

CHAPTER XIII. - ENFORCEMENT OF FINES AND COSTS

Judge Todd Thornhill

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Judge Todd Thornhill assumes authorship of this chapter from Judge Keith Sutherland who is former chair of the Municipal Judge Education Committee and now circuit judge for the 12th Judicial Circuit in Warren County. Judge Thornhill received his B.A. from Southwest Missouri State University and his J.D. from the University of Missouri-Columbia. He has served as a judge of the Springfield Municipal Court since his appointment in 1993 and was president of the Missouri Municipal and Associate Circuit Judges Association in 1999-2000.

CHAPTER XIII

ENFORCEMENT OF FINES AND COSTS

13.1 INTRODUCTION

The purpose of this chapter is to outline the various means, both voluntary and compulsory, of collecting fines and costs from ordinance violators following either a plea of guilty by the defendants or a finding of guilty by the court at trial, and the steps to take if the violators will not pay.

VOLUNTARY PAYMENT

13.2 PAYMENT IN FULL

For obvious reasons, it is preferable that defendants pay the total fine(s) and costs at one time. If for some reason a defendant cannot pay at the time the fine and costs are assessed, under Rule 37.64(f) the court may grant a stay of execution not to exceed six months. If a stay is granted, the defendant should be given a definite date on which to pay, and the stay should be entered in writing. A stay raises the possibility that the defendant's intervening bankruptcy filing may suspend or alter the court's ability to enforce the judgement. Although 11 U.S.C. section 1328 (a) (3) makes nondischargeable "restitution or a criminal fine included in a sentence on the [Chapter 13] debtor's conviction of a crime, "such items are most likely discharged if rendered for violation of a municipal ordinance because such infractions are not crimes. Furthermore, restitution orders most frequently occur in orders of suspended imposition of sentence, not a sentence of conviction.

There is a substantial body of case law addressing the dischargeability of fines and costs in a bankruptcy proceeding. There is some authority that fines and costs are not dischargeable. See, for example, In Re Stevens, 184 B.R. 584 (Bankr. W.D. Wash. 1995) (unpaid traffic fines "are nondischargeable whether they are denominated as civil or criminal under local law." Id.) For an extensive discussion including numerous case citations, see "Debts Arising from Penalties as Exceptions to Bankruptcy Discharge under Section 523(A)(7), (13) and 1328(A) of Bankruptcy Code of 1978," 150 A.L.R. Fed. 159 (1998).

13.3 PARTIAL PAYMENTS

The court may accept partial payments of fines and costs if it wishes to do so. Mo. Sup. Ct. Rule 37.64(f), 37.65(a), Section 479.240, RSMo, and Section 560.026, RSMo. There is no statute or rule that requires a court to accept partial payments. However, many courts do accept partial payments as a convenience to defendants. Allowing a defendant to make partial payments is a stay of execution and should be set forth in writing.

13.4 BOND ON STAY OF EXECUTION

Under Rule 37.64(f), the court has the right to require a defendant to enter into a bond on any stay of execution. This is not mandatory and is rarely done when the stay of execution involves only the payment of a fine and costs rather than a jail sentence, but it can be a useful tool for repeat violators who have demonstrated an unwillingness to pay fines and costs in the past. If a bond is entered into and the defendant fails to appear on the return date, the city prosecutor can then file an information against the defendant charging failure to appear on bond — if there is an ordinance covering this offense. [See Chapter VI, "Bail and Sureties," for discussion of bonds.]

13.5 APPLYING BOND TO FINE AND COSTS

If a defendant has entered into an appearance bond and deposited cash bail, the defendant may want to pay the fine and costs from the cash bail. The fines and costs can be paid from the bail, but only with the permission of the defendant. If the bail money is to be used to pay the defendant's fine and costs, the judge should obtain the written consent of the defendant (or of the person who posted the cash bail for defendant if so indicated on the bond form, see State v. Echols, 850 S.W.2d 344, 347, (Mo. banc 1993) or obtain the defendant's oral consent in open court and make a docket entry reflecting the defendant's consent. See form 13-01 following this chapter for suggested consent. Otherwise, there are only two things the court can properly do with cash bail money:

1. Return it to the defendant (or to the person who posted the cash bail) after the case is completed; or
2. Forfeit the bond if the defendant fails to appear. See the Chapter on Bail and Sureties for forfeiture procedures.

State v. Echols, 850 S.W.2d 344 (Mo. banc 1993) discusses from a historical perspective the theory of cash bail and rights thereto at different stages in criminal proceeding.

COMPELLING PAYMENT

13.6 GENERAL CONSIDERATIONS

Defendants who fail or refuse to pay their fines and costs can be extremely difficult to deal with, but if there is a credible threat of incarceration if they do not pay, the job of collection becomes much easier. An intervening bankruptcy may prohibit this possibility, however, because the threat of incarceration may be viewed as an attempt to collect a debt in violation of the automatic stay of 11 U.S.C. section 362. In Re Commonwealth Companies, Inc., 913 F.2d 518 (8th Cir. 1990).

13.7 ORDER TO SHOW CAUSE/MOTION FOR CONTEMPT

No court can summarily put a defendant in jail for failing to pay a fine and costs. Williams v. State of Illinois, 399 U.S. 235 (1970). To do so is a violation of the right to equal protection of law under section one of the U.S. Constitution's 14th Amendment. The rationale is that "there can be no equal justice where [the kind of punishment] a man gets depends on the amount of money he has." Williams at 241, citing Griffin v. Illinois, 351 U.S. 12 (1956).

The Supreme Court of Missouri has followed the Williams line of decisions. Hendrix v. Lark, 482 S.W.2d 427 (Mo.banc 1972). Additionally, the procedure for addressing fine-defaulting defendants found at Section 560.031 addresses the equal protection issues raised in Williams. "The very purpose of the Section 560.031 enactment was to avoid the constitutional peril of the unequal protection of the laws that peremptory confinement in lieu of nonpayment of a fine works against an indigent." State ex. rel Stracener v. Jackson, 610 S.W.2d 420, 424 (Mo.App. W.D. 1980).

The U.S. Supreme Court has tempered somewhat the Williams line of cases by holding that if a defendant refuses to pay when able or refuses to make bona fide efforts to obtain money to pay, then incarceration as a sanction may be used. Bearden v. Georgia, 461 U.S. 660, 672-73 (1983). Bearden goes further by stating that even if a defendant is faultlessly unable to pay, then incarceration may be used, but only if "alternative measures are not adequate to meet the state's interests in punishment and deterrence." Id. at 672-73.

The defendant first must be given the opportunity to show whether there is any good reason for failing to pay. The first step in this process is notifying the defendant. Mo. Supreme Ct. Rule 37.65(b); Section 560.031.1, RSMo. This notification may be given either by an order to show cause (see form 13-03 following this chapter) or by a motion for contempt. The order or motion may be served on the defendant by mail or by personal service. [See Chapter XV, "Contempt of Court."]

13.8 RIGHT TO AND NOTICE OF HEARING/RIGHT TO COUNSEL

The order to show cause or motion for contempt, once mailed to or personally served on the defendant, constitutes adequate notice of hearing. Defendants who have failed to pay are entitled to an opportunity for a hearing to give them a chance to explain why they failed to pay. If a defendant fails to appear in court on the return date of the order to show cause or motion for contempt, a warrant should be issued to get the defendant before the court for the hearing. The defendant may also be held in contempt for failing to appear for the contempt hearing if there is no good cause for the failure. Section 560.031(1)-(5), RSMo specifies the procedure required. Utilization of state statute by municipal courts is authorized through Missouri Rules of Court 37.08 and 19.04.

A defendant who does appear on the return date has the absolute right to a hearing and to be represented by a lawyer if the defendant is likely to be jailed or cannot show good cause for failing to pay. Since the threat of jail is the only viable means of coercing payment, a lawyer should always be appointed for the indigent defendant. [See Section 5.8.] Not to be overlooked is

the argument that if a defendant is found to be truly “indigent,” by definition he has not acted “intentionally” in not paying fines. *State v. Jackson*, 610 S.W.2d at 424-25.

The defendant may waive the right to counsel in writing [See Sections 5.6, 5.9 and 5.10], but the defendant should be informed unequivocally that he or she will be given a jail sentence or is most likely to be given a jail sentence if the defendant cannot show good cause for the failure to pay.

13.9 WRITTEN PAYMENT AGREEMENTS

Many courts have had success with written payment agreements. One form of such an agreement is the “Agreement to Pay and Order to Show Cause in Event of Non-Compliance” (see form MBB 13-02 following this chapter) promulgated by the Office of State Courts Administrator. Use of such a form eliminates the necessity of following the steps outlined in Sections 13.7 and 13.8, above, as the form puts the burden on the defendant to either pay as agreed or to appear to show cause why he or she has not paid without the court having to take any additional steps to notify the defendant of a hearing. If such a form is used, the defendant should be provided with a copy.

13.10 SUSPENSION OF DRIVERS’ LICENSE FOR NON COMPLIANCE

Defendants who fail to pay their fines and costs can have their drivers’ licenses suspended whether they are residents of Missouri or most other states. There are two different procedures which need to be followed depending on whether the defendant has a Missouri license or an out-of-state license:

1. Out-of-state drivers’ licenses come under what is commonly called the Non-Resident Violator’s Compact (NRVC). The official title in Missouri is the Driver License Compact (Section 302.600 - .605, RSMo). Any state which is a member of the compact has agreed to suspend the license of any driver who has failed to take case of a traffic violation in another compact state. Not all states are members of the compact, but Arkansas, Illinois, Iowa, Kansas, Nebraska, and Oklahoma are. There are two major qualifications under the compact, namely:

- a. Notification to the defendant’s home state must be made within six months of the date of the violation; and
- b. Serious traffic offenses are not covered by the compact. For purposes of the municipal divisions, the main offense not covered is DWI.

MEMBERS OF THE NONRESIDENT VIOLATOR’S COMPACT (NRVC)

Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming

See also Section 8.12.

2. Drivers licensed in Missouri are covered by Section 302.341, RSMo, which allows any municipal court in a municipality to order the Director of Revenue to suspend the driver's license of any defendant who fails to appear or dispose of their violation. This procedure is referred to as FACT (for Failure to Appear in Court for Traffic Violations). The multi-part forms necessary to have a license suspended are available from the Department of Revenue (see approved FACT forms following this chapter). This procedure applies only to violations occurring after June 30, 1996.

COMMITMENT

13.11 FOR NONPAYMENT'S

A defendant who willfully fails to pay a fine and costs can be committed to jail for contempt. Missouri has enacted legislation to address the incarceration of non-paying defendants. Section 560.031, RSMo allows a court to order a defendant to show cause why fines have not been paid, and if the defendant has either "intentionally" refused to pay or failed to "make a good faith effort to obtain the necessary funds," he may be imprisoned. The imprisonment is in the nature of "punishment for contempt of court." State v. Jackson, 610 S.W.2d 420, 423 (Mo.App. 1980). Of course, if a defendant is truly indigent, he by definition has not acted "intentionally." Id. at 424-25. The procedures for an indirect contempt hearing, found at Missouri Rules of Court 36.01 and 37.75, must be followed prior to incarceration. These procedures include notice (see also rule 37.65(b), a hearing on indigence, and a judgment "reciting the essential facts constituting the criminal contempt." If the failure to pay is "excusable," the court may allow additional time, reduce the fine, or revoke any part of the fine. Section 560.031(3), RSMo. However, this practice is not recommended because of the possibility of incarcerating someone who is, in fact, indigent and therefore cannot constitutionally be incarcerated for debt. Incarceration of an indigent strictly for contempt for failure to pay leaves the judge and the municipality open to liability for damages for violation of the defendant's civil rights. See Davis v. City of Charleston, 635 F. Supp. 197 (E.D. Mo. 1986). The harshness of Davis and other similar cases was diluted by passage of the Federal Courts Improvement Act in 1996, found at 42 U.S.C. Sections 1983 and 1988(b), which greatly enhances judicial immunity. Instead, the procedure for commitment for contempt for failure to appear should be used.

13.12 FOR CONTEMPT

By committing a defendant for contempt of court for failing to appear to show good cause for failure to pay, the court does not have to worry about whether the defendant is indigent. When a defendant fails to appear on the return date of an order to show cause or a motion for contempt, that defendant is in contempt of court for failure to appear regardless of indigency. In this situation, the action of the defendant that constitutes contempt is the failure to appear, not the failure to pay. Consequently, the constitutional prohibition against imprisonment for debt is not applicable. [See Chapter XV, "Contempt of Court."] Where the defendant has wholly failed to appear, a warrant should be issued to get the defendant before the court. When the defendant is brought before the court on the warrant and cannot show good cause for failing to appear, he or

she may be found in contempt of court and an order issued. (See form 13-04 following this chapter.)

13.13 VOLUNTARY COMMITMENTS

A few defendants will ask to be committed to jail rather than have to pay a fine and costs. This should be distinguished from a court improperly assessing a sentence such as "\$100.00 or 10 days in jail." This sort of alternative sentence is not proper and should never be imposed, but if a fine and costs have been assessed and the defendant voluntarily requests that the fine and costs be commuted to a jail sentence, the court may do so if the municipality has an ordinance permitting it. An ordinance similar to Section 543.270.1, RSMo (1986) would be sufficient. (See form 13-04 following this chapter.) Any request by a defendant for commitment in lieu of a fine should be put in writing and signed by the defendant. A statement such as the following will suffice: "John Doe, defendant, requests that the fine and costs totaling \$100.00 be commuted to a jail sentence to be served at the rate of \$10.00 per day." Hendrix v. Lark, 482 S.W.2d 427, 431 (Mo.banc 1972.)

13.14 EXECUTION AND GARNISHMENTS

Orders to show cause or motions for contempt are not the only means available to enforce the collection of fines and costs. Under the provisions of Rule 37.65(c), the court may use "means for the enforcement of money judgments." This means, among other things, that an execution can be issued to garnish a defendant's wages, bank account, or other assets. This procedure is not used as often as it could be to collect fines and costs. The major problem with garnishing wages or bank accounts is knowing where the defendant works or banks. However, if the court uses a form for stays of execution and partial payments, this information could be requested on the form.