STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8049
(Formerly CX-84-2137)

ORDER ESTABLISHING DEADLINE FOR SUBMITTING COMMENTS ON PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

The Minnesota Supreme Court Advisory Committee on Rules of Criminal Procedure filed a report on August 1, 2011, proposing amendments to the Minnesota Rules of Criminal Procedure. This court requested public comment through October 17, 2011. Based on that first round of comments, the Advisory Committee on Rules of Criminal Procedure filed an amended proposal on December 13, 2011. The court is now soliciting additional comments on the amended proposal.

IT IS HEREBY ORDERED that any individual wishing to provide written statements in support of or opposition to the proposed amendments shall submit twelve copies addressed to Bridget Gernander, Clerk of the Appellate Courts, 25 Rev. Dr. Martin Luther King, Jr. Boulevard, St. Paul, Minnesota 55155, no later than February 6, 2012. A copy of the committee's amended report containing the proposed rule changes is annexed to this order.

Dated: December 22, 2011

BY THE COURT:

Lorie S. Gildea
Chief Justice

MEMORANDUM

TO: **CHIEF JUSTICE LORIE S. GILDEA AND MEMBERS OF THE SUPREME COURT**

FROM: **MARK WERNICK, CHAIR**
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
FILE NO. ADM10-8049

DATE: **DECEMBER 12, 2011**

RE: **ADDENDUM TO COMMITTEE'S AUGUST 1, 2011 REPORT**

I. Introduction

As the Court is aware, the Advisory Committee on Rules of Criminal Procedure filed a report on August 1, 2011, addressing two issues referred to it by the Court:

1) Consider amending Minn. R. Crim. P. 23.04 to permit the prosecutor to certify a misdemeanor offense as a petty misdemeanor offense without the defendant's consent; and
2) Consider amendments to the Rules of Criminal Procedure that would procedurally treat gross misdemeanors like misdemeanors.

In its August 16, 2011 Order, the Court welcomed comments in response to the Committee's report and recommendations; the comment period closed on October 17, 2011:
http://www.mncourts.gov/Documents/0/Public/administration/AdministrationFiles/Criminal%20Procedure%20Rules%20ADM10-8049%20(formerly%20C1-84-2137)/2011-08-16%20Order%20Crim%20Rls%20Comments.pdf

The Court received only one comment, which was from the Minnesota Association of Criminal Defense Lawyers (MACDL):
http://macsnc.courts.state.mn.us/ctrack/document.do?document=aa69b440040199668e6efb214cc321df6544126c68257461f83d48b2353cc9c3&doView=

In its letter, the MACDL expressed support for the Committee's recommendations relating to the gross misdemeanor rules; however, the group objected to the Committee's recommendations relating to petty misdemeanor certification.

Currently, Rule 23.04 prohibits a prosecutor from certifying a misdemeanor offense as a petty misdemeanor in the absence of the defendant's consent. Rule 23.05 currently provides that when a misdemeanor is certified as a petty misdemeanor, the defendant's right to counsel is limited to offenses involving "moral turpitude."

In its August 1 report at Recommendation #14, the Committee recommended that Rule 23.04 be amended to authorize petty misdemeanor certification without the defendant's consent except when consent is required by statute or the court determines that the interests of justice requires the defendant's consent. The Committee recommended no change to Rule 23.05.

The MACDL is concerned that if the prosecutor's authority to certify misdemeanor offenses as petty misdemeanors is expanded as proposed in the Committee's August 1 report, the prosecution may be empowered to take away a defendant's constitutional right to counsel.

In light of the arguments made by the MACDL, and for other reasons stated below, the Committee is filing this addendum to its August 1 report. The Committee respectfully requests that the Court 1) consider these recommendations relating to Rule 23.04 as an alternative to Recommendation #14 in the August 1 report, and 2) consider the proposed amendments to Rule 23.05.

***Please note** that this amended proposal was only discussed via email as the Committee was unable to meet to discuss these concerns. While a majority of the Committee members agreed with this amended proposal, there was not the same ability for opposing viewpoints to be debated and explored. Wherever this report notes the position of the "Committee," keep in mind that the report only reflects the opinion of a simple majority of the members who agreed via email to the submission of this report.

II. Discussion

A. MACDL Comment

The MACDL argues that the Committee's recommendation unfairly empowers prosecutors to control what should be the defendant's decision to have a jury trial and (when financially eligible) the assistance of court-appointed counsel. While there is no risk of jail time for petty misdemeanor convictions, the MACDL notes that a defendant's primary concern in these kinds of cases is often the adverse collateral consequences (e.g., loss of housing and employment opportunities) which may arise from a conviction.

As explained in the Committee's August 1 report, the Committee did not recommend specifically addressing the right to counsel in Rule 23 in part because Minn. Stat.

§ 609.131, subd. 1, already provides that when an offense is certified as a petty misdemeanor, "the defendant's eligibility for court-appointed counsel must be evaluated as though the offense were a misdemeanor." Thus every defendant charged with a misdemeanor, even if the offense is later certified as a petty misdemeanor without the defendant's consent, is entitled under statute to representation by the public defender if qualified.

As noted in its August 1 report, the Committee had some interest in addressing the right to court-appointed counsel issue raised by these cases, but ultimately agreed not to recommend any further change to Rule 23.05 and to leave it to district courts to decide on a case-by-case basis how to reconcile the interrelationship between the rules and the statute and then apply the withdrawal-of-counsel standards as appropriate.

However, as noted by the MACDL, by failing to recommend any changes to Rule 23.05 (no right to counsel for certified petty misdemeanors except for offenses involving moral turpitude), the recommended changes to Rule 23.04 in the August 1 report may give prosecutors inappropriate leverage over an indigent defendant's relationship with a previously appointed lawyer. This issue would be further complicated if section 609.131 were ever amended or repealed.

The Committee shares the concerns expressed by the MACDL, namely that public defense may not necessarily be offered to defendants whose misdemeanors offenses are certified as petty misdemeanors. The Committee also agrees that collateral consequences may be significant for certain petty misdemeanor convictions. In light of the comments filed by MACDL, and upon further discussion by the Committee, the Committee respectfully requests the Court accept this amended recommendation relating to Rule 23.05, which now includes a specific provision addressing the defendant's right to counsel that comports with section 609.131, subdivision 1.

B. Other Considerations

Since the August 1 report was filed, Committee members have had occasion to consider efforts the Judicial Branch has made in recent years to gain efficiency in the handling of lower-level criminal offenses.

In 2008, in light of the economic outlook and continuing budget concerns, the Judicial Council created the Access and Service Delivery (ASD) Committee, which was asked to "take a global look at the operations and structure of the Judicial Branch and develop recommendations for possible Council consideration and action." In its final report to the Judicial Council, the ASD Committee expressed support for the 1997 Non-Felony Enforcement Advisory Committee (NEAC) report and recommendations:

http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/ASD_Report.doc.

Some basic tenets of the NEAC report and recommendations are that lower-level offenses should be treated as non-criminal "infractions" and that such offenses for which offenders do not typically receive incarceration should be handled informally to conserve scarce judicial resources. *See* NEAC Executive Summary, Appendix U to the ASD 2 Report: http://www.mncourts.gov/Documents/0/Public/NewsPostings/ASD_2_Report_Final.pdf

In response to the ASD Final Report, one step that was taken by Judicial Council to conserve scarce judicial resources and streamline how lower-level offenses are handled was a significant expansion of the Statewide Payables List for 2009. Another step that was taken was to seek legislative approval for treating all payable misdemeanors as petty misdemeanors. However, as noted in the Final Report of one of the ASD successor committees, ASD 2:

> The Committee discussed the potential efficiencies of NEAC proposals to the justice system. However, it recognized the continued opposition to such proposals including the branch's effort in the 2009 session to seek legislative approval for treating low level payable misdemeanors as petty misdemeanors for purposes of collecting old debt.

See ASD 2 Report (at link above), at p. 37.

In sum, the Judicial Branch has been focused on finding creative ways to streamline how lower-level cases are handled, and has taken the steps within its control to make positive strides. However, the inability to get legislative support for treating lower-level misdemeanors as petty misdemeanors has left the Branch struggling with how to effectively process payable misdemeanor cases when the defendant appears in court and is now entitled to a jury trial for an otherwise payable offense. It has also left the Branch struggling with how to effectively deal with lower-level misdemeanor offenders who fail to appear for court. Under current law, a conviction cannot be entered when a misdemeanant fails to appear. *See State v. Osborne*, 715 N.W.2d 436, 442 (Minn. 2006) (holding that silence cannot be deemed waiver of constitutional rights to trial and counsel). The only options available to the court are to issue warrants and/or impose administrative sanctions such as suspension of driver's licenses or DNR licenses where applicable. However, warrants are costly to enforce for sheriff's departments that are also financially strapped, and administrative sanctions are of limited effectiveness.

In light of these efforts, and upon further review of Rule 23, the Committee now recommends an alternative approach in Rule 23 which: 1) authorizes prosecutors to

certify misdemeanor offenses on the Statewide Payables List as petty misdemeanors without the consent of the defendant, consistent with Minn. Stat. § 609.131, subd. 1; and, 2) authorizes the district court to enter conviction for any petty misdemeanor offense, or payable misdemeanor offense certified as a petty misdemeanor, when the defendant fails to appear in court as required, consistent with Minn. Stat. § 609.491, subd. 1.

1. Certifying Payable Offenses without the Defendant's Consent

This approach is worthy of consideration in part because there is already an avenue for criminal justice agency partners (and professional associations such as MACDL) to be heard on which offenses should qualify for inclusion on the payable list. Under Judicial Council's Statewide Payable Offense Policy, justice agency partner input is solicited annually regarding changes to the list, and the changes proposed by Judicial Council are also published for public comment to give partner agencies another opportunity to be heard before Judicial Council approves and publishes the annual lists. *See* Statewide Payable Offense Policy 506.1, and current Statewide Payables Lists at the following link: http://www.mncourts.gov/?page=1774

2. Certification and Conviction upon Failure to Appear in Court

Amending Rule 23 to specifically address the consequences of failure to appear in court would give the Court the opportunity to reconcile the procedural questions raised by the case of *State v. Haney*, 600 N.W.2d 469 (Minn. App. 1999). That case held that the district court erred when it entered convictions in petty misdemeanor traffic cases where the defendants failed to appear for trial. The case noted that petty misdemeanors are governed by the Minnesota Rules of Criminal Procedure, which did not address the consequences of failure to appear. But the case failed to address the application of Minn. Stat. § 609.491, subd. 1, a 1989 statute which provides:

> If a person fails to appear in court on a charge that is a petty misdemeanor, the failure to appear is considered a plea of guilty and waiver of the right to trial, unless the person appears in court within ten days and shows that the person's failure to appear was due to circumstances beyond the person's control.

In recent years, the Judicial Branch has struggled with how to apply section 609.491 in light of *Haney*. Arguably, this Court has already begun to reconcile section 609.491 with the Rules; effective January 1, 2012, Rule 6.01, subdivision 4, will include a specific requirement that all citations contain the notice required by section 609.491. *See* January 22, 2011, Court Order:

http://www.mncourts.gov/Documents/0/Public/administration/AdministrationFiles/Criminal%20Procedure%20Rules%20ADM10-8049%20(formerly%20C1-84-2137)/2011-01-13%20Order%20Crim%20Rls%20Amendments%20Re%20Uniform%20Citation.pdf

Providing clear authority for resolving a significant number of petty misdemeanor and payable misdemeanor cases that would otherwise remain in a largely unenforceable "warrant" status would help solve a case-processing problem that has cost the courts, and our justice agency partners, valuable resources.

Within this framework, the Committee also recommends providing a process for a defendant to obtain relief, when warranted, from a conviction entered because of a failure to appear.

In sum, upon further consideration the Committee has concluded that the recommendations contained in the August 1, 2011, Final Report were inadequate to fully address all of the issues raised by the certification process. As it stands, the Committee's recommendations in the August 1 report invite needless litigation on issues such as whether the interests of justice requires the defendant's consent to certification, and whether the offense involves moral turpitude. The Committee respectfully requests that the Court consider the alternative recommendations relating to Rule 23.04, and consider further amending Rule 23 to specifically address the right to counsel, the consequences of failure to appear in petty misdemeanor cases, and to provide a remedy for defendants convicted upon failure to appear.

Recommendation. The Committee recommends, as an alternative to the recommendations contained in the August 1 report, that Rule 23.04 be amended to eliminate the defendant's consent requirement for certification of offenses on the Statewide Payables List, but not for other misdemeanor offenses.

The Committee further recommends amending Rule 23:

a. to allow conviction to be entered, the payable fine amount imposed (not to exceed $300) and collections pursued when the defendant fails to appear on either a petty misdemeanor or a payable misdemeanor certified as a petty misdemeanor; and

b. to provide a process for a defendant convicted upon failure to appear to seek withdrawal of the guilty plea and vacation of the conviction where appropriate.

The Committee also now recommends amending Rule 23.05 to specifically adopt the right to counsel language from Minn. Stat. § 609.131, subd. 1. This will ensure that the right to court-appointed counsel on misdemeanor offenses certified as petty misdemeanors will be preserved even if that statute is later amended or repealed.

PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

The Supreme Court Advisory Committee on Rules of Criminal Procedure recommends that the following amendments be made in the Minnesota Rules of Criminal Procedure. In the proposed amendments, except as otherwise indicated, deletions are indicated by a line drawn through the words and additions by a line drawn under the words.

1. Amend Rule 23.03, subd. 2, paragraph 1, as follows:

(1) Uniform Fine Schedule. The Judicial Council must adopt and, as necessary, revise a uniform fine schedule setting fines for statutory petty misdemeanors and for statutory misdemeanors as it selects. The uniform fine schedule is applicable statewide, and is known as the Statewide Payables List.

2. Amend Rule 23.04 as follows:

Rule 23.04 Certification as a Petty Misdemeanor in a Particular Case

Before trial, the prosecutor may certify ~~the~~a misdemeanor offense as a petty misdemeanor if the prosecutor does not seek incarceration and seeks a fine at or below the statutory maximum for a petty misdemeanor. Subject to the following exception, c~~C~~ertification takes effect only on approval of the court and consent of the defendant. Certification does not require the defendant's consent if the offense is included on the Statewide Payables List on the date of the alleged offense.

3. Amend Rule 23.05 as follows:

Rule 23.05 Procedure in Petty Misdemeanor Cases

Subd. 1. No Right to Jury Trial. No right to a jury trial exists in a misdemeanor charge certified as a petty misdemeanor under Rule 23.04.

Subd. 2. Right to Appointed Counsel. ~~A defendant charged with a misdemeanor offense certified as a petty misdemeanor cannot qualify for court appointed counsel unless the offense involves moral turpitude.~~ When a misdemeanor offense is certified as a petty misdemeanor under this rule, the defendant's eligibility for court-appointed counsel must be evaluated as though the offense were a misdemeanor. In these cases the defendant must qualify financially prior to appointment.

Subd. 3. General Procedure. A defendant charged with a petty misdemeanor violation is presumed innocent until proven guilty beyond a reasonable doubt. Except as otherwise provided in Rule 23, the procedure in petty misdemeanor cases must be the same as for misdemeanors punishable by incarceration.

Subd. 4. Failure to Appear. If a defendant charged with a petty misdemeanor, or a misdemeanor on the Statewide Payables List that is certified as a petty misdemeanor, fails to appear or respond as directed on the citation or complaint, conviction may be entered, the payable fine amount no greater than the maximum fine for a petty misdemeanor may be imposed, and the matter referred to collections. Conviction shall not be entered until 10 days after the failure to appear, consistent with Minn. Stat. § 609.491, subd. 1.

Subd. 5. Withdrawal of Plea. A defendant convicted under subdivision 4 may move under Rule 15.05 to withdraw the guilty plea and vacate the conviction. The motion may be made on the grounds that a) the defendant did not receive the notice required by Rule 6.01, subd. 4(b), and Minn. Stat. § 609.491, subd. 2; b) the defendant did not receive the instructions required by Rule 6.01, subd. 4(a) to appear or contact the court; or c) the interests of justice[1] otherwise require that the guilty plea be withdrawn and conviction vacated. Motions based solely on the interests of justice must be made within 90 days[2] after the conviction is entered.

4. Amend paragraph 7 in the Comments to Rule 23 as follows:

Contrary to what is provided in Rule 23.04, Minn. Stat. § 609.131, enacted by the legislature in 1987 (Chapter 329, Section 6), purports to allow the reduction of any misdemeanor to a petty misdemeanor without the consent of the defendant. The Advisory Committee is aware of this statute, but after consideration rejected ~~any change in the~~ fully conforming the Rule to the statute. On such matters of procedure the Rules of Criminal Procedure take precedence over statutes to the extent there is any inconsistency. State v. Keith, 325 N.W.2d 641 (Minn. 1982).

5. Amend the third paragraph in the Comments to Rule 6, effective January 1, 2012, as follows:

[1] During email review, some members expressed a preference for listing "good cause" in addition to or in place of "interests of justice" as grounds for the motion to withdraw. The Committee defers to the Court on that issue.

[2] Some members contend that a motion based on interests of justice or good cause should be allowed for up to a year; the rationale is that the motion may be filed because of collateral consequences, which may not occur until long after conviction is entered. Again the Committee defers to the Court on how much time should be allowed for filing motions based solely on interests of justice/good cause grounds. No specific time limit is recommended for motions filed on the grounds that the defendant did not receive the notices or instructions required by law.

Rule 6.01, subd. 4(b), reiterates that the citation must contain the statutorily required notice that failure to appear for a petty misdemeanor offense results in a conviction. As stated in the rule, the citation must direct the defendant to either appear or contact the court by a particular date. This means a conviction will be entered ~~under the statutory process~~: (1) if the defendant fails to appear on the scheduled court date; (2) if the defendant fails to pay the fine or otherwise contact the court by the scheduled deadline; or (3) if the defendant requests an initial hearing on the citation but then fails to appear for it. ~~The statutory conviction procedure is not applicable, however, if the defendant invokes the process available in the Rules of Criminal Procedure by making an initial appearance but then fails to appear for a subsequent hearing. See State v. Haney, 600 N. W2d 469 (Minn. Ct. App. 1999) and Judicial Council Policy 515, Petty Misdemeanor Failure to Appear.~~