CHAPTER SEVEN

"in all cases of felony"

7.010. Introduction

The supreme court has original appellate jurisdiction over felonies; appeals in misdemeanor cases are heard by the courts of appeals.[1] Because jurisdiction depends on the classification of the offense under consideration, the reviewing court must identify the offense involved and decide whether it should be classified as felony or misdemeanor.

7.020. Identification and Classification of Offenses

Generally, felonies are distinguished from misdemeanors according to the maximum potential punishment made possible by conviction. If punishable by death or imprisonment in the state penitentiary, the offense is a felony; if punishable by fine or county jail sentence, it is a misdemeanor.[2] Since the

1. The courts of appeals have exclusive jurisdiction of a case involving a misdemeanor, unless it fits another category of exclusive supreme court appellate jurisdiction. State v. Powers, 350 Mo. 942, 169 S.W.2d 377, *trans'd,* 176 S.W.2d 293 (Ct. App. 1943); State v. Monroe, 278 S.W. 723 (Mo. 1925), *trans'd,* 289 S.W. 29 (Ct. App. 1926); State v. Cox, 259 S.W. 1041 (Mo.), *trans'd,* 266 S.W. 734 (Ct. App. 1924); State v. Graham, 295 Mo. 695, 247 S.W. 194 (1922), *trans'd,* 250 S.W. 925 (Ct. App.), *retrans'd,* 301 Mo. 272, 256 S.W. 770 (1923), *retrans'd*; State v. Cook, 217 Mo. 236, 117 S.W. 30 (1909), *trans'd,* 148 Mo. App. 383, 128 S.W. 212 (1910); State v. Gamma, 215 Mo. 100, 114 S.W. 619 (1908), *trans'd,* 149 Mo. App. 694, 129 S.W. 734 (1910); State v. Nicholson, 116 Mo. 522, 22 S.W. 804 (1893), *trans'd,* 56 Mo. App. 412 (1894); State v. Ciarelli, 366 S.W.2d 63 (Mo. Ct. App. 1963); State v. Hunter, 198 S.W.2d 544 (Mo. Ct. App. 1946). *But see* State v. Thayer, 158 Mo. 36, 58 S.W. 12 (1900), which indicates that prior to 1900, the supreme court took jurisdiction of numerous misdemeanor appeals apparently without considering whether they fell within one of the categories of exclusive appellate jurisdiction. This case is also discussed § 8.020, note 6.

Another indication that the supreme court presently refuses jurisdiction if the case does not involve a jurisdictional "felony" is State v. Harold, 364 Mo. 1052, 271 S.W.2d 527 (1954), *trans'd,* 281 S.W.2d 605 (Ct. App. 1955), holding that appeals in juvenile proceedings lie in the courts of appeals. The fact that the offense would have been a felony if committed by an adult was held insufficient to vest jurisdiction in the supreme court. See also State v. Heath, 352 Mo. 1147, 181 S.W.2d 517 (1944). When presented with a case involving a misdemeanor conviction for malicious trespass to land, the supreme court refused to set up a hybrid basis for jurisdiction between the felony and title to realty categories. State v. Zinn, 141 Mo. 329, 42 S.W. 938 (1897). It was held that the court of appeals had properly taken jurisdiction of the appeal (61 Mo. App. 476 (1895)) although the case was analogous to those falling within both categories. *Accord,* State v. McNeary, 88 Mo. 143 (1885). The significance of these holdings is further discussed, § 7.020, note 7.

2. State v. Kollenborn, 304 S.W.2d 855 (Mo. 1957); State v. Combs, 301 S.W.2d 529 (Mo. Ct. App. 1957), *trans'd*; State v. Lehr, 16 Mo. App. 491 (1885). This also

decisive factor is the *potential* punishment, not the sentence actually imposed, an offense may be a felony for purposes of jurisdiction if only a fine or jail sentence is imposed.[3]

Jurisdictional problems have arisen in cases in which the same course of conduct might constitute two substantive offenses, one a felony and the other a misdemeanor. Graded offenses[4] have presented special problems. Prior to 1913, the courts, with two exceptions,[5] ruled that when a defendant had been charged in such a way that he could have been convicted of either a

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has long been the basic test in this state for non-jurisdictional classifications. State v. Thomas, 343 S.W.2d 56 (Mo. 1961); State v. Diffenbacher, 51 Mo. 26 (1872). See Mo. REV. STAT. § 556.020 (Supp. 1963); Mo. REV. STAT. § 556.040 (1959).

An exception to the potential punishment test exists in two older cases. State v. Tummons, 225 Mo. App. 429, 37 S.W.2d 499 (1931), held that the label affixed to an offense by the general assembly takes precedence over potential punishment. Thus if an offense is labeled misdemeanor even though punishable by penitentiary sentence, the courts of appeals have jurisdiction. See State *ex rel.* Stinger v. Krueger, 280 Mo. 293, 217 S.W. 310 (1919). Arguably this exception is invalid in light of the present statutory definition of felony in section 556.020 which includes only offenses punishable by death or penitentiary sentence "and no other." The provision specifies that this definition shall apply to all statutes of the state.

3. State v. Ulrich, 316 S.W.2d 537 (Mo. 1958) (leaving scene of accident); State v. Dikos, 294 S.W.2d 41 (Mo. 1956) (keeping gaming devices); State v. Owen, 258 S.W.2d 662 (Mo. 1953) (exhibiting deadly weapon); State v. Klink, 363 Mo. 907, 254 S.W.2d 650 (1953) (molesting a minor); State v. Box, 169 S.W.2d 393 (Mo. 1943) (driving while intoxicated); State v. La France, 165 S.W.2d 624 (Mo. 1942) (taking and making away with motor vehicle); State v. Ellis, 159 S.W.2d 675 (Mo. 1942) (fraudulent execution of deed); State v. Coppersmith, 152 S.W.2d 108 (Mo. 1941) (receiving stolen property); State v. Minter, 84 S.W.2d 617 (Mo. 1935) (driving while intoxicated); State v. Brown, 306 Mo. 532, 267 S.W. 864 (1924) (carrying concealed weapon); State v. Criddle, 302 Mo. 634, 259 S.W. 429 (1924) (driving while intoxicated); State v. Gabriel, 301 Mo. 365, 256 S.W. 765 (1923) (aggravated assault); State v. Oldenhage, 185 Mo. 618, 84 S.W. 873 (1904) (assault with intent to kill); State v. Green, 66 Mo. 631 (1877) (assault with intent to kill); Johnston v. State, 7 Mo. 183 (1841) (felonious assault); State v. Combs, 301 S.W.2d 529 (Mo. Ct. App. 1957), *trans'd* (driving while intoxicated); State v. Plassard, 190 S.W.2d 464 (Mo. Ct. App. 1945), *trans'd,* 355 Mo. 90, 195 S.W.2d 495 (1946) (exhibiting deadly weapon); State v. McLelland, 272 S.W. 700 (Mo. Ct. App.), *trans'd,* 312 Mo. 68, 278 S.W. 981 (1925) (maiming a bull); State v. Huffman, 264 S.W. 79 (Mo. Ct. App.), *trans'd,* 267 S.W. 838 (1924) (carnal knowledge of female minor); State v. McGovern, 159 Mo. App. 134, 139 S.W. 231, *trans'd,* 237 Mo. 248, 140 S.W. 867 (1911) (assault with intent to kill); State v. Herrick, 158 Mo. App. 487, 139 S.W. 258, *trans'd,* 237 Mo. 204, 140 S.W. 873 (1911) (seduction); State v. Melton, 53 Mo. App. 646, *trans'd,* 117 Mo. 618, 23 S.W. 889 (1893) (assault with intent to rape); State v. Gilmore, 28 Mo. App. 561 (1888), *trans'd,* 98 Mo. 206, 11 S.W. 620 (1889) (gambling).

4. This term as used here is synonymous with "included offenses."

5. Clearly in State v. Wilson, 140 Mo. App. 726, 126 S.W. 996, *trans'd,* 230 Mo. 647, 132 S.W. 238 (1910), and arguably in State v. McMahill, 214 Mo. 310, 113 S.W. 1071 (1908), the court referred to the information rather than the conviction to determine jurisdiction.

felony or a lesser included misdemeanor, the nature of the conviction would govern for jurisdictional purposes.[6] In 1913 the supreme court transferred *State v. Woodson*[7] in which the verdict and the judgment of conviction had been of felony.[8] This case could be interpreted as holding that appeals in *all* cases of graded offenses should be heard by the courts of appeals, whether the conviction had been of felony or misdemeanor.[9] However, the subsequent case law, without expressly overruling *Woodson,* has ignored this possible interpretation and has restored the pre-1913 rule that the *conviction* determines jurisdiction. Thus, an appeal of felony is heard by the supreme court; of a lesser included misdemeanor, by the court of appeals. Representative cases presenting the problem—receiving stolen property,[10] stealing by

6. State v. Greenspan, 137 Mo. 149, 38 S.W. 582, *trans'd,* 70 Mo. App. 468 (1897) (charged with felony of receiving stolen property, jury found property worth less than $30); State v. Saye, 109 Mo. 224, 19 S.W. 65 (1892), *trans'd* (indicted for aggravated assault, found quilty of common assault); State v. White, 109 Mo. 223, 19 S.W. 65 (1892), *trans'd,* 52 Mo. App. 285 (1893); *accord,* State v. Amos, 165 Mo. App. 213, 145 S.W. 864 (1912); State v. Johnston, 154 Mo. App. 265, 134 S.W. 38 (1911).

7. 248 Mo. 705, 154 S.W. 705 (1913), *trans'd,* 175 Mo. App. 393, 162 S.W. 327 (1914).

8. The defendants had been convicted of receiving stolen property worth more than $30, which amount at that time separated felony and misdemeanor in cases of receiving stolen property, larceny and false pretenses. The case was initially appealed to the Kansas City Court of Appeals which transferred on motion to the supreme court. The court of appeals opinion upon retransfer is the only clear discussion of the verdict. 175 Mo. App. 393, 162 S.W. 327 (1914). This opinion indicates that the court of appeals was baffled by the result reached in the supreme court, although it acquiesced in that result.

9. Two cases decided after *Woodson* handled this possible interpretation in an unsatisfactory manner. State v. Sparks, 180 Mo. App. 495, 166 S.W. 642 (1914), *trans'd,* 263 Mo. 609, 173 S.W. 1057 (1915), represents an attempt to reconcile *Woodson* with the pre-1913 law. The court of appeals sought to explain that *Woodson* stood for the proposition that an offense remains a felony even though less than a penitentiary sentence is imposed, rather than for the denial of supreme court jurisdiction in all cases of graded offenses. However, the court failed to advert to the *result* reached in *Woodson.* State v. Eggleston, 27 S.W.2d 726 (Mo. Ct. App. 1930), which involved, as did *Woodson,* the offense of receiving stolen property, was the only case found in which the *result* in *Woodson* was followed. The court cited *Woodson* for the proposition that "in this particular class of offense, the jurisdiction on appeal is in this court, notwithstanding the fact that the information charges the commission of a felony . . . ."*Id.* at 728. This was the only reference to jurisdiction and the court did not state how it reached its interpretation of *Woodson. Eggleston* has apparently been ignored. See note 10 *infra* and accompanying text.

10. See State v. Ham, 104 S.W.2d 232 (Mo. 1937) (supreme court retained jurisdiction of conviction for receiving property in the amount of $63 without jurisdictional comment); State v. Weiss, 185 S.W.2d 53 (Mo. Ct. App. 1945) (charge of receiving property worth more than $30, convicted of receiving less).

deceit or false pretenses,[11] larceny,[12] and assault[13]—indicate that this is now the rule.

Several cases have presented problems of identification and classification because of ambiguous verdicts or discrepancies between the verdict and the judgment. In these cases the offense for which the defendant was *convicted* determined jurisdiction, but to identify that offense, the reviewing court had to look to the trial record. In *State v. Bradley*,[14] the circuit court judgment recited a conviction for grand larceny, but the record revealed that the verdict was guilty of petit larceny. The form of the judgment was not controlling and the court of appeals retained jurisdiction.

When the defendant has been charged with the felony part of a graded offense and he is found "guilty as charged," there has been a felony rather than a misdemeanor conviction and the supreme court has jurisdiction.[15] The matter is more complicated when the verdict in a graded offense is the general one of "guilty." One case[16] has held that since the defendant was charged with stealing by deceit an amount of money far in excess of the minimum for felony, and there was nothing in the record or in the general verdict of "guilty" to indicate a finding that a lesser amount had been taken, it could be presumed for jurisdictional purposes that the conviction had been one of felony.

Thus, the general rule is that the substantive offense is identified by reference to the conviction and that offense is then classified as felony or misdemeanor for jurisdictional purposes. There is at least one necessary exception, which is illustrated in appeals by the state from the quashing of informations. In these cases, the offense charged by the information will

11. State v. Fenner, 358 S.W.2d 867 (Mo. 1962); State v. Neal, 350 Mo. 1002, 169 S.W.2d 686 (1943); see State v. Green, 305 S.W.2d 863 (Mo. 1957).

12. See State v. Willis, 283 S.W.2d 534 (Mo. 1955); State v. Murphy, 256 S.W. 743 (Mo. 1923), *trans'd,* 264 S.W. 422 (Ct. App. 1924); State v. Bradley, 247 S.W.2d 351 (Mo. Ct. App. 1952).

One case may be distinguished because it involved a different form of larceny. The supreme court retained jurisdiction in State v. West, 349 Mo. 221, 161 S.W.2d 966 (1942), involving a theft *from the person,* which remained a felony even though less than $30 had been taken.

13. State v. Garner, 360 Mo. 50, 226 S.W.2d 604 (1950); State v. Gabriel, 301 Mo. 365, 256 S.W. 765 (1923); State v. Smith, 284 Mo. 168, 223 S.W. 749 (1920); State v. Teague, 263 Mo. 336, 172 S.W. 593, *trans'd,* 190 Mo. App. 280, 176 S.W. 250 (1915); State v. Keith, 235 S.W.2d 1023 (Mo. Ct. App.), *trans'd,* 241 S.W.2d 901 (Mo. 1951).

14. 247 S.W.2d 351 (Mo. Ct. App. 1952).

15. State v. Garner, 360 Mo. 50, 226 S.W.2d 604 (1950); State v. Keith, 235 S.W.2d 1023 (Mo. Ct. App.), *trans'd,* 241 S.W.2d 901 (Mo. 1951).

16. State v. Fenner, 358 S.W.2d 867 (Mo. 1962). *But see* State v. Krouse, 171 Mo. App. 424, 156 S.W. 727 (1913).

determine appellate jurisdiction,[17] because there is no conviction to which to refer.

The absence of a conviction may have caused the supreme court to refer to the information on defendant's appeal in the 1924 case of *State v. Criddle*.[18] The court's discussion of jurisdiction, however, implies that the information should be used as the jurisdictional referent as a matter of course: "Appeal was properly granted to this court, because the crime which the information *purported* to charge against the appellant was one for which imprisonment in the penitentiary might have been imposed . . . ."[19] To resolve this apparent inconsistency, it is necessary to consider the court's disposition on the merits. The court first noted that a statute redefining the offense in question as a felony was not effective at the time of defendant's alleged criminal act. The court admitted that the offensive act could therefore constitute only a misdemeanor under the older statute defining the offense, and that the insertion of the word "feloniously" in the information was an error of the prosecutor. However, the court's decision apparently indicates that there could have been no conviction either of the felony or of the misdemeanor: the case was reversed on the ground that prosecution for the offense was barred by the statute of limitations. This apparently left no alternative but to refer to the information which purported to charge a felony. It is arguable that the correct result was reached, but it is unfortunate that the statement of jurisdiction does not inform the reader of the reason for reference to the information.

Under the view that the result on the merits corrects the jurisdictional statement, the *Criddle* case may be squared with another decision[20] in the same year. In this case a statute defining the offense in question as a felony had, before commission of the offense, been repealed by a statute defining it as a misdemeanor. The supreme court held that the fact the prosecutor used the term "feloniously" in the information could not confer jurisdiction. In this case there *had* been a conviction (necessarily of the misdemeanor) and the court referred to it rather than to the information purporting to charge a felony.

There were three cases decided during the Prohibition Era in which the

17. State v. Scarlet, 291 S.W.2d 138 (Mo. 1956); State v. Meyer, 246 Mo. 596, 152 S.W. 331 (1912), *trans'd*; *cf.* State v. Brooks, 372 S.W.2d 83 (Mo. 1963).

In this situation, the unilateral action of the prosecutor in preparing the information, in effect, confers jurisdiction on the proper court, since nothing else is available for the court's determination of the offense involved.

18. 302 Mo. 634, 259 S.W. 429 (1924).

19. *Id.* at 636, 259 S.W. at 429. (Emphasis added.)

20. State v. Bressie, 304 Mo. 71, 262 S.W. 1015, *trans'd*, 266 S.W. 766 (Ct. App. 1924).

courts' language deceptively appears to stress reference to the information rather than the conviction. In *State v. Pullam*[21] the defendant had been charged with the felony of illegally manufacturing whiskey, but was allowed to plead guilty to the misdemeanor of possession of a still. A jail sentence was imposed and a stay of execution during good behavior was ordered. When this order was revoked, the defendant appealed to the Springfield Court of Appeals, which held that it did not have jurisdiction because the original information had not been altered and still specified a felony. This holding appears to conflict with the conviction test. However, there is further reasoning in the opinion to the effect that the misdemeanor to which the defendant pleaded was not a lesser included offense of the felony with which he was charged, so that he could not be convicted of the misdemeanor. The court therefore, was apparently saying there was no conviction available as a referent, which left no alternative but to refer to the information.

A complication in the liquor cases arose because of a statutory definition of "possession of a still *fit for use*" as a misdemeanor, while the same statute[22] defined *actual use* of the still as a felony. Two cases[23] arising under this statute contain language which may indicate that the supreme court was construing the informations in order to identify the offense involved; but it is also possible that reference was made to the informations as an aid in determining of which offense each defendant was *convicted*.[24]

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21. 293 S.W. 484 (Mo. Ct. App. 1927).

22. Mo. Laws 1923, at 237, § 2.

23. *Compare* State v. Harrison, 292 S.W. 415 (Mo. 1927), *with* State v. Turner, 273 S.W. 739 (Mo. 1925), *trans'd,* 284 S.W. 827 (Ct. App. 1926).

24. The informations were similarly worded in both cases, but one was construed to charge a felony and the other, a misdemeanor. There is some indication in both opinions, however, that because the one case had been conducted as a felony trial and the other as a misdemeanor, it was understood by both the prosecutor and the trial judge at the time of judgment that the *convictions* were for felony and misdemeanor, respectively. Thus the language of the court in these two cases (creating the impression that the court was looking solely to the information) is misleading. In State v. Turner, *supra* note 23, at 740, the court stated: "It is plain that the information in this case charges a misdemeanor in the possession of such still, and does not charge that the defendant used it. Therefore defendant was *tried* and *convicted* of a misdemeanor, of which this court has not jurisdiction, unless a constitutional question is properly raised and preserved." (Emphasis added.)

In State v. Harrison, *supra* note 23, at 416, the court stated: "The allegation in the amended information . . . effectually charges a felony . . . . This court, therefore, has appellate jurisdiction." However, just above its jurisdictional statement, the *Harrison* court, in distinguishing *Turner,* made this statement: "That case was tried as a felony. This case was tried as a misdemeanor."

7.030. Conclusion

The only recurrent jurisdictional problems under the felony category are the identification of the substantive offense involved on appeal and the classification of that offense as felony or misdemeanor. Generally, when there has been a conviction, the courts refer to it to make the requisite identification and classification. Only when no conviction is available, is reference made to the original charge or information. However, failure of the courts to articulate consistently that they refer to the conviction when possible has often resulted in confusing implications that the original charge, not the conviction, is *always* the controlling factor. The rule that conviction governs when available is so simple to apply that it is surprising to find jurisdictional statements by the courts which are either completely uninformative, or confusing in their dependency upon the disposition of the merits.

In addition, there is some authority that the jurisdictional question should not be determined by anticipation of the court's consideration of the merits. In *Fisher v. Lavelock*,[25] in considering whether it had jurisdiction on the ground that title to real estate was involved, the supreme court stated:

> [W]e will disregard the fact that the land described in the option is located in Texas. If we were to hold that we did not have jurisdiction because the land in question is not located in Missouri, such would be an adjudication upon the merits. That holding would apply with equal force to the jurisdiction of all courts in this state. Therefore, in determining this question, we will consider only the type of action and the relief sought.[26]

The failure of the courts in felony cases to consider this rationale is further evidence that "felony" cases have determined jurisdiction on an *ad hoc* basis and have not maintained a view to the overall problem of appellate jurisdiction.

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25. 282 S.W.2d 557 (Mo. 1955), *trans'd,* 290 S.W.2d 655 (Ct. App. 1956).

26. *Id.* at 560; see Fowler v. Terminal R.R. Ass'n, 363 S.W.2d 672 (Mo. 1963), discussed § 9.015, note 35.