CHAPTER XIV - TRIAL DE NOVO

Judge Charles Curry

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CHAPTER XIV

TRIAL DE NOVO

14.1 SCOPE OF CHAPTER

This chapter discusses the statutory authority for trial de novo, the judge's obligation to advise the defendant of any right to a trial de novo, outlines the application procedure for a trial de novo, and explains why the outcome of a trial de novo may differ from that of the municipal court trial.

14.2 STATUTORY AUTHORITY FOR TRIAL DE NOVO

The Court Reform and Revision Act which went into effect on January 2, 1979, added a new tier to the due process structure for defendant — the trial de novo. Formerly cases from the municipal courts were taken on direct appeal when defendants believed they had not received a fair hearing. Authority for the trial de novo is found in Section 479.200, RSMo (1986) as follows:

> '479.200 Appeals, trial de novo.
>
> 1. In any case tried before a municipal judge who is not licensed to practice law in this state, the defendant shall have a right to trial de novo, even from a plea of guilty, before a circuit judge or an associate circuit judge.
>
> 2. In any case tried before a municipal judge who is licensed to practice law in this state or before an associate circuit judge, except where there has been a plea of guilty or the case has been tried with a jury, the defendant shall have a right of trial de novo before a circuit judge or upon assignment before an associate circuit judge. An application for a trial de novo shall be filed within ten days after judgment and shall be filed in such form and perfected in such manner as provided by Supreme Court rule.
>
> 3. In any case tried with a jury before an associate circuit judge a record shall be made and appeals may be had upon that record to the appropriate appellate court.
>
> 4. The Supreme Court may provide by rule what record shall be kept and may provide that it be a stenographic record or one made by the utilization of electronic, magnetic, or mechanical sound or video recording devices.

Cases interpreting Section 479.200 have resulted in some interesting rulings. In the case of State of Missouri, ex rel Brian D. Wilson v. Hon. Thomas Sims, 654 S.W.2d 325 (Mo. app. 1983) the defendant had entered a guilty plea to the charge of stealing before Judge Sims, a lawyer judge. Wilson applied for a trial de novo and Judge Sims refused to accept the application relying on the language in '479.200.2 supra, which appears to say that a defendant who pleads guilty

before a lawyer judge does not have a right to a trial de novo. Held: The question of whether a defendant has a right to a trial de novo after a plea of guilty is to be decided by the circuit court. Furthermore, the municipal judge is without jurisdiction to refuse to process a defendant's application for trial de novo and must forward the file to the circuit court.

In this same case the court further ruled in dicta that a defendant may appeal, after a guilty plea before a lawyer judge, for the limited purpose of determining the validity of his waiver of counsel and plea of guilty. See State ex rel. Kansas City v. Meyers, 513 S.W.2d 414 (Mo. banc 1974).

In summary, if a defendant timely files an application for trial de novo in a municipal division, regardless of the manner in which the case was disposed of, the municipal judge must forward the file to the circuit court for disposition.

More recently in City of Kansas City, Missouri v. Terry Dudley, 244 S.W.3d 763 (Mo.App. 2008) addressed the issue of what constitutes a "trial" for the purpose of satisfying the requirement stated in paragraph 2 of '479.200. In the Dudley case, the defendant had pled not guilty to the charge but had stipulated to the city's records for the case. The court imposed a fine and jail sentence and Dudley timely filed an application for trial de novo. The circuit court judge, to which the case was assigned, decided it did not have subject matter jurisdiction for a trial de novo because in its opinion since the defendant entered a technical not guilty the case was not "tried" in the municipal court as required by the statute, and dismissed the trial de novo. The court of appeals held that: a) defendant's stipulation to the city's case file satisfied the requirement in Rule 37.62 that evidence be offered by the prosecutor; b) in both criminal and civil cases, stipulations of fact are considered evidence; c) trial by stipulation is not a guilty plea because the defendant has not conceded his guilt and reserves his right to challenge the sufficiency of the evidence to convict; and d) since the court pronounced judgment based on the record presented the proceeding was the functions equivalent of a municipal court trial under Rule 37.62.

14.3 DEFINITION

Trial de novo simply means a new trial before a different judge, as though the case had never been heard before.

14.4 DUTY TO ADVISE DEFENDANT

At the time of sentencing (after sentence is pronounced), the municipal judge is required to advise the defendant of any right to a trial de novo, and of the right to proceed as an indigent if the defendant cannot pay the cost for a trial de novo. (See Rule 37.64(c).)

Rule 37.64 Sentence and Judgment

(ee) Notification of Right to Trial De Novo. After imposing sentence the judge

> shall advise the defendant of any right to trial de novo and the right of a defendant who is unable to pay the cost to proceed as an indigent.

In cases heard by a non-lawyer judge, the defendant has a right to trial do novo even when a plea of guilty has been entered in the municipal court.

A defendant is not entitled to a trial de novo until after there has been a sentence imposed after a finding of guilt after trial in the municipal division. A municipal judge has no authority to transfer a case to the circuit court for any proceedings unless there is a judgment in the municipal division. City of Webster Groves, Missouri v. Kurt, 797 S.W.2d 494 (Mo. App. 1990).

PROCEDURE FOR APPLICATION FOR TRIAL DE NOVO

14.5 APPLICATION FORM

A sample form for an application for trial de novo (see form 14-01) together with a sample form for the bond for trial de novo (see form 14-02) are provided at the end of this chapter. Also provided is a Trial De Novo Information Sheet (see form 14-03), which has been found to be very useful and helpful in providing information to defendants about the procedure used to file for trial de novo. It is recommended that the defendant sign one of the forms for inclusion in the court's file. The inclusion of a signed copy of the information sheet has been extremely useful in resolving disputes between defendants and the court where claims that the defendant was not provided the correct or sufficient information to perfect his/her right to trial de novo have been made.

It has been held that even an unsigned application for trial de novo is sufficient to perfect a defendant's request for trial de novo. It is not necessary that suggested forms be used so long as the application clearly indicates the defendant's intent to seek a trial de novo in the circuit court. City of Lake Winnebago v. Sharp, 652 S.W. 2d 118 (Mo. 1983). The application for the trial de novo must be filed with the municipal court clerk.

14.6 TEN-DAY FILING PERIOD

> Rule 37.71 Trial de Novo - Right - Time
>
> (a) An application for trial de novo shall be filed as provided by law. No judge may order an extension of time for filing or perfection of an application for trial de novo.
>
> (b) An application for trial de novo shall not be granted after the satisfaction by the defendant of any part of the penalty and costs of the judgment. (Amended December 18, 1998, effective January 1, 2000.)

The defendant must file an application for trial de novo with the municipal court clerk within 10 days from the time judgment is entered, and no extension of time can be granted, regardless of the reason. The specific requirement that the application for trial de novo be filed within 10 days was deleted in the 1998 amendment to Rule 37.71(a). The 10-day time limitation for filing the application for trial de novo remains in '479.200, RSMo. In the event the defendant pays any part of the fines or court costs assessed by the municipal court, or otherwise satisfies any part of the penalty, the defendant is barred from a trial de novo.

14.7 COMPUTING THE TEN-DAY PERIOD

The 10-day period of time for filing the application for trial de novo is computed in accordance with Rule 37.09(a).

> Rule 37.09 Time - Computation Of - Enlargement
>
> > (a) Computation. In computing any period of time prescribed or allowed by this Rule 37, by order of court, or by an applicable statute, the date of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day that is neither a Saturday, Sunday nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

Examples: The judge finds the defendant guilty and sentences him or her on Tuesday, September 6, as shown on the calendar below.

SEPTEMBER

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

The 10-day period for filing the application for trial de novo begins on Wednesday, September 7. The last day on which the application can be filed is Friday, September 16. Assume though, that the judge sentences the defendant on Wednesday, September 7. The 10-day period then begins on Thursday, September 8. However, since the tenth day would fall on a Saturday, the period of time for filing the application for trial de novo is extended through Monday, September 19.

14.8 RULE AGAINST EXTENDING TEN-DAY PERIOD

Although Rule 37.09(b) allows the court to enlarge (extend) certain time limits for good cause, the same rule specifically states that the period of time for filing a application for trial de novo cannot be enlarged under any circumstances. (See Rule 37.71(a).)

The filing of a motion to vacate a guilty plea entered in the municipal division does not toll the running of the ten day period for filing an application for trial de novo. Thus the 10-day period runs from the date of the conviction in the municipal division not from the date of the court's ruling on the motion. City of Slater, Missouri v. Burks, 714 S.W. 2d 534 (Mo. App. 1986).

14.9 RULE 37.09 TIME - COMPUTATION OF - ENLARGEMENT

> (b) Enlargement. When by this Rule 37 or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown, may at any time in its discretion (1) with or without motion or notice, order the period enlarged if the request, therefore, is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon notice and motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but the court may not enlarge the period for filing an application for trial de novo.

14.10 COSTS OF FILING

Section 479.260.5, RSMo (1996) requires that an application for trial de novo be accompanied by payment of a $30 fee.

> 479.260 Court Costs, Filing Fees.
>
> 5. In municipal ordinance violation cases, when there is an application for a trial de novo, there shall be an additional fee in an amount to be set pursuant to sections 488.010 to 488.020, RSMo, which shall be assessed in the same manner as provided in subsection 2 of this section.
>
> 488.012 Collections, clerk of court--amount of court costs
>
> 6. Twelve dollars for municipal court costs, fifteen dollars for municipal ordinance violations filed before an associate circuit judge and thirty dollars for applications for a trial de novo of a municipal ordinance violation, pursuant to section 479,260, RSMo.

However, the exact amount of the filing fee may vary in some circuits under local circuit court rules, so it is advisable to check with the local circuit clerk if there is any doubt.

If the defendant has been determined to be indigent, in which case the filing fee is waived, then the application for trial de novo must be accompanied by an affidavit of indigency.

PROCEDURE AFTER FILING OF APPLICATION FOR TRIAL DE NOVO

14.11 STAY OF EXECUTION

If there is any indication that the defendant might file an application for trial de novo, the judge should stay execution of the sentence for ten days to allow time for filing. Once the application is filed, execution of the sentence is automatically suspended until the case is actually heard again at the trial de novo. (See Rule 37.72.)

> Rule 37.72 Trial De Novo - Stay of Execution
>
> The filing of an application for trial de novo or review shall suspend the execution of the judgment of the municipal division. If the applicant for trial e novo withdraws the application or, if before commencement of trial, the court enters a finding that the applicant has abandoned the trial de novo, the case shall be remanded to the municipal division for execution of judgment (Amended December 18, 1998, effective January 1, 2000)

14.12 BOND PENDING TRIAL DE NOVO

Although a municipal judge has no specific authority by statute or Supreme Court rule, some municipal courts take the position that it is within the court's inherent authority to require the defendant to post an appearance bond to assure the defendant's appearance for the trial de novo, especially if no bond has been previously required. Such bond is only to assure the defendant's appearance in the circuit court and is not to be punitive in nature; thus, the bond cannot properly be set so high as to deprive defendants of their basic right to a trial de novo under due process.

Any bond previously posted, or imposed by the court pending trial de novo, is to be forwarded to the circuit clerk together with the filing fee, application for trial de novo, and other records as described in Section 14.12 of this chapter.

14.13 TRANSMITTAL OF RECORD

Upon receipt of the application for trial de novo, the clerk of the municipal court should stamp

the application to show the actual date filed and collect the appropriate application fee (or affidavit of indigency, when applicable).

A duplicate copy of the municipal court records, including the trial de novo application, should be made and kept in the municipal court file. The clerk then certifies the original record as being true and complete. (See Rule 37.73.)

> Rule 37.73 Trial de Novo - Transmittal of Record
>
> When an application for trial de novo is filed, the clerk shall transmit the duly certified record to the clerk of the division designated to hear ordinance violations de novo. The failure of the clerk to transmit the record shall not affect the defendant's trial de novo. (Adopted May 14, 1985, effective January 1, 1986.)

The municipal court should forward to the circuit clerk, or to the associate circuit division if designated by local court rule, the following:

1. The application for trial de novo:
2. The certified record and all related documents, including the original signed information;
3. The appropriate trial de novo fee (or affidavit of indigency); and
4. Any bond given as security in the case.

Local circuit court rules or policies may vary as to how the trial de novo fee or bond monies or both should be transmitted. Again, the municipal court should check with the local circuit court clerk if there is any question in this regard.

14.14 DISPOSITION OF TRIAL DE NOVO

Trial de novo proceedings in the associate circuit court, are the same as for a trial of a misdemeanor by the rules of criminal procedure. (See Rule 37.74.)

> Rule 37.74 Trial de Novo — Procedure
>
> All trials de novo shall proceed in the manner provided for the trial of a misdemeanor by the rules of criminal procedure. (Adopted May 14, 1985, effective January 1, 1986)

Once the trial de novo application and associated records and monies are transmitted to the circuit clerk or associate division, the municipal judge has no further jurisdiction, and his/her

involvement in the case ends at that point. The municipal court docket and related municipal court records should be closed with an appropriate notation as to the application for trial de novo having been received and the file having been transmitted to the circuit clerk or associate circuit division, as applicable. Collection of any fines or costs subsequently imposed, if the defendant is found guilty on trial de novo, and transmittal of such fines or costs back to the original municipality, as required, becomes the responsibility of the circuit division hearing the trial de novo.

It has often been strongly suggested that a municipal judge not be concerned about how many of his or her decisions are changed after a trial de novo lest such knowledge cloud the judge's judgment on future cases. The municipal judge should remember that the testimony and evidence presented on trial de novo may differ greatly from that presented at the original hearing; thus acquittal or a reduced sentence on trial de novo does not necessarily mean that the municipal judge who originally heard the case erred in the original decision or sentencing.