

**RELEVANT ISSUES IN 2004  
DWI LAW ENHANCEMENTS & SURCHARGES**

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- ◆ Founding Member, National college of DUI Defense
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### **Bar Admissions**

- ◆ Supreme Court of the United States of America
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### **Advanced Professional Achievements**

- ◆ National College of DUI Defense, Advanced DWI Training and Education, 1995, 1996, 1997, 1999;  
Harvard Law School, Boston, Massachusetts
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## RELEVANT ISSUES IN 2004 DWI LAW ENHANCEMENTS & SURCHARGES

Felony DWI cases are my least favorite. They either represent an individual with a serious drinking problem or an over-aggressive law enforcement officer and judicial system.

In last year's presentation, I stressed defense attorneys, prosecutors and judges to all look more closely at the unique characteristics of the defendant. I do not retreat from that stance. Because of the volume of DWI arrests and prosecutions, too many DWI defendants get lumped into one homogenous group. They all get the same recommendations and sentences even when the particular offenses have no similarities. This presentation about DWI cases indicates that the Texas Legislature is now considering the individual characteristics of the DWI offender as it relates to indictment for a felony DWI.

My first topic is DWI felony enhancement. Penal Code '49.09 was amended in 2001 to change the way prior DWI convictions could be used to enhance a DWI case to a felony.

In 2001 and 2003, Texas Penal Code '49.09 was amended in two areas that are important for DWI felony cases: (For purposes of this paper the 2003 amendments did not provide significant changes)

- 1) A DWI may be enhanced to a felony if the defendant has **one prior conviction for Intoxication Manslaughter** and
- 2) The procedure for calculating how priors may be used to enhance an offense to a third DWI has been changed.

Most people can understand the first of these changes. If a person has been convicted of causing the death of another by driving while intoxicated, society believes that the person should have learned an important lesson. Most people believe that if you killed someone by driving while intoxicated, you would never drink again, much less drink and then drive. It will be difficult to argue against that prosecutorial closing argument.

The second change is a little difficult to understand, but is very important for judges, prosecutors and defense attorneys. Under this change, judges will be ruling on more Motions to Quash Indictment, prosecutors will have to pay closer attention when charging a felony DWI and defense attorneys will have to remain the check to see that this law is followed.

In 2003, the changes made in 2001 were affirmed in the way they affect the calculation of prior DWI offenses for purposes of increasing the offense to felony grade. The change in 2001 first appears to be one of semantics. On second and closer reading however, a fundamental change was enacted.

Prior to 2001, it was common knowledge that the State could use any prior DWI conviction to enhance an offense to a felony DWI if there were any prior DWI convictions *within 10 years of the date of commission of the instant offense*. This scheme allowed the State to indict for a felony case if there was one prior DWI within the ten (10) year period with any DWI offense that occurred since the defendant had been licensed to drive a car.

*URIEGA v. STATE*, 04-03-00397-CR (Tex.App.-San Antonio [4th Dist.] 2004) was the first case to deal with this issue. The Court reviewed the former and amended versions of '49.09. I strongly recommend that you read this case at least three times to fully understand the reasoning and interpretation of this significant change in DWI enhancement law.

The court stated the pertinent paragraphs of '49.09 as follows:

**Prior to its amendment on September 1, 2001**, subsection (e) of Section 49.09 provided:

A conviction may not be used for purposes of enhancement under this section if:

- (2) the person has not been convicted of an offense under Section 49.04, 49.05, 49.06, 49.07, or 49.08, or any offense relating to operating a motor vehicle while intoxicated, **committed *within 10 years before the date on which the offense for which the person is being tried was committed.***" (emphasis added)

**After its amendment on September 1, 2001**, subsection (e) of Section 49.09 now provides:

- (3) The person has not been convicted of an offense under Section 49.04, 49.05, 49.06, 49.065, 49.07, or 49.08 or any offense related to operating a motor vehicle while intoxicated **within 10 years of the latest date under Subdivision (2).** (Emphasis added)

I believe that an example will be the best way to explain and understand the change.

Jack Daniels was a party animal at college. He was a fraternity boy and could really hold his liquor according to his friends. In 1982, when he was 21, Jack was driving a girl home from a party and was arrested for DWI. Realizing the error of his ways, he accepted responsibility for this mistake and received a two year probated sentence

on **January 1, 1983**. He was discharged from community supervision on **January 2, 1985**.

Jack graduated after five years, and began working with Texas Instruments. He worked his way up the corporate ladder and became a junior executive and earned a Gold Badge as a computer chip designer. On **February 1, 1995** he went out to celebrate a company bonus and was again arrested for DWI. Again, Jack realized that he had probably had too much to drink and accepted another probated sentence on **May 1, 1996**. He was discharged from that probation on **May 2, 1998**.

The second DWI caused serious trouble with Jack's marriage to his high school sweetheart to whom he had been married since 1984. His wife became disenchanted with their marriage and had begun surfing the Internet in her spare time. During one of her chat sessions she struck up a conversation with a man in Chicago who convinced her that she had married too young and had missed a lot by not dating around or even meeting other men. In short, he convinced her that he had more to offer her than Jack, and she agreed.

On April 1, 2002, she informed Jack that she was leaving. She just didn't love him anymore. Jack thought this was an April Fool's joke until he was served with a Petition for Divorce the next day. He tried to reconcile with his wife, but she said that she just wanted out and he could keep the house (after the divorce; she would remain during the suit) and kids if he would give her 65% of the equity in the home and assume all of the community debt.

Jack just couldn't believe that this was happening and he called his best friend from college, Johnny Walker, to meet him for advice and consolation. They went to their favorite hangout, "The Lonely Tiger", about 6 o'clock and played a few games of pool and shared one pitcher of beer.

Jack left the club at midnight feeling fine, but still upset about his pending divorce.

On his way home, still wondering what he was to do, he meets Officer Friendly. Friendly has been named Officer of the Year and has been honored by M.A.D.D. for his constant DWI enforcement vigilance.

As he makes that last turn to go home, he forgets to use his turn signal. Friendly lights him up and stops him at his driveway. Jack tries to explain the situation, the problems at home and the night with his friend, but Friendly seems disinterested.

Jack does the field sobriety tests and although they are not perfect, they are real close according to Friendly (not on video). Because of his prior DWI experiences and the fact that he had been drinking beer that night, Jack is reluctant and declines the portable breath test.

Friendly runs a DL check and discovers the two prior DWI's. His decision is made. Let the system figure this one out, after all, he admitted drinking, did not ace the SFST's, and he refused the portable breath test, he is probably drunk. Jack is arrested and is released from jail pending charges.

Jack is indicted for felony DWI using his two prior DWI offenses. Jack comes to your office and explains that a felony conviction will ruin his life. You try to console Jack and tell him that you just heard a speech about enhancement cases that just might help him out.

The pertinent facts you need for your evaluation are:

- 1) First DWI -
  - Date of Offense **September 1, 1982**
  - Date of conviction **January 1, 1983-**
  - Discharge from community supervision **January 2, 1985**
- 2) Second DWI -
  - Date of Offense **February 1, 1995**
  - Date of conviction **May 1, 1996**
  - Discharge from community supervision **May 2, 1998**
- 3) Third DWI -
  - Date of Offense **April 2, 2002**

Obviously the newest date of offense is after 2001 and therefore the new rules of enhancement will apply.

We first begin by looking at the facts of Jack's 1982 DWI arrest. The amended '49.09 allows us to use any of the following for enhancement and all of them for the analysis:

- 1) Date of final conviction **January 1, 1983**
- 2) Discharge from community supervision **January 2, 1985**
- 3) Discharge from parole **Not applicable**
- 4) Release from confinement **Not applicable**

The latest of these four dates is the date that Jack was discharged from community supervision or **January 2, 1985**. We then look forward ten (10) years to January 2, 1995. Reviewing Jack's criminal history we find that there is **no DWI or intoxication related offenses during this ten (10) year period**.

Jack is very lucky. Although he committed the second DWI on February 1, 1995, the date to look forward to is the date of conviction." We see that he was convicted for that offense on **May 1, 1996**, therefore the 1983 offense is not usable for enhancement.

Next we look at the second DWI case. Jack was discharged from probation for that offense on **May 2, 1998**. His latest arrest was in April of 2002. Therefore, this case may be enhanced to the Class A Misdemeanor offense of DWI 2<sup>nd</sup> only.

Prosecutors should be aware that the State must prove any alleged prior convictions as an element of the offense: *GIBSON v. STATE, 995 S.W.2d 693* (Tex.Cr.App. 1999).

Those allegations must be proven as part of the State’s case in chief: *WEAVER v. STATE*, 87 S.W.3d 557 (Tex.Cr.App. 2002). The burden of proof is beyond a reasonable doubt. {The prosecution should note that in order to use a conviction from another state, the statutes must contain substantially similar elements to apply.

**I. SURCHARGES**

In 2003, the Texas Legislature was facing a huge budget deficit. In order to avoid a state income tax, everyone was looking for a new way to raise money for the state. DWI seemed like a good place to start.

Not to be confused with a “fine” or “costs,” the legislature enacted the new “surcharge” provisions of the Code. I have attached the pertinent portions of the Code with this paper and a synopsis of its provisions and applications.

One interesting point is that the law as initially passed stated that it would apply to convictions after September 1, 2003. This caused a panic for attorneys who consider options other than pleas and a serious “race to the courthouse.” This language severely hampered adequate representation for defendants and may have caused many to plead guilty without full knowledge of their case.

The Department of Public Safety and the Texas Criminal Defense Lawyers Association got to work early on this dilemma. Both agreed that the date of offense should control to avoid future problems with the enforcement of the law and the collection of funds. After much discussion with the Senators involved with the bill, an amendment was passed at the first special session to correct the problem. Please allow this speech to inform you that Texas Transportation Code ' 708.101 was revised to read:

“This subchapter does not apply to an offense committed before September 1, 2003.” (Emphasis added)

As of the date of this paper, I have not seen anyone billed or pursued for collection of surcharges. Because of the bureaucratic nature of the Texas Department of Public Safety (DPS), I am anticipating that this will be enforced as people attempt to renew their licenses. It is important to note that the DPS can only review the prior 36 month period for assessment of any surcharges.

Surcharges will eventually be collected on the following charges and convictions:

- 1) Moving violations (to be defined by the Department of Public Safety)
  - 2 points for each moving violation
  - 3 points if there was an accident involved
  - 0 points if for speeding < 10% over the posted speed limit

- Assessed when 6 points accumulated (during a 36 month period)
- \$100 per year; \$25 increase for each point after 6

- 2) Failure to maintain financial responsibility
  - \$250 per year
- 3) Driving while license invalid or suspended
  - \$250 per year
- 4) Driving while registration suspended
  - \$250 per year
- 5) Driving without a license, and
  - \$250 per year
- 6) Driving While Intoxicated.
  - \$1,000 per year DWI 1<sup>st</sup>
  - \$1,500 per year DWI 2<sup>nd</sup>
  - \$2,000 per year if alcohol concentration ≥ 0.160

**IMPORTANT: Commercial Drivers are no longer eligible to receive deferred adjudication to avoid a conviction or points!**

Whenever these surcharges appear, we should all pay close attention to what the legislature provided, and maybe more importantly what the law did not provide or even address. I have thought of a few things, but I know that more will be discovered as we set off in these uncharted waters.

**A. Occupational Drivers License**

The transportation code begins each section assessing a surcharge with the same language, “Each year the department shall assess a surcharge on the license of each person...” It may be optimistic thinking on my part, but this language appears to apply **ONLY TO NORMAL LICENSES**. By this I am speculating that Occupational Licenses may not be subject to surcharge. At least they should not be subject to a surcharge without further clarification of the application and legislative intent of the new law.

**Practice Tip:** In a DWI 2<sup>nd</sup> case for example, it might now be better to ask for the maximum two year suspension upon conviction to avoid \$2,000 - \$4,000 in surcharge assessment.

**B. Breath / Blood Tests of at least 0.160**

To my knowledge there are no DPS forms that contain a blank for this important information. I do not know how breath / blood test results will be transmitted to DPS for enforcement of the enhanced surcharge.

Additionally, how will the “true” alcohol concentration be determined? Is it the concentration at the time of

driving? At the time of testing? Simply the breath test result obtained?

In my opinion this is very important considering the surcharge penalty for conviction of DWI (\$3,000 - \$6,000). I believe that the State has been given an additional burden in DWI cases. The questions will be what do they have to allege? What do they have to prove? What is their burden of proof for this information?

It is my opinion that they should be required to establish, beyond a reasonable doubt, the alcohol concentration of the driver at the time of operation of the motor vehicle.

**Practice Tip:** In DWI trials where breath tests have been taken and resulted in a score of 0.160 or more, request a special jury issue and finding that they find beyond a reasonable doubt that the score was proven. It has been my experience that many times in such a trial, the jurors often comment that they “did not believe the test results, but he was probably over 0.08,” and that is why they found my client guilty.

**C. Is it Double Jeopardy yet???**

Many of you remember that in 1995 when the latest DWI laws were enacted, many appeals were filed arguing double jeopardy should apply to the Administrative License decision. Appellate courts quickly resolved this issue finding that driving was a “privilege” and that the \$125 reinstatement fee and license suspension was not “punishment.”

This round of appeals may again be unsuccessful, but at some point the public will object to courts not recognizing that driving is an essential element of life in the 21<sup>st</sup> century. In a state like Texas, there is also no adequate or workable public transportation to maintain employment and provide for dependents. Unfortunately, we may all see more DWLS cases, and I hope we all remember to look at specific facts when resolving these cases.

I hope that DWI defense will provide us all with a portion of the income generated with this new law. If you consider that there are 100,000 DWI arrests annually; 95,000 ALR suspensions; 85,000 DWI 1<sup>st</sup> convictions - the numbers are staggering. Consider this:

Reinstatement Fees			
95,000	X	\$125	= \$11,875,000
1 year surcharge			
85,000	X	\$1000	= <u>85,000,000</u>
Total revenue			\$96,875,000

This total does not even include fines and court costs!!!

I hope that you will return to your work and rethink the way we all handle DWI cases. Again, I will preach that

we all consider the specific facts and defendants involved rather than treating them all alike. We are the backbone of the system, the front-line soldiers. If we abandon our work here, our beloved State will suffer.

New Surcharge Law  
Effective 9/1/2003

The Point System:

Department will annually review driving record for violation convictions within the preceding 36 months

**(NOTE: 9/1/2003 language missing)**

2 points for any "moving violation" (defined by DPS)

3 points for any "moving violation" that resulted in an accident

0 points if for speeding and offense is <10% of posted speed limit (School Zones Excluded)

- Applicable to Texas and any other state where violation found

Surcharge of \$100 for the first 6 points and \$25 each point thereafter

Department shall provide notice by first class mail of assignment of 5<sup>th</sup> point to driving record at current DL address

DWI Offenses

Department will annually review driving record for violation convictions within the **preceding 36 months**

Not applicable to convictions that are **final** before 9/1/2003

\$1,000 per year for conviction of DWI 1<sup>st</sup> offense

\$1,500 per year for conviction of DWI 2<sup>nd</sup> or more

\$2,000 per year for any DWI with breath/blood test result  $\geq 0.160$

Fee may not be assessed in more than 3 years (i.e. \$3,000 total)

Driving While License Suspended or Invalid

§521.457: Driving While License Invalid

§601.191: Failure to Maintain Financial Responsibility

§601.371: Driving While License Suspended

Surcharge: \$250 year (No 36 month language)

Driving Without a License

§521.021: Surcharge: \$100 per year

Fee may not be assessed in more than 3 years

Collection of Surcharge

If fail to pay within 30 days after receiving notice of surcharge, license is **automatically suspended**

License remains suspended until fees are paid

Installment Agreements

If <\$2, 3000, may make payments in not more than 12

If  $\geq$ \$2, 300, may make payments in not more than 24 payments

Credit Card Accepted

DPS may accept credit card for payment. No mention of installments or total accepted.

If credit card payment is chargeback, automatic suspension

License remains suspended until fees are paid

▪ **708.101 TRANSP.. Nonapplicability**

This subchapter does not apply to an offense committed before September 1, 2003.

▪ **708.102 TRANSP. Surcharge for Conviction of Certain Intoxicated Driver Offenses**

- (a) In this section, "offense relating to the operating of a motor vehicle while intoxicated" has the meaning assigned by Section 49, Penal Code.
- (b) Each year the department shall assess a surcharge on the license of each person who during the preceding 36-month period has been finally convicted of an offense relating to the operating of a motor vehicle while intoxicated.
- (c) The amount of a surcharge under this section is \$1,000 per year, except that the amount of the surcharge is:
  - (1) \$1,500 per year for a second or subsequent conviction within a 36-month period; and
  - (2) \$2,000 for a first or subsequent conviction if it is shown on the trial of the offense that an analysis of a specimen of the person's blood, breath, or urine showed an alcohol concentration level of 0.16 or more at the time the analysis was performed.

(d) A surcharge under this section for the same conviction may not be assessed in more than three years.

▪ **708.103 TRANSP. Surcharge for Conviction of Driving While License Invalid or Without Financial Responsibility**

(a) Each year the department shall assess a surcharge on the license of each person who during the preceding 36-month period has been convicted of an offense under

▪ **521.457**

**Driving While License Invalid**

(a) A person commits an offense if the person operates a motor vehicle on a highway:

- (1) driver's license has been canceled;
- (2) during a period that the person's driver's license or privilege is suspended or revoked
- (3) while the person's driver's license is expired if the license expired during a period of suspension; or
- (4) driver's license has been denied under any law of this state, if the person does not have a driver's license subsequently issued under this chapter.

(b) A person commits an offense if the person is the subject of an order issued under any law of this state that prohibits the person from obtaining a driver's license and the person operates a motor vehicle on a highway.

▪ **601.191**

**Operation of Motor Vehicle in Violation of Motor Vehicle Liability Insurance Requirement; Offense**

▪ **601.371**

**Operation of Motor Vehicle in Violation of Suspension**

(a) suspension of the person s vehicle registration is in effect under this chapter, knowingly permits a motor vehicle owned by the person to be operated on a highway.

(b) The amount of a surcharge under this section is \$250 per year.

▪ **708.104 TRANSP. Surcharge for Conviction of Driving Without Valid License**

a) Each year the department shall assess a surcharge on the license of a person who during the preceding 36-month period has been convicted of an offense under Section 521.021 TRANSP.

(b) The amount of a surcharge under this section is \$100 per year.

(c) A surcharge under this section for the same conviction may not be assessed in more than three years.