

DWI STATUTES 2005

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. THE 2005 LEGISLATIVE SESSION AND HOUSE BILL 3241..... 2

III. BILLS THAT DID PASS..... 4

 A. HB 51 DLD Required for 0.15+ probation 4

 B. Ten Year Enhancement Rule Repealed 4

 C. HB 157 72 hours “continuous confinement for DWI 2nd 4

 D. HB 904 Multiple Intox Assault and Manslaughter Consecutive 4

 E. HB 2275 Felony DWI is subject to property forfeiture 4

 F. HB 2868 Civil Liability for Adults Serving Minors 4

 G. SB 1257 Minors not allowed to use cell phones for 6 months 4

 H. HB 699 Fake ID Increased and DUI Punishment for Minors 5

 I. HB 1357 DL Suspension for Providing Alcohol to Minor 5

 J. HB 1481 Driving Around Barricades..... 5

 K. SB 907 Officer’s Ability to Arrest Outside Jurisdiction 5

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I. INTRODUCTION

In beginning to write this paper, I realized that there is not more to say about specific DWI statutes. I began to think about the uniqueness of my DWI practice and wondered what I could possibly teach to judges and prosecutors without my usual criminal defense biases.

I then thought about my spring and what I had learned or relearned about DWI. As I thought, it occurred to me that I relearned that the law changes every legislative term and that DWI was always a hot topic of debate.

I was reminded to my very first trip to the Texas Legislature as a spokes person defending DWI and opposing one of the proposed bills that had been filed. I found, in my 24 hours in Austin, that I was not the only “stranger” to the legislative phenomenon and that other lawyers and judges had also not personally gone to Austin to speak at a public hearing on a bill.

I arrived the night before to insure that I made it on time to the committee meeting. The meeting was scheduled for 2 p.m. on Friday, but I wanted a good night’s sleep as I was anticipating a fierce debate over House Bill 3241. After all, it proposed very drastic changes to current DWI law.

Among these changes were to make refusal of a breath test a crime, eliminate the enhancement rules of DWI, deferred adjudication for intoxication cases among other things. In all, HB 3241 was the most sweeping DWI bill I had ever seen proposed and little of it appeared favorable to my clients and future clients.

Arriving at the meeting space by 1:30, I was thankful to find that no one had arrived yet. I bought a “know your legislator” book that had pictures, committees and phone numbers for all of the members of the House and Senate and began to look for the faces that I anticipated would be at the hearing. Some looked familiar and others did not. It didn’t matter; at least I now knew what they looked like and would not embarrass myself before the hearing began.

About 2:00 I went back to the hearing room to find a few lawyers that I knew who had come for the meeting. Everyone had their own ideas and thoughts on the bill. There were others present to speak on other bills that were scheduled for the hearing. They were mainly composed of police, EMT providers and medical personnel. Of course the DPS had a representative too. We all exchanged greetings and then collected with our “groups” to discuss “strategy” (all of us not knowing what was about to happen).

We soon learned that the House was still in session and that the meeting would proceed after adjournment for the day. After awhile, my group of

patriots had discussed and re-discussed the same topics and I wanted to meet some new people and hear some new ideas, even if they were directly opposed to my own.

I learned that the doctor and EMT people were present to confront two bills that proposed to allow EMT personnel to draw blood for DWI cases when an accident was involved. They were opposed for several reasons. The chief ones being that they were responsible to physicians, not police and that they had specific procedures that must be followed to protect against liability claims.

Well, it was about 4:00 p.m. and the House was still in session. Prosecutors had arrived and kept to themselves except for pleasantries. But in truth, the defense counsel acted the same. It was then I met a very powerful lobbyist from Austin.

His name was simply “Sputnik”. I never thought I would talk with him in a million years. He was dressed in ragged jeans and shirt with a dirty leather vest filled with patches. His hair was the “Mohawk” type except gray. He had a long ponytail and wore a beard. His most noticeable features were his tattoos. The most prominent one was on his forehead. It read simply “FREE” in large capital letters.

Sputnik is the president of the Texas Motorcycle Riders Association with some 180,000 members. I asked him to share what he knew about the delay in our hearing. He explained that it always happened that way. House members never left session to conduct public hearings. They were also rarely rescheduled and usually took place late in the day and early evening. He said however, that you needed to be there at the scheduled time, because there was always a chance that it would start without you.

He told me about his Association’s opposition to the helmet law and how they had been successful in having it repealed. He and his members feel that if they are old enough to ride a motorcycle and responsible enough to attend and teach safety classes, that they should be allowed to choose for themselves whether or not they wanted to wear helmets when they rode their bikes. He explained that he had visited with every House member to voice their opinion. He had monitored the bill’s progress in the committee. He watched to see who would try and block his proposal with the calendar or simply let it die in committee.

If any of these obstacles arose, Sputnik and his members were ready. He explained that he could command 100,000 phone calls, faxes and emails on a minutes notice. He said that some members had begged him to stop the faxes because they were literally running out of paper on their fax machines. Sputnik explained that he was sorry, but there were a lot of voters who supported him and his members with the project.

Sputnik shared that he had learned something new during that session. He learned that if you want a bill to be heard, but one single representative did not, your bill can be “blackballed” by the loner. After considering his options and doing some homework, he learned that if all of the members stated that they wanted the bill heard, that it must be placed on the calendar and scheduled for hearing.

Rather than alienating anyone, Sputnik went to each legislator and asked them for support. If they agree, he asked that they write it on their business card. He could then present all of the cards and have the bill placed on the schedule.

All but one representative gave him their card. The final voter was always unavailable although Sputnik would camp out in his office for any spare moment. Finally the representative personally came out and told Sputnik that he was simply too busy to talk with him. Sputnik just smiled and showed him all of the cards he had collected and stated that he would just speak with the other members. The representative became nervous as it was a large stack of cards. Sputnik of course had a smile as he had discovered his “enemy” on the bill. The representative asked Sputnik what he was requesting and gladly gave him a signed card. The bill was placed on the calendar, heard by the House and the new law was passed. Imagine that!!!

Around 7:00 the meeting began to be called. I was asked to complete a “sign in” form as required for public hearings. The form asked if I was there to “support” or “oppose” the bill. Well I supported deferred adjudication for intoxication cases, but I opposed making refusal of a breath test a crime. I checked both. I was quickly called by the bailiff to his desk (as did anyone who filled out the form wrong) and was afraid that I would be jailed. There is a lot more decorum in the House Chamber than many courts where I practice. The bailiff informed me that I must choose either support or oppose, but I was free to speak on anything contained in the bill. I was relieved I was not in trouble and decided I opposed more of the bill than I supported and so indicated on my appearance form.

The meeting finally got under way about 7:45. HB 3241 was not the first bill discussed. It wasn't even the second. I lost count by the time I heard it called. Suffice it to say that it was finally called about 10:30 p.m. Totally exhausted from waiting and spending seven hours with mostly lawyers, I hoped that I still remembered why I came.

I finally appeared before the committee and delivered my points. I preceded my speech by explaining that I was not a paid lobbyist nor represented any one group of people. I explained that I would still defend DWI cases no matter what laws were enacted. Despite the late hour, all of the committee members appeared interested and most

interacted with me on my questions and positions. I stayed for a few of my compatriots speeches but was too tired to stay until adjournment.

After all of the dust settled and the session was over, I learned a valuable lesson. Except for meeting Sputnik and getting my little book, there was no real good reason for me to have gone to Austin. Upon my return and monitoring of the bills, I learned that these things are decided behind closed doors and not public meetings. I learned that the committee members were probably so nice to me because I acknowledged that it was 11:30 p.m. and they were probably just as tired as I was and less happy to be there. I learned that public meetings are exactly that. At those meetings they want to hear from John Q Public and not anyone directly affected by the bill. It was a flagpole test to see if people would salute or riot at the proposed legislation. MORAL; don't go to Austin unless you just want to hear yourself talk or talk in front of someone else (either the committee or the attendees!).

II. THE 2005 LEGISLATIVE SESSION AND HOUSE BILL 3241

The bill that sparked my interest and action was House Bill 3241. This bill was number 3241 which gives you an indication how far down the line the Legislature was going to consider this bill when proposed. This bill was proposed by Representative Smith of Tarrant County.

There were a number of items in this bill that should be of interest to anyone defending intoxication cases. The first proposed change was to grant deferred adjudication for intoxication offenses. This is a sweeping change since the inception of deferred adjudication.

This bill proposed that DWI 1st offenders should be eligible for deferred adjudication, with some expected restrictions and special exceptions. HB 3241 proposed that deferred be available for all intoxication offenses, **except for intoxication assault and intoxication manslaughter**. It also exempted DWI deferred adjudications from a Motion for Non-Disclosure Petition in the future with no time limits for restriction.

This was where the “defense oriented” part of the legislation ended. The remainder of the bill made a DWI conviction even more onerous than it has been.

First and foremost, it was proposed that all limits be repealed for using prior DWI convictions for enhancement purposes. Last year we saw a new rule and I spoke about it at last year's seminar. That rule eliminated using any priors unless two of any prior DWI convictions and probations occurred within ten years of each other. This allowed the “twice in a lifetime” offenders avoid enhancement.

{Although HB 3241 did not become law, this provision was also contained in HB 51 (note the **low**

number) which also had several other similarities to HB 3241. HB 51 abolished the 10 year rule by repealing Sections 49.09(e) and (f), Penal Code.}

The next part of HB3241 that caught my attention in this area was that it proposed that the refusal of an intoxication suspect to submit to the taking of a specimen of breath, blood or urine should be a class B misdemeanor. This provision made this a new Class B misdemeanor with a minimum term of 120 continuous hours confinement. Several states in the U.S. have similar laws that have withstood appellate challenges and I have been expecting its request for the past few years.

Once and for all **IT IS STILL NOT a CRIME TO REFUSE a BREATH/BLOOD TEST!!!**

The next proposal of HB 3241 was a little cleanup work. It allowed DWI with child passenger convictions to be used for purposes of enhancement.

In a later portion of the bill, it proposed that although DWI 1st offenders should be eligible for deferred, but not non-disclosure and added that a DWI deferred could also be used for enhancement purposes.

Another disturbing provision to defense attorneys was the elimination of the power to subpoena officers with personal knowledge of the reasonable suspicion and probable cause to arrest a suspect for intoxication offenses at Administrative License Revocation Hearings. I don't know how many of you have NOT done an ALR hearing, but the Department of Public Safety wins 90% of all of them. Occasionally the defense will win, but frankly most of those wins are attributable to officers either not being available or not willing to show up for the hearings when subpoenaed. The truly debatable issues at an ALR hearing are whether the officer had a proper reasonable suspicion to investigate (rather than just staking out bars) or whether the officer had probable cause to arrest for intoxication (with or without field sobriety tests). Many officers contradict their police reports and although the odor of alcohol is enough to suspend a license, it is not enough probable cause for a DWI arrest.

I can happily report that this provision DID NOT PASS. You can still subpoena police officers to ALR hearings (but never more than one!).

A financial proposal was also made in this bill. As you should be aware, the current surcharge law is a huge stream of new financing for the State. If you estimate 85,000 simple DWI convictions each year and a surcharge of \$1,000 per offender, our surcharge law generates approximately \$85 million dollars annually for a period of 3 years for a grand total of \$255,000,000 (\$255 million dollars)!

HB 3241 proposed that the surcharge be increased to \$2,000 per year for DWI 1st offenders who had refused to provide a sample of their breath or blood for analysis. This law too, **DID NOT PASS.**

The next bold suggestion contained in this bill concerned when blood could be drawn involuntarily. It kept mandatory specimens for accident cases expected to have been caused by alcohol and in which a person suffered serious bodily injury or died or will die. The new proposal was that mandatory specimens could be taken if:

“...at the time of the arrest, **the officer possesses or receives reliable information from a credible source** that the person has been previously convicted two or more times of an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft; ...”

The issue here is what constitutes 1) reliable information; 2) a credible person and (3) do these credible people understand what a “final conviction” is? This provision also **DID NOT PASS**, but it sure had many DWI defense attorneys worried since the recent increase in 991 calls in pursuits and arrests. It is important to note, that it was not eliminate that the person first be requested to provide a specimen and refusal before a mandatory specimen could be obtained.

As expected, there was another proposal to revise the most current version of the DIC-24 or statutory warning to be given to a person before a specimen may be requested. It advised the suspect that refusing was a crime and several other changes by the aforementioned proposals. The most devious of the proposals had to do with requesting an ALR hearing.

The fifteen (15) day limit for requesting was left intact, but the ability to request a hearing by facsimile was eliminated. The majority of all ALR hearing requested by attorneys is done by fax. This is the only way to generate any data that the hearing was actually requested within the prescribed time. It does not happen often, but sometimes this becomes an issue in license defense. If the 15 day rule is not strictly obeyed, a hearing is lost forever and the license is automatically suspended on the 40th day following receipt of the Notice of Suspension (DIC-25).

HB 3241 also suggested a change in law that would create a “presumption “for samples collected within three (3) hours of the incident. The State would be presumed to have proven an alcohol concentration **equal to or greater** than at the time of testing if the breath test was admitted. This completely disregards even the Texas Breath Test Program (and 50 years of science) training material that clearly states that an alcohol concentration before an actual test can be greater than, **less than**, or equal to the concentration at the time of testing. Any of these results is equally possible.

As you can tell by now, **THIS DID NOT PASS.**

House Bill 3241 was recessed after our public meeting and never left the committee to be reviewed by the House of Representatives (another way to “kill a bill”).

Enough said for what was proposed in just one bill; let’s turn our attention to the new laws we will all have to deal with beginning September 1, 2005 as they relate to DWI.

III. BILLS THAT DID PASS

A. **HB 51 DLD Required for 0.15+ probation**

House Bill 51 added a new section to Article §42.12 (13) (i) of the Code of Criminal Procedure. This new provision of the community supervision DWI chapter states that 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 0.15 or more at the time the analysis was performed *the court shall require the installation of a deep lung ignition devise* as a condition of community supervision.

This portion of the rule also states that the DLD requirement is not mandatory if the prior DWI incidents occurred more than ten years between each other. Discretion was left with the court.

B. **Ten Year Enhancement Rule Repealed**

This Bill also formally eliminated the 10 year rule by repealing §49.09 (e) & (f) of the Penal Code. **THERE IS NO MORE TEN YEAR RULE.**

C. **HB 157 72 hours “continuous confinement for DWI 2nd”**

Although there has been much talk about the mandatory 72 continuous hours of confinement to be imposed on DWI offenders, the truth is that this condition **only applies to persons punished under §49.09 (a) or (b) or DWI 2ND OFFENDERS ONLY.** Although other DWI attorneys disagree, this may be the wake up call some second offenders need to investigate event the possibility of an alcohol problem. After all, they have been caught and convicted at least twice.

HB 157 amends §42.12 (13) (a) with this new “continuous” confinement requirement as a condition of community supervision.

D. **HB 904 Multiple Intox Assault and Manslaughter Consecutive**

House Bill 904 amends §3.03 (b) of the Penal Code to allow the court to run sentences consecutively or concurrently for any combination of Intoxication Assaults and Intoxication Manslaughters that may arise out of the same criminal incident. This just brings intoxication cases in line with other episodes that involve the commission of more than one crime in the same incident.

E. **HB 2275 Felony DWI is subject to property forfeiture**

House Bill 2275 was a sleeper and never mentioned in most of the pre-legislature hype by either the prosecution or defense. It made another rather sweeping change as it will relate to DWI cases.

This Bill amends Article 59.01(2), Code of Criminal Procedure. This provision has never been a part of DWI law. Article 59.01 deals with forfeiture of property in drug cases.

The basis of the original law was to subject the property (real, real, personal, tangible, or intangible) of drug traffickers to forfeiture to the State. It raised millions of dollars in assets ranging from sports cars to apartment building in its enforcement and prosecution. The new law introduces new subjects to forfeiture. Any defendants convicted of a crime contained in Chapter 49 Penal Code punishable as a felony of the third degree or state jail felony if the defendant had been previously convicted **three time of an offense under that chapter.**

The three prior convictions will be a key in defense of these cases. It will be interesting to see how this law develops. Another consideration will be the type of property pursued. With most cars now being leased, it will be interesting to see what type of property the State will attempt to forfeit.

F. **HB 2868 Civil Liability for Adults Serving Minors**

This is another interesting law that will affect DWI cases, but in the civil arena. House Bill 2868 amended Section 2.02, Alcoholic Beverage Code. This is the statute where civil liability is imposed on adults who serve or provide or allow someone else to serve a minor (on the premises owned or leased by the adult) with alcohol that contributed to the minor’s intoxication.

Here will be the fact situation. Children are home from college at ages ranging from 18 – 20 years old. The parents have a Christmas Party at their home and staff the party with a bartender from the catering company. One of the children’s friends attends and has too much to drink and then drives from the party causing an accident, injury or death.

Under this statute, the hosting parents will be subject to civil charges arising out of any claims from the minor’s accident after leaving the party. It may be inapplicable to DWI defense attorneys, but will certainly provide for lively conversation this holiday season for a knowledgeable DWI to impart this information to his host while he is attending the party!

G. **SB 1257 Minors not allowed to use cell phones for 6 months**

This bill amends the Transportation Code at §545.424 to provide for a “probationary period” for

newly licensed drivers. If the new driver is under 18 years of age, she **may not operate a motor vehicle while using a “wireless communication” device.** This also applies to persons under 17 years of age who are driving with a restricted license. It specifically also includes the operation of motorcycles and mopeds.

Wireless communication device is the key. Parents and young drivers should be cautioned that in the 21st Century this will include: cell phones, two way pagers; instant messaging devices and even the old fashioned walkie-talkie or CB radio. This probation automatically expires 180 days after the original license was granted.

Transportation Code §545.425 was also added to prohibit persons from operating wireless communication devices while driving passenger buses with a minor passenger on the bus. The only statutory exception is in case of emergency or if the passenger bus is not in motion.

H. HB 699 Fake ID Increased and DUI Punishment for Minors

This law amends Section 521.451, Transportation Code. That provision deals with possession or presenting a false or fictitious drivers license. It also prohibits possession of more than one valid license. The new law raises this offense to a Class A Misdemeanor and if the defendant is a minor, they are subject to the additional punishment considerations of Alcoholic Beverage Code §106.07 that traditionally deals with DUI and minor in possession of alcohol charges.

I. HB 1357 DL Suspension for Providing Alcohol to Minor

Another new law regarding minors was contained in this bill. The new law

Amends Section 106.115(d), Alcoholic Beverage Code that provides if a minor was ordered to attend an alcohol awareness class for deferral of their case and fails to turn in the certificate of completion within the required time period, the minor’s drivers license is suspended for 6 months. If the minor’s driving record reveals that the minor has a prior traffic ticket conviction the period of suspension is increased to 1 year.

Sec. 521.351, Alcoholic Beverage Code was also added. It provides that a person’s drivers license is automatically suspended for 6 months upon conviction for purchasing or furnishing alcohol to a minor.

J. HB 1481 Driving Around Barricades

This bill amended Section 472.022 of the Transportation Code and defined a new traffic offense. Suspected because of the major traffic jam after events at the Texas Motor Speedway and the excellent work of some Denton and Tarrant County traffic lawyers,

this bill makes “driving around a barricade” a traffic offense. This is where the provisions are located prohibiting dangerous driving in or near construction zones. Driving around a barricade is a Class C misdemeanor unless the barricade or sign was erected to drive around because water is over any portion of the street or highway. If water is the reason, this offense is increased to a Class B Misdemeanor.

This bill set a new range of fines for offenses committed in a construction zone. The range of fine is now \$2.00 - \$400.00.

K. SB 907 Officer’s Ability to Arrest Outside Jurisdiction

The last bill that I want to discuss was proposed by the Senate rather than the House although there was a comparable House Bill that was signed into law on the same subject.

This new law describes when an officer can make an arrest outside of his normal jurisdiction. This law provides that an officer can make such an arrest for any offense committed within his presence or view, except for traffic offenses. If it is a traffic offense, the offense must have been at least partially committed within the officer’s home jurisdiction to be lawful.

As you can tell, the Legislature is alive and well and each individual representative proposes one more bills each session. Many are requested by constituents and many are proposed for political purposes. With the increase in revenue generated by DWI prosecution and the unpopularity of drinking and driving is sure to produce new proposals each year. It will be the continuing task of defense attorneys, prosecutors and judges to stay abreast of the new laws and decide how they will be implemented in their jurisdictions.

I thank you for the opportunity to present this information to you.