

Of General Interest

Repeat Offender Driving Reform: Summary of Key Elements and Practice Tips

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STATEMENT OF PROBLEM—BACKGROUND

There are drivers in Michigan with as many as 17 alcohol (MCL 257.625) convictions on their driving records, drivers whose licenses are revoked and denied through 2183, and drivers who have more than 50 open suspensions for Failing to Appear in Court (FAC) or Failing to Comply with Judgment (FCJ). In 1999, 544 people were killed on Michigan roads in alcohol-related convictions, 1,505 people were killed on Michigan roads in all crashes, and 137,546 people were injured in these crashes.

While the incidence of alcohol-related fatalities has decreased over the years, clearly, our existing laws were not working. The criminal justice community has known for some time that Driving While Suspended or Revoked was commonplace but that little could be done about it. In fact, the 1994 University of Michigan Traffic Research Institute report concluded that while the 1992 drunk driving reforms were generally effective, Driving While License Suspended (DWLS) and repeat drunk driving were still a problem.

On April 24, 1995, Governor Engler's office wrote to Secretary of State Candice Miller and Colonel Michael Robinson, director of the Michigan State Police (MSP), soliciting their advice on how to enforce the laws effectively against people caught driving with suspended and revoked licenses and repeat alcohol offenders. This communication pointed out that people driving with suspended or revoked licenses had reached "epidemic proportions" and that "meaningful enforcement of the traffic code depends on the criminal justice system's ability to effectively enforce licensing sanctions."

MSP's Office of Highway Safety Planning responded by organizing a workshop featuring representatives from other states that had already implemented new and innovative programs to confront this problem. A Michigan plan was developed, but it languished for some time. Governor Engler called for enactment of the package first in his 1997 State of the State and then again in 1998.

The Governor signed the first wave of repeat offender bills into law on October 16, 1998. The initial segment of the legislation was a bipartisan package of 20 bills that amended various sections of the Vehicle Code, the Penal Code, the Felonious Driving Act, and the Natural Resources and Environmental Protection Act. The purpose of the package was to increase penalties and offer law enforcement, prosecutors, courts, and the Secretary of State additional tools to combat the problems of repeat offenders, *i.e.*, those people who continue to drive despite the fact that their driving privileges are suspended or revoked, and people who repeatedly commit alcohol-related driving offenses.

This was the first time Michigan lawmakers and officials had made a concerted effort to address the problem of people who drive while suspended or revoked. It was also the first time Michigan law had called for sanctions against the vehicles driven by these offenders.

Throughout the entire legislative process, there was not a single vote of opposition. The package, most of which was effective on October 1, 1999, contains several major concepts, including: separating the offender from the vehicle, increasing repeat offender consequences, providing for uniform licensing actions and treatment, and establishing an evaluation process to determine the effectiveness of the new laws.

Even as the original package was signed into law, its sponsors were aware that clean-up legislation would be necessary. Because all of the new crimes were made 93-day misdemeanors, for purposes of fingerprinting, the most important issue that had to be addressed was to amend state law so local communities could enact ordinances for 93-day misdemeanors. It was also necessary to amend the Code of Criminal Procedure to allow officers to write citations for these offenses and the Revised Judicature Act to allow magistrates to adjudicate such offenses. The Public Health Code also was amended by 1999 PA 144 to provide that people convicted of drug crimes would be eligible for restricted driving privileges similar to the restrictions for those convicted of other crimes. Fourteen bills were signed into law in June of 1999, effective on October 1, 1999.

The mandatory fingerprinting requirement for a first DWLS often discouraged officers from arresting people for this offense. Automobile dealers were concerned that people subject to registration denial could not title newly-purchased vehicles. In addition, some local charters prohibited adoption of a 93-day misdemeanor local ordinance. In light of these problems, one more set of amendments was passed, effective December 29, 1999. These amendments established a fingerprint requirement exception for a first DWLS crime in MCL 28.243, allowed vehicle titling under MCL 257.219(2), and established a charter work-around to deal with 93-day misdemeanor ordinance prohibitions. These amendments also allowed local units of government to adopt the Michigan Vehicle Code by reference.

Finally, because the requirement that prosecutors give notice of immobilization under MCL 257.625(14) and MCL 257.904(8) was confusing courts when vehicle immobilization was mandatory under MCL 257.904d, the notice provisions were removed by SB 826 (2000 PA 77). The notice requirement was not intended to be jurisdictional. However, defense attorneys were "withdrawing notice" in plea agreements, thus defeating the intent of the law.

The following discussion summarizes the impact of this comprehensive legislative effort.

CASE SCENARIO

Arrest and Plate Confiscation

A police officer must confiscate the metal plate from a vehicle and issue a paper plate if the operator is arrested for drunk driving and either has one prior conviction for a crime under MCL 257.625, or Manslaughter, Murder, or Negligent Homicide with a vehicle, within seven years of the arrest, or two convictions for such crimes within 10 years of the arrest. The plate also must be confiscated if the officer arrests the operator for Driving While License Suspended/Revoked (DWLS/R) and the offender has two prior mandatory additional suspensions/revocations imposed under MCL 257.904 within seven years of the arrest.¹ The paper plate is valid until the criminal case is adjudicated.

Mandatory additional suspensions/revocations are imposed under MCL 257.904 (10), (11), (12), or former (2) or (4), for any moving violation committed during a period of suspension/revocation. Prior to October 1, 1999, such suspensions were not imposed if the underlying offense was a suspension for FAC or for FCJ. Beginning October 1, 1999, 30-day mandatory additional suspensions are imposed for violating these suspensions.² Prior convictions for DWLS are not used for purposes of plate confiscation; counting mandatory additional actions includes all moving violations, not merely DWLS convictions.

Police officers who stop vehicles for violations will check the Law Enforcement Information Network (LEIN). The

state's mainframe computer evaluates the person's driving record and returns a message through LEIN. The message identifies the number of prior convictions and actions within the appropriate statutory time frames and instructs officers when to take the metal license plate and issue a paper plate. This process is very similar to the paper driver's license concept that was part of the 1992 drunk driving reform package, under which officers confiscate and destroy the photo license and issue a paper permit to people who fail or refuse to take a chemical test.³

After the metal plate is removed, officers enter the information about the confiscation into LEIN, thus placing a "hold" on the offender's file. The offender is not eligible to obtain a metal plate until after the case is adjudicated. Ownership of the vehicle is not considered in plate confiscation due to the serious nature of the offense and the fact that the owner or any person holding a valid driver's license may still drive the vehicle with the paper plate. Ownership of a vehicle with a paper plate may not be transferred to avoid these consequences.⁴

Local jurisdictions may vary their procedures. Generally, the offender is fingerprinted, and a copy of the paper plate, proof of printing, and the officer's report are forwarded to the prosecutor.

As of June 2, 12,048 plates were confiscated by law enforcement.

Conviction, Sentencing, and Immobilization

Upon conviction, courts may give drivers a Notice of Adjudication form, which may be taken to any Secretary of State (SOS) branch office to clear the hold on the metal plate. A new plate may be purchased at that time. When the abstract of conviction is posted to the driving record, the plate hold is also cleared, thus allowing purchase of a metal plate.

Although people may obtain a metal plate after their case is adjudicated, courts must order vehicle immobilization for the offending vehicle if the offender is convicted of a crime under MCL 257.625, or Manslaughter, Murder, or Negligent Homicide with a vehicle. Immobilization also must be ordered if the offender is convicted of a moving violation with two prior mandatory additional suspensions/revocations. Note that a conviction for DWLS is not required. Immobilization is required if the offender has any ownership interest in the vehicle. If the offender has no ownership interest in the vehicle, then immobilization will be ordered only if the owner knowingly allowed the offender to operate the vehicle while intoxicated or while his or her license was suspended/revoked.

Court procedures may vary, but generally speaking, the offender is ordered to have the vehicle immobilized and return proof of immobilization to the court. Offenders may be held in contempt for failure to comply, subject to probation violation charges, or their vehicles may be subject to forfeiture. The State Court Administrative Office (SCAO) has produced a court-ordered form (MC 267) for this purpose.

Those subject to immobilization may not transfer the vehicle to a family member, defined as a person who is not subject to payment of use tax under Section 3 of the Use Tax Act, 1937 PA 94, as amended; MCL 205.93. Offenders may sell the vehicle to another person, but are prohibited from purchasing or leasing another vehicle. Such purchase or lease is a 93-day misdemeanor.⁵ Immobilization periods, prescribed by MCL 257.904d, range from permissive for a first offense drunk driving, to one to three years for a third drunk driving or fifth moving violation with prior mandatory additional suspensions/revocations. All periods of immobilization start after any period of imprisonment.⁶

When vehicle immobilization is ordered, the SOS files are updated with information from the sentencing abstract. Therefore, LEIN checks will verify whether a vehicle is subject to immobilization. If a vehicle subject to immobilization is stopped, officers must impound the vehicle and notify the court.⁷ The court will then issue an order directing disposition of the vehicle.

As of June 2, 1,722 vehicles were ordered immobilized. This number appears low when compared to the number of plates confiscated. Judges have indicated that in many cases the defendants are being sentenced, that offenders are selling vehicles, or that nonowners were operating the vehicles. While some of this may be true, SOS statistics reveal that only 14 percent have been sold. Some judges have expressed concern that family members will be unable to access the vehicle. However, this concern is unfounded because a company, *Driver ID, Inc.*, has developed a tether technology that prohibits only the offender from operating the vehicle.

Courts are required to order treatment for people convicted of a second alcohol-related offense.⁸

Licensing Actions

Under the new law, all licensing actions were consolidated in the SOS, thus reducing redundancies in the system and confusion for offenders.⁹ (The sole exception is for drug crimes, because the SOS has no access to the criminal history files.) Licensing is an executive branch function and was in the agency prior to 1980. This responsibility is in the department of motor vehicles in many states. Courts should experience some reduction in paperwork related to licensing actions. Minimum actions are prescribed by the Legislature. The agency will have no discretion; restricted privileges, when authorized by law, will be generic and broad. Drivers will be expected to carry proof of destination and hours and to present these to police officers upon request.

Registration Denial

The registration denial portion of the repeat offender package takes effect June 1, 2000. In addition to plate confiscation and vehicle immobilization, registration denial limits repeat offender access to vehicles. People whose licenses are revoked/suspended for three or more drunk driving offenses, or for five or more driving while suspended/revoked violations, will not be eligible to register vehicles with the SOS.¹⁰ This denial is effective until the person is relicensed. Registration denial is based upon the person's driving history and applies to any vehicle in which the person has an ownership interest.

People subject to registration denial may not transfer title to a family member without a court order, nor may they purchase or lease another vehicle. These offenses are 93-day misdemeanors under MCL 257.233. A vehicle purchased by a person subject to registration denial may be titled, so the seller's name may be removed from the title in casual transactions and dealers receive some protection.

Summary of Ownership Impact

Plate Confiscation—Ownership is not an issue in plate confiscation. If the vehicle was being operated by an individual arrested as a repeat offender, the plate will be taken from the vehicle.

Immobilization—There must be some ownership interest in the vehicle subject to immobilization, or it must be shown that the owner of the vehicle knowingly allowed it to be operated by an intoxicated, suspended, or revoked driver.¹¹

Registration Denial—Registration denial is based upon driver's licensing status. Any vehicles owned, co-owned, leased, or co-leased by the offender will be denied registration.¹²

OTHER PROVISIONS

Tougher Consequences

One of the most far reaching aspects of the package requires the SOS to revoke an operator's license for any combination of two alcohol-related crimes.

The Legislature knew that the average Bodily Alcohol Content (BAC) upon arrest is .16 percent in Michigan. The Legislature also knew that of the approximately 60,000 alcohol-related arrests annually, only 450 people are *arrested* for the lesser offense of Operating While Impaired (OWI). Approximately 33,000 people are *convicted* of OWI each year, however, so the Legislature decided to make OWI convictions more meaningful.

Before October 1, 1999, drivers received a license revocation for two convictions of Operating While Under the Influence of Liquor, Unlawful Bodily Alcohol Content, or Operating While Under the Influence of Drugs (OUIL/UBAC/OUID) within seven years. Three convictions of any of these crimes within 10 years constituted a felony.

Under the new law, any combination of drunk driving crimes under Section 625 [excluding section 625(2) offenses] results in a license revocation. Any combination of three such convictions is a felony. An exception is that only one Zero Tolerance crime may be used in these combinations of offenses. The new law will substantially increase the number of people subject to license revocation.¹³

New Crimes

Several new crimes were established by this legislation. The most important among them are: Child Endangerment, MCL 257.625(7), a 93-day misdemeanor; DWLS Causing Death, MCL 257.904(4), a 15-year felony; DWLS Causing Serious Injury, MCL 257.904(5), a five-year felony; Knowingly Allowing Another to Operate While DWLS Causing Serious Injury, MCL 257.904(7), a two-year felony; and Knowingly Allowing Another to Operate While DWLS Causing Death, MCL 257.904(7), a five-year felony.

As of June 2, 105 people have been convicted of Child Endangerment.

Restoration Appeals

In the drunk driving reform of 1992, habitual alcohol offender restoration appeals to circuit court were limited to a review of the record. Thereafter, subsequent laws prohibited hardship appeals as new laws were passed. In this package, the Legislature reviewed all types of offenses appealed to circuit court for licensing relief and established a review of the record standard for all offenses except those listed in MCL 257.323(3).¹⁴

In MCL 257.323(3), hardship appeals were specifically allowed for Driver Assessment actions imposed under MCL 257.320, for mandatory additional suspensions imposed under MCL 257.904(10), (11), (12), for first implied consent suspensions imposed under MCL 257.625f, and for medical application denials under MCL 257.303(1)(g). Note that no revocation actions are appealable based on hardship. In addition, all appeals are taken under the law in effect at the time of imposition of the action.¹⁵ (See the "Appeals to Circuit Court" chart for the standard of review both before and after October 1, 1999.)

Ignition Interlock

Ignition interlocks are no longer court-ordered, as all licensing sanctions are now imposed by the SOS. The Legislature wanted to ensure that, as habitual alcohol offenders are returned to the road, they will all be required to drive for at least one year with an ignition interlock device installed on their vehicles. These devices require operators to take and pass a breath test before starting the vehicle.

Random rolling tests also are required to ensure on-going operator sobriety. MCL 257.322(6)-(9) mandates installation of these devices for any habitual offenders who receive restricted driving privileges from the Driver License Appeal Division (DLAD) after October 1, 1999. As of June 2, 1,634 ignition interlock devices have been ordered installed.

Hearing rules were updated¹⁶ and a new rule (R 257.313a) was promulgated to implement the ignition interlock program. The rules require three-month periods of ignition interlock extension for minor violations, as defined in R 257.313a(1)(b), and reinstatement of license revocations for major violations as defined in R 257.313a(1)(a).

The Bureau of Automotive Regulation in the Department of State is required to certify companies to install these devices. Two private companies are certified in Michigan:

National Interlock 1-888-294-7002

American Interlock, Ltd. 1-800-580-0504

Practice Tips—How to Count Priors

When reviewing a complete driving record and the agency LEIN/SOS response, some question why all DWLS offenses are not counted as priors for plate confiscation. Most DWLS convictions generate a mandatory additional suspension/revocation for committing a moving violation during a period of suspension/revocation. However, a person earning a DWLS conviction during an FAC/FCJ suspension prior to October 1, 1999, did not earn mandatory additional. Although this person does not fall under Repeat Offender for plate confiscation, as the person did not earn mandatory additional for this type of DWLS, the conviction may be used to enhance criminal sanctions.

For driving while license suspended violations requiring plate confiscation, the person must be arrested for DWLS with two prior mandatory additional suspensions/revocations. For mandatory immobilization, the person must be convicted of any moving violation during a period of suspension or revocation with two prior mandatory additional suspensions or revocations.

For the crime of DWLS, prior DWLS convictions trigger enhancement. This is summarized in the chart below:

Purchasing Driving Records

Attorneys may purchase a copy of their client's driving record for \$6.55. Certification is an additional \$1.00 per record. Request a full, certified driving record, which will contain the person's current status and complete driving record. Because driving records contain "personal information" subject to Michigan's Driver Privacy Protection Act (DPPA), attorneys who request a driving record must complete a form (BDVR-154) certifying that the personal information in the record will be used only for permissible purposes prescribed in MCL 257.208c. Forms may be obtained by writing to: Record Lookup Unit, Michigan Department of State, 7064 Crouner Drive, Lansing, MI 48918-1447 or by fax at (517) 322-1181. Forms are also available on the Internet at www.sos.state.mi.us/fax/bdvr154.pdf

General Practice Tips (Originally appeared as a sidebar.)

- FAC/FCJ violations earn a 30-day mandatory additional suspension after October 1, 1999.
- FAC/FCJ additional suspensions are appealable to circuit court on hardship.

- Restricted privileges are comprehensive and include all restrictions formerly allowed by court order under MCL 257.625b.
- Restrictions, if available under law, are automatically mailed to the driver.
- Drivers must have their current addresses on the SOS system to receive restricted licenses.
- Courts do not order licensing actions after October 1, 1999. The operator is not suspended/revoked when leaving the court. The licensing action starts after the Secretary of State receives the abstract of conviction and notifies the driver.
- After October 1, 1999, mandatory additional actions are effective without extension.
- Old law additional actions will still be effective and will carry through-dates beyond additional actions after October 1, 1999.
- Actions described in MCL 257.323(3) are appealable to circuit court on hardship after October 1, 1999.
- Judicial review is governed by the law in effect at the time of the offense.
- Use the SCAO court-order forms to avoid jurisdictional problems. These are CC 269 and CC 268.
- Registration denial is effective June 1, 2000.

Footnotes

¹ MCL 257.904d.

² MCL 257.904(10), (11), (12).

³ 1991 PAs 93, 95, 98, 99.

⁴ MCL 257.233(4).

⁵ MCL 257.233.

⁶ MCL 257.904d(6).

⁷ MCL 257.904e(7).

⁸ MCL 257.625b(5).

⁹ MCL 257.303, 319, and 324.

¹⁰ MCL 257.219(1)(d).

¹¹ MCL 257.904d(4).

¹² MCL 257.219(1)(d).

¹³ MCL 257.303(2)(c).

¹⁴ MCL 257.323(4).

¹⁵ MCL 257.320e.

¹⁶ 1999 MR 9, R 257.301-314.



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