county shall annually submit to the commission a shared revenue agreement with any other city or county. All moneys owed the home dock city or county shall be deposited and distributed to such city or county in accordance with rules and regulations of the commission. All revenues provided for in this section to be transferred to the governing body of any city not within a county and any city with a population of over three hundred fifty thousand inhabitants shall not be considered state funds and shall be deposited in such city's general revenue fund to be expended as provided for in this section.

(2) The remaining amount of the adjusted gross receipts tax shall be deposited in the state treasury to the credit of the "Gaming Proceeds for Education Fund" which is hereby created in the state treasury. Moneys deposited in this fund shall be considered the proceeds of excursion boat gambling and state funds pursuant to article IV, section 15 of the Missouri Constitution. All interest received on the gaming proceeds for education fund shall be credited to the gaming proceeds for education fund. Appropriation of the moneys deposited into the gaming proceeds for education fund shall be pursuant to state law.

(L. 1991 H.B. 149 § 10 Adopted by Referendum, Proposition A, November 3, 1992, A.L. 1993 S.B. 10 & 11 § 10, A.L. 2000 S.B. 902)

313.824. Boat and game operator licensees to furnish reports to commission — commission security staff to be on boat, costs paid by boat licensee. — Gambling excursion boat and gambling game operator licensees shall furnish to the commission reports and information as the commis-

sion may require with respect to its activities. The commission shall establish by rules and regulations the amount of staff necessary to protect the public on any excursion gambling boat. The excursion gambling boat licensee shall reimburse the commission for the full cost of such staff.

(L. 1991 H.B. 149 § 11 Adopted by Referendum, Proposition A, November 3, 1992, A.L. 1993 S.B. 10 & 11 § 11)

Effective 4-29-93

313.825. Audit of licensee, contents, procedure. — In accordance with the rules established by the commission, after the end of each calendar quarter, the licensee shall transmit to the commission an audit of compliance and of the financial transactions and condition of the licensee's total operations for the calendar quarter. Any audits shall be conducted by certified public accountants registered or licensed in the state of Missouri under chapter 326, RSMo, and approved by the commission. The compensation for each certified public accountant shall be paid directly by the licensee to the certified public accountant.

(L. 1991 H.B. 149 § 12 Adopted by Referendum, Proposition A, November 3, 1992, A.L. 1993 S.B. 10 & 11 § 12, A.L. 2000 S.B. 902)

313.830. Prohibited acts, penalties — commission to refer violations to attorney general and prosecuting attorney — venue for actions.

— 1. A person is guilty of a class D felony for any of the following:

(1) Operating a gambling excursion where wagering is used or to be used without a license issued by the commission;

(2) Operating a gambling excursion where wagering is permitted other than in the manner specified by section 313.817; or

(3) Acting, or employing a person to act, as a shill or decoy to encourage participation in a gambling game.

2. A person is guilty of a class B misdemeanor for the first offense and a class A misdemeanor for the second and subsequent offenses for any of the following:

(1) Permitting a person under the age of twenty-one to make a wager while on an excursion gambling boat;

(2) Making or attempting to make a wager while on an excursion gambling boat when such person is under the age of twenty-one years; or

5. The possession of one or more of the devices described in subdivision (3), (5), (13) or (14) of subsection 4 of this section permits a rebuttable inference that the possessor intended to use the devices for cheating.

6. Except for wagers on gambling games or exchanges for money as provided in section 313.817, a licensee who exchanges tokens, chips, or other forms of credit to be used on gambling games for anything of value commits a class B misdemeanor.

7. If the commission determines that reasonable grounds to believe that a violation of sections 313.800 to 313.850 has occurred or is occurring which is a criminal offense, the commission shall refer such matter to both the state attorney general and the prosecuting attorney or circuit attorney having jurisdiction. The state attorney general and the prosecuting attorney or circuit attorney with such jurisdiction shall have concurrent jurisdiction to commence actions for violations of sections 313.800 to 313.850 where such violations have occurred.

8. Venue for all crimes committed on an excursion gambling boat shall be the jurisdiction of the home dock city or county or such county where a home dock city is located.

(L. 1991 H.B. 149 § 14 Adopted by Referendum, Proposition A, November 3, 1992, A.L. 1993 S.B. 10 & 11 § 14, A.L. 2000 S.B. 902)

313.832. Forfeitures for illegal activities, enforcement procedures. — 1. Anything of value, including all traceable proceeds including but not limited to real and personal property, moneys, negotiable instruments, securities, and conveyances, is subject to forfeiture if the item was used for any of the following:

- (1) In exchange for a bribe intended to affect the outcome of a gambling game; or
- (2) In exchange for or to facilitate a violation of sections 313.800 to 313.840.

2. All moneys, coin, and currency found in close proximity of wagers, or of records of wagers are presumed forfeited. The burden of proof is upon the claimant of the property to rebut this presumption.

3. Subsections 1 and 2 of this section do not apply if the act or omission which would give rise to the forfeiture was committed or omitted without the owner's knowledge or consent.

4. Forfeitures under this section shall be enforced as provided under sections 513.600 to 513.645, RSMo.

(L. 1991 H.B. 149 § 15 Adopted by Referendum, Proposition A, November 3, 1992)

Effective 11-3-92

313.835. Gaming commission fund created, purpose, expenditures — veterans' commission capital improvement trust fund, created, purpose, funding — disposition of proceeds of gaming commission fund — early childhood development education and care fund, created, purpose, funding, study, rules. — 1. All revenue received by the commission from license fees, penalties, administrative fees, reimbursement by any excursion gambling boat operators for services provided by the commission and admission fees authorized pursuant to the provisions of sections 313.800 to 313.850, except that portion of the admission fee, not to exceed one cent, that may be appropriated to the compulsive gamblers fund as provided in section 313.820, shall be deposited in the state treasury to the credit of the "Gaming Commission Fund" which is hereby created for the sole purpose of funding the administrative costs of the commission, subject to appropriation. Moneys deposited into this fund shall not be considered proceeds of gambling operations. Moneys deposited into the gaming commission fund shall be considered state funds pursuant to article IV, section 15 of the Missouri Constitution. All interest received on the gaming commission fund shall be credited to the gaming commission fund. In each fiscal year, total revenues to the gaming commission fund for the preceding fiscal year shall be compared to total expenditures and transfers from the gaming commission fund for the preceding fiscal year. The remaining net proceeds in the gaming commission fund shall be distributed in the following manner:

(1) The first five hundred thousand dollars shall be appropriated on a per capita basis to cities and counties that match the state portion and have demonstrated a need for funding community neighborhood organization programs for the homeless and to deter gang-related violence and crimes;

(2) The remaining net proceeds in the gaming commission fund for fiscal year 1998 and prior years shall be transferred to the "Veterans' Commission Capital Improvement Trust Fund",

crime. If the victim is a merchant, as defined in section 400.2-104, RSMo, and the property is a type that the merchant sells in the ordinary course of business, then the property shall be valued at the price that such merchant would normally sell such property;

(2) Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertainable market value such as some public and corporate bonds and securities, shall be evaluated as follows:

(a) The value of an instrument constituting evidence of debt, such as a check, draft or promissory note, shall be deemed 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;

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

(3) When the value of property cannot be satisfactorily ascertained pursuant to the standards set forth in subdivisions (1) and (2) of this section, its value shall be deemed to be an amount less than five hundred dollars.

(L. 1977 S.B. 60, A.L. 2002 H.B. 1888 merged with H.B. 2120)

570.030. Stealing—penalties.—1. A person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.

2. Evidence of the following is admissible in any criminal prosecution pursuant to this section on the issue of the requisite knowledge or belief of the alleged stealer:

(1) That he or she failed or refused to pay for property or services of a hotel, restaurant, inn or boardinghouse;

(2) That he or she gave in payment for property or services of a hotel, restaurant,

inn or boardinghouse a check or negotiable paper on which payment was refused;

(3) That he or she left the hotel, restaurant, inn or boardinghouse with the intent to not pay for property or services;

(4) That he or she surreptitiously removed or attempted to remove his or her baggage from a hotel, inn or boardinghouse;

(5) That he or she, with intent to cheat or defraud a retailer, possesses, uses, utters, transfers, makes, alters, counterfeits, or reproduces a retail sales receipt, price tag, or universal price code label, or possesses with intent to cheat or defraud, the device that manufactures fraudulent receipts or universal price code labels.

3. Notwithstanding any other provision of law, any offense in which the value of property or services is an element is a class C felony if:

(1) The value of the property or services appropriated is five hundred dollars or more but less than twenty-five thousand dollars; or

(2) The actor physically takes the property appropriated from the person of the victim; or

(3) The property appropriated consists of:

(a) Any motor vehicle, watercraft or aircraft; or

(b) Any will or unrecorded deed affecting real property; or

(c) Any credit card or letter of credit; or

(d) Any firearms; or

(e) A United States national flag designed, intended and used for display on buildings or stationary flagstaffs in the open; or

(f) Any original copy of an act, bill or resolution, introduced or acted upon by the legislature of the state of Missouri; or

(g) Any pleading, notice, judgment or any other record or entry of any court of this state, any other state or of the United States; or

(h) Any book of registration or list of voters required by chapter 115, RSMo; or

(i) Any animal of the species of horse, mule, ass, cattle, swine, sheep, or goat; or

(j) ...
with a ...

(k) ...
by section ...

(l) ...
(m) ...

(n) ...
cance w ...

hundred ...

4. If ...
with a ...

violation ...
such in ...

product ...
amine ...

analog ...
felony ...

drous ...
attemp ...

ammo ...
felony ...

drous ...
truck ...

tank ...
a class ...

5. ...
servic ...

sectio ...
may ...

may ...

6. ...
para ...

tion ...
prov ...

of s ...
valu ...

cer ...
cla ...

7. ...
prop ...

B (...
serv ...

sub ...

no ...
a ...

(...

AG

(j) Live fish raised for commercial sale with a value of seventy-five dollars; or

(k) Any controlled substance as defined by section 195.010, RSMo; or

(l) Anhydrous ammonia;

(m) Ammonium nitrate; or

(n) Any document of historical significance which has fair market value of five hundred dollars or more.

4. If an actor appropriates any material with a value less than five hundred dollars in violation of this section with the intent to use such material to manufacture, compound, produce, prepare, test or analyze amphetamine or methamphetamine or any of their analogues, then such violation is a class D felony. The theft of any amount of anhydrous ammonia or liquid nitrogen, or any attempt to steal any amount of anhydrous ammonia or liquid nitrogen, is a class C felony. The theft of any amount of anhydrous ammonia by appropriation of a tank truck, tank trailer, rail tank car, bulk storage tank, field (nurse) tank or field applicator is a class A felony.

5. The theft of any item of property or services pursuant to subsection 3 of this section which exceeds five hundred dollars may be considered a separate felony and may be charged in separate counts.

6. Any person with a prior conviction of paragraph (i) of subdivision (3) of subsection 3 of this section and who violates the provisions of paragraph (i) of subdivision (3) of subsection 3 of this section when the value of the animal or animals stolen exceeds three thousand dollars is guilty of a class B felony.

7. Any offense in which the value of property or services is an element is a class B felony if the value of the property or services equals or exceeds twenty-five thousand dollars.

8. Any violation of this section for which no other penalty is specified in this section is a class A misdemeanor.

(L. 1977 S.B. 60, A.L. 1981 S.B. 202, A.L. 1985 H.B. 333 & 64, A.L. 1996 S.B. 657, A.L. 1997 H.B. 635, A.L. 1998 H.B. 1147, et al., A.L. 2001 H.B. 471 merged with S.B. 89 & 37, A.L. 2002 H.B. 1888 merged with S.B. 712, A.L. 2003 S.B. 5, A.L. 2004 S.B. 1211)

CROSS REFERENCE:

Child support, retention of erroneously paid support to be crime of stealing, when, RSMo 454.531

570.040. Stealing, third offense. — 1.

Every person who has previously pled guilty or been found guilty on two separate occasions of a stealing-related offense where such offenses occurred within ten years of the date of occurrence of the present offense and where the person received and served a sentence of ten days or more on such previous offense and who subsequently pleads guilty or is found guilty of a stealing-related offense is guilty of a class D felony and shall be punished accordingly.

2. As used in this section, the term "stealing-related offense" shall include federal and state violations of criminal statutes against stealing or buying or receiving stolen property and shall also include municipal ordinances against same if the defendant was either represented by counsel or knowingly waived counsel in writing and the judge accepting the plea or making the findings was a licensed attorney at the time of the court proceedings.

3. Evidence of prior guilty pleas or findings of guilt shall be heard by the court, out of the hearing of the jury, prior to the submission of the case to the jury, and the court shall determine the existence of the prior guilty pleas or findings of guilt.

(L. 1977 S.B. 60, A.L. 1995 H.B. 424, A.L. 2002 H.B. 1888, A.L. 2003 S.B. 5)

Effective 6-27-03

570.080. Receiving stolen property. —

1. A person commits the crime of receiving stolen property if for the purpose of depriving the owner of a lawful interest therein, he receives, retains or disposes of property of another knowing that it has been stolen, or believing that it has been stolen.

2. Evidence of the following is admissible in any criminal prosecution pursuant to this section to prove the requisite knowledge or belief of the alleged receiver:

(1) That he was found in possession or control of other property stolen on separate occasions from two or more persons;

Former Rule 24, Indictments and Informations, consisting of 24.01 to 24.24, was repealed and a new Rule 24, Misdemeanors or Felonies—Arrest and Proceedings Before Trial, consisting of 24.01 to 24.12, was adopted by order of the Supreme Court of Missouri dated June 13, 1979, effective January 1, 1980.

Subject matter of the new Rule 24 was previously covered by former Rule 25. Subject matter of former Rule 24 is now covered by Rule 23.

Orders of the Supreme Court dated July 27, 1979 and Nov. 21, 1979, made certain nonsubstantive corrections of stylistic, typographical, and grammatical errors.

24.01. Misdemeanors or Felonies—Arrest

Arrest shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

(Adopted June 13, 1979, eff. Jan. 1, 1980.)

Committee Note—1979

This is the same as Fed.R.Crim.P. 10.

Compare: Prior Rule 25.04.

24.02. Misdemeanors or Felonies—Plea

(a) **Alternatives.** A defendant may plead not guilty, guilty, or not guilty by reason of mental disease or defect excluding responsibility, or both not guilty and not guilty by reason of mental disease or defect excluding responsibility. If a defendant refuses to plead or if a corporation fails to appear, the court shall enter a plea of not guilty.

(b) **Advice to Defendant.** Except as provided by Rule 31.03, before accepting a plea of guilty, the court must address the defendant personally in open court, and inform defendant of, and determine that defendant understands, the following:

1. The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

2. If the defendant is not represented by an attorney, that defendant has the right to be represented by an attorney at every stage of the proceedings against defendant and, if necessary, one will be appointed to represent defendant; and

3. That defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that defendant has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against defendant, and the right not to be compelled to incriminate himself or herself; and

4. That if defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty defendant waives the right to a trial.

(c) **Ensuring That the Plea Is Voluntary.** Except as provided by Rule 31.03, the court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty results from prior discussions between the prosecuting attorney and the defendant or defendant's attorney.

(d) **Plea Agreement Procedure.** The court shall not participate in any such discussions, but after a plea agreement has been reached, the court may discuss the agreement with the attorneys including any alternative that would be acceptable.

1. **In General.** The prosecuting attorney and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty to a charged offense or to a lesser or related offense, the prosecuting attorney will do any of the following:

(A) Dismiss other charges; or

(B) Make a recommendation, or agree not to oppose the defendant's request, for a particular disposition, with the understanding that such recommendation or request shall not be binding on the court; or

(C) Agree that a specific sentence is the appropriate disposition of the case; or

(D) Make a recommendation for, or agree on, another appropriate disposition of the case.

The court shall not participate in any such discussions, but after a plea agreement has been reached, the court may discuss the agreement with the attorneys including any alternative that would be acceptable.

2. **Disclosure of Plea Agreement—Court's Action Thereon.** If a plea agreement has been reached by the parties, the court shall require the disclosure of

the agreement on the record in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is pursuant to Rule 24.02(d)1(B), the court shall advise the defendant that the plea cannot be withdrawn if the court does not adopt the recommendation or request. Thereupon the court may accept or reject the agreement or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

3. Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody the disposition provided for in the plea agreement in the judgment and sentence.

4. Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw defendant's plea if it is based on an agreement pursuant to Rule 24.02(d)1(A), (C), or (D), and advise the defendant that if defendant persists in the guilty plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

5. Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this Rule 24.02(d)5, evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or of any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or an offer to plead guilty to the crime charged or any other crime is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(e) Determining Accuracy of Plea. The court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea.

(Adopted June 13, 1979, eff. Jan. 1, 1980. Amended Nov. 21, 1979, eff. Jan. 1, 1980; May 18, 1981, eff. Jan. 1, 1982; June 27, 2003, eff. Jan. 1, 2004.)

Committee Note—1979

Paragraph (a) is the same as Fed.R.Crim.P. 11(a) with the addition of "... not guilty by reason of mental disease or defect excluding responsibility, or both not guilty and not guilty by reason of mental disease or defect excluding responsibility ..." and the deletion of "nolo contendere."

Compare: Prior Rule 25.04.

Paragraph (b) is the same as Fed.R.Crim.P. 11(c)1), (2), (3), and (4) with the deletion of "nolo contendere."

Compare: Prior Rule 25.04.

Paragraph (c) is the same as Fed.R.Crim.P. 11(d).

Compare: Prior Rule 25.04.

Paragraph (d) is new.

Compare: Fed.R.Crim.P. 11(e).

Paragraph (e) is new.

Compare: Fed.R.Crim.P. 11(f).

24.03. Felonies—Guilty Pleas—Record

When a defendant enters a plea of guilty to a felony, the court reporter shall:

(a) Record accurately all court proceedings in connection with the plea;

(b) Prepare a transcript of such proceedings when the sentence imposed requires delivery of the defendant to the department of corrections on a felony, except any class C or class D felony. The transcript shall not be prepared otherwise unless a motion is filed under Rule 24.035. The circuit clerk shall notify the court reporter that the motion has been filed, and the transcript shall be prepared within thirty days from the date the reporter receives the notice.

(c) Certify the accuracy of the transcript of the proceedings and immediately deliver the certified transcript to the circuit clerk;

(d) Receive for preparing such certified transcript the amount provided in section 485.100, RSMo, for preparing an original transcript in a criminal case where the defendant is unable to pay the costs.

The circuit clerk shall note the filing of the certified transcript in his record and shall place the same, as a part of the permanent record of the case, in the file containing the indictment or information.

(Adopted June 13, 1979, eff. Jan. 1, 1980. Amended Jan. 15, 1986; Sept. 10, 1991, eff. July 1, 1992.)

Committee Note—1979

This is substantially the same as the order of the Supreme Court dated February 22, 1972 which followed prior Rule 25.04.

Compare: Fed.R.Crim.P. 11(g).

24.035. Conviction After Guilty Plea—Correction

(a) Nature of Remedy—Rules of Civil Procedure Apply. A person convicted of a felony on a plea of guilty and delivered to the custody of the department of corrections who claims that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum