

## **93-DAY MISDEMEANORS**

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In recent years, the maximum term of imprisonment that may be imposed for various misdemeanors under State law has been increased from 90 to 93 days. While many statutes prescribe a different jail term for misdemeanors, a 90-day maximum is common under the law (and is the maximum term for a misdemeanor if no other jail time is specified by statute). In what may appear to be a trend, however, 90-day maximums often are raised to 93 days, and 93-day maximums are established for many new or revised offenses. In 1998, for example, a package of drunk driving legislation--effective October 1, 1999--includes this three-day increase for operating a vehicle while impaired or under the influence (first offense). Another 1998 law set a 93-day maximum for third-degree retail fraud (shoplifting). As discussed below, a three-day increase in a maximum sentence has consequences or potential consequences in several areas: fingerprinting; the assignment of attorneys for indigent defendants; and local incarceration.

### **Fingerprinting**

The law governing the Bureau of Criminal Identification, within the Department of State Police, prescribes fingerprinting requirements (MCL 28.243). These include a provision that, upon the arrest of a person for a misdemeanor punishable by a maximum penalty over 92 days' imprisonment, the city, village, or township police department, the county sheriff's department, the Department of State Police, and any other governmental law enforcement agency in the State must take the person's fingerprints in duplicate and forward them to the State Police. One set of the prints must be sent to the Department's Criminal Records Division (CRD), and one to the Federal Bureau of Investigation.

When the CRD receives the prints, it compares them with prints already on file and determines whether the arrestee has a prior criminal record. If a record already exists, the new arrest is added to it; if not, a criminal record is created. The criminal history then becomes available through the Law Enforcement Information Network. After the fingerprints have been processed, the CRD may notify the prosecuting attorney and the arresting agency of a prior criminal record. If the arrestee is not convicted, there are criteria for purging his or her record.

As a rule, fingerprints are not taken from a person arrested for a misdemeanor punishable by less than 93 days' imprisonment, unless the person fails to produce satisfactory evidence of identification. When a person actually is convicted of a misdemeanor, whether or not it is punishable by imprisonment for more than 92 days, the person's fingerprints are supposed to be forwarded to the State Police.

Apparently, implementing these requirements involves some practical difficulties. When a person's fingerprints are taken, he or she must be physically present in a police station. This is not a problem when someone is taken into custody. At times, however, police officers simply issue a citation when arresting a person for a misdemeanor (whether or not it is punishable by more than 92 days' incarceration). In addition, when someone is convicted of a misdemeanor and has not already been fingerprinted, his or her prints must be taken regardless of whether the sentence imposed includes incarceration. Both of these scenarios require procedures for fingerprinting people who may never be present at a jail or police station.

Increasing a maximum sentence to 93 days obviously means that more people will have to be fingerprinted at the time of arrest. As police officers issue more citations for misdemeanor violations, the number of people who must be printed but are not taken to a police station will increase. Evidently, the law enforcement community has not yet devised a way to ensure that these people's prints are obtained.

The cost of taking fingerprints is borne by the police or sheriff's department making an arrest, and may depend on the method used. Typically, an officer takes prints by pressing a person's fingertips against an ink pad and then on a fingerprint card, which is mailed to the State Police. With a new computerized system called "Live Scan", a person presses his or her fingertips on glass, a camera captures their impression, and the prints are transmitted electronically to the CRD. While this system is much faster than the traditional method, it may or may not be less costly. The up-front expense of installing Live Scan can be prohibitive to both local and State agencies, although

Federal funding is available to help make the transition. Agencies also must bear the monthly expense of maintaining the link.

The costs of acquiring and maintaining the new fingerprinting system could be reduced by the development of centralized booking stations, where the equipment would be available to all law enforcement agencies within a community. Centralized stations also might mitigate the problem of bringing in misdemeanor offenders for fingerprinting. This concept, however, has not yet been implemented.

### **Assigned Counsel**

According to the Michigan Rules of Court:

*An indigent defendant has a right to an appointed attorney whenever*

- (a) the offense charged is punishable by more than 92 days in jail;*
- (b) the offense charged requires on conviction a minimum term in jail; or*
- (c) the court determines that it might sentence the defendant to jail.*

If an indigent defendant is without an attorney and has not waived the right to an appointed attorney, the court may not sentence the defendant to jail. (Emphasis added) (MRC 6.610(D)(2))

The Sixth Amendment to the U.S. Constitution guarantees the right to assistance of counsel in a criminal prosecution. The U.S. Supreme Court held in 1963 that indigent citizens accused of a crime are entitled to appointed counsel at public expense (*Gideon v Wainwright*, 372 US 335); in 1972, this right was extended to misdemeanor defendants who are sentenced to a jail term (*Argersinger v Hamlin*, 407 US 25).

In Michigan, at the trial court level, all funding for appointed attorneys is provided by the counties. While each judicial circuit makes its own arrangements for the assignment of counsel, the circuits generally choose one of three methods, which may overlap and are subject to numerous variations. The three basic approaches are: contracting with law firms or individual attorneys; assigning counsel on a per-event basis; and making use of a public defender office.

Counties that contract with firms or individuals generally divide a total amount of funding among them for the term of the contract, or pay retained attorneys a specific amount per case or event. Counties that appoint counsel on a per-event basis either pay an hourly fee or designate a total dollar amount for the specific event at which an attorney provides representation, such as a preliminary exam, arraignment, jail visit, line-up, trial, or sentencing. The fee may vary depending upon the crime charged, the maximum possible sentence, whether the offense is a misdemeanor or a felony, and whether the attorney's time is spent in or out of court. Public defender offices are public agencies or private nonprofit corporations whose function is to represent indigent clients upon appointment by a court. Six circuits rely entirely or partly on public defender offices for the representation of indigent defendants.

In addition, many counties pay certain expenses when an attorney is assigned for an indigent defendant. Depending on the circuit, the covered expenses may include such items as witness fees, expert witness fees, investigators' fees, psychiatric exams, polygraph tests, transcripts, filing fees, service of process fees, blood tests, photographs, mileage, toll calls, postage, photocopying, and photographs.

The impact of increasing sentences to 93 days is highly uncertain. One factor influencing the impact is whether there will, in fact, be an influx of indigent defendants needing publicly funded attorneys. In such an event, if the amount allocated for indigent defense were inadequate in a particular circuit, presumably the county would appropriate supplemental funding, if it were available. Another significant factor is the degree to which a court currently appoints defense counsel for 90-day misdemeanors. That is, if a court already appoints counsel for all indigent drunk driving defendants, even though the current maximum penalty is 90 days in jail, increasing the maximum for drunk driving offenses on October 1 will not increase the need for assigned counsel.

The Sixth Amendment right to counsel applies regardless of what term of imprisonment may be imposed under a statute. Whether the maximum term is 90 days, 93 days, or life, an unrepresented indigent defendant who has not waived his or her right to counsel cannot be incarcerated. On the other hand, a court is not constitutionally required to appoint counsel for a misdemeanor who is not sentenced to jail. Arguably, if a court's appointed counsel budget were inadequate, a judge could simply choose not to incarcerate individuals convicted of misdemeanors. Nevertheless, the Michigan court rule states that a defendant who is charged with an offense punishable by more than 92 days in jail has a *right* to an appointed attorney. Thus, according to the Prosecuting Attorneys Coordinating Council, judges automatically assign counsel in every case in which the maximum sentence is 93 days or more of incarceration, and will continue to do so regardless of the number of indigent defendants requiring appointed attorneys.

### **Local Incarceration**

When a convicted defendant receives a sentence of 93 days or less, he or she will be incarcerated in the local jail (unless a local unit contracts for space in a State facility). Jail costs vary from county to county. Approximate costs range from \$27 to \$70 per day, depending upon the efficiency of a jail (which is a result of the age of the facility).

Although the maximum term of imprisonment for a particular offense may be increased from 90 to 93 days, the increase will add to the cost of incarceration only if a judge imposes the maximum sentence, or if a judge tends to impose a higher average sentence (e.g., 10 days instead of seven) simply because the maximum is higher. Based on the range of costs noted above, an additional three days in jail will generate an increased cost of \$81 to \$210. In view of many jails' crowded conditions, however, judges may be inclined to impose a sentence that does not include jail time, such as community service, a fine, or probation. Further, in regard to drunk driving offenses, if a judge's practice is to require a convicted offender to spend a couple of days in jail and then participate in substance abuse treatment, the increased maximum sentence will make no difference (and an indigent defendant will have the right to appointed counsel, anyway).

### **Conclusion**

Except in regard to fingerprinting, the consequences of increasing maximum sentences from 90 to 93 days are speculative. Some people fear that an influx of additional indigent defendants requiring appointed counsel will strain court resources. Others believe that the sentence increase should be completely immaterial to all components of the criminal justice system other than the police, who will be affected by the fingerprinting requirements. Moreover, even though additional people will have to be fingerprinted upon arrest, the actual impact of this requirement is uncertain, since the fingerprints of all convicted offenders must be reported to the State Police and are retained by the Criminal Records Division.