

Minnesota Sentencing Guidelines Commission

Conspiracy and Benefit of a Gang Offenses: Possible Modifications January 16, 2014

Issue: The language in Minn. Sentencing Guidelines § 2.G.10, addresses offenses committed for the benefit of a gang. When an offender is sentenced for an offense committed for the benefit of a gang under Minn. Stat. § [609.229](#), subd. 3(a), a duration of 12 months is added to the presumptive duration for a completed offense, and a duration of 6 months is added to the presumptive duration for an attempted offense or for a conspiracy to commit the offense. The additional duration is doubled if the victim was under 18 (24 months for a completed offense; 12 months for and attempt or conspiracy).

The term “conspiracy” was added to section 2.G.10, at the time of the full revision of the Guidelines in 2012; however, it is unclear how to apply the conspiracy modifier to a benefit of a gang offense because there are two different types of conspiracies to consider: general conspiracy under Minn. Stat. § [609.175](#) and conspiracy to commit a controlled substance offense under Minn. Stat. § [152.096](#).

Guidelines Considerations: Attempt (Minn. Stat. § [609.17](#)) and conspiracy (Minn. Stat. § [609.175](#)) are sentence modifiers. The term “modifier” is used in the Guidelines to describe a statute that aids in defining the punishment for the underlying offense. Attempt (Minn. Stat. § [609.17](#)) and conspiracy (Minn. Stat. § [609.175](#)), reduce the statutory maximum imprisonment duration by one-half, so the Guidelines correspondingly reduce the presumptive Guidelines duration by one-half, as described in Minn. Sentencing Guidelines § 2.G.2:

When an offender is sentenced for an attempted offense under Minn. Stat. § 609.17 or for conspiracy to commit an offense under Minn. Stat. § 609.175, the presumptive duration is one-half of that found in the appropriate cell on the applicable Grid for the underlying offense.

In addition to the general conspiracy statute described above, Minnesota law also prohibits conspiracy to commit a controlled substance offense under Minn. Stat. § [152.096](#). Unlike the general conspiracy modifier, this statute does not reduce the statutory maximum imprisonment duration (see Minn. Stat. § 152.096, subd. 2). Correspondingly, under Minn. Sentencing Guidelines § 2.G.4, “the modifying statute for Conspiracy to Commit a Controlled

Substance offense under Minn. Stat. § 152.096 does not affect the presumptive sentence for the underlying offense.”

Crime committed for the benefit of a gang is also a sentence modifier. But this modifier is unique in that it increases the statutory maximum sentence for the underlying offense by a set number of years. Minn. Stat. § 609.229, subd. 3(a) reads as follows:

Subd. 3. Penalty.

(a) If the crime committed in violation of subdivision 2 is a felony, the statutory maximum for the crime is five years longer than the statutory maximum for the underlying crime. If the crime committed in violation of subdivision 2 is a felony, and the victim of the crime is a child under the age of 18 years, the statutory maximum for the crime is ten years longer than the statutory maximum for the underlying crime.

When the benefit of a gang modifier was enacted into law in 1991¹, the Sentencing Guidelines Commission had to determine how to implement the intent of the provision – to enhance the sentence – within the structure of the Guidelines. The Commission did not consider modifying the duration for attempts or conspiracies differently than for completed offenses: a 12-month enhancement was applied to all crimes committed for the benefit of a gang. In 1995, the issue was brought before the Commission again for clarification because there was “no language that addresses what to do when such a crime is an attempt or when the crime calls for a mandatory minimum sentence.”² The Commission modified the 1995 Minn. Sentencing Guidelines to apply the 12-month benefit of a gang modifier to attempts then divide the duration by two (duration divided in half because it was an attempt). At that time, there was no discussion of conspiracy to commit a crime for the benefit of a gang.

In 1998, crime committed for the benefit of a gang was brought before the Commission because there were new statutory maximums to consider and because staff discovered that the way the calculation was performed for attempted offenses (applying the 12-month benefit of a gang modifier to attempts and then dividing the duration by two) “seemed to be adding the attempted time incorrectly and the proposed language would correct that problem.”³ When the staff proposed changing the language to read, “add 12 months for completed offenses and 6 months for attempted offenses,” the discussion moved beyond the practical application of the modifier to whether it made sense to apply less time to

¹ [1991 Laws of MN, Ch. 279, Sec. 30.](#)

² Minnesota Sentencing Guidelines Commission. (1995, May 25, p. 7). *Meeting of the Minnesota Sentencing Guidelines Commission* [Meeting minutes].

³ Minnesota Sentencing Guidelines Commission. (1998, April 23, p. 5). *Meeting of the Minnesota Sentencing Guidelines Commission* [Meeting minutes].

attempted offenses at all, and, questions were raised for the first time about what to do with conspiracy offenses.

An excerpt from the 1998, April 23, Minnesota Sentencing Guidelines Commission meeting minutes read (P. 7):

Ray Schmitz said that the purpose of this statute is that if you commit a crime or attempt or conspire to commit a crime and it is for the benefit of a gang, then the full 12 month sanction should apply to the attempted or conspired crime. He believed that the gang involvement should still carry the full 12 month additional penalty whether you succeed at the commission of the crime or attempt the crime.

[Executive Director] Ms. Dailey stated that conspiracies are treated similarly to attempts in the guidelines.

A motion that would have provided a 12-month duration enhancement for crimes committed for the benefit of a gang regardless of whether the crime was completed or an attempt failed. A motion to apply a 12-month duration enhancement for completed offenses and a 6-month enhancement for attempted offenses prevailed.⁴

In 2005, crime committed for the benefit of a gang was again amended to provide for double the enhancement when the victim is a child under the age of 18. The Commission correspondingly amended section 2.G to double the duration added to the presumptive sentence when the victim is under 18, but there was no discussion regarding attempt or conspiracy.

As noted above, conspiracy was added to section 2.G.10 during the Guidelines revision. But because there are two forms of conspiracy under state law – general conspiracy, which halves the sentence duration, and conspiracy to commit a controlled substance offense, which does not impact the sentence – it is unclear whether the term “conspiracy” in section 2.G.10, is meant to refer to both modifiers.

⁴ Minnesota Sentencing Guidelines Commission. (1998, April 23, p. 8). *Meeting of the Minnesota Sentencing Guidelines Commission* [Meeting minutes].