SPONSOR: Rep. Spence
Sens. Henry, Winslow

HOUSE OF REPRESENTATIVES

140th GENERAL ASSEMBLY

HOUSE BILL NO.

AN ACT TO AMEND CHAPTER 41, TITLE 21 OF THE DELAWARE CODE RELATING TO DRIVING UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend §4177, Title 21 of the Delaware Code by adding the phrase "or with a prohibited alcohol content" between the word "influence" and the first ";" in the catch line of that section.

Section 2. Amend §4177(a), Title 21 of the Delaware Code by striking paragraph "(5)" in its entirety and substituting in lieu thereof the following:

"(5) When the person's alcohol concentration is, within 4 hours after the time of driving .10 or more. Notwithstanding any other provision of the law to the contrary, a person is guilty under this subsection, without regard to the person's alcohol concentration at the time of driving, if the person's alcohol concentration is, within 4 hours after the time of driving .10 or more and that alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when that person was driving."

Section 3. Amend §4177(b), Title 21 of the Delaware Code by striking paragraph "(2)" in its entirety and substituting in lieu thereof the following:

"(2)a. No person shall be guilty under subsection (a)(5) of this section when the person has not consumed alcohol prior to or during driving but has only consumed alcohol after the person has ceased driving and only such consumption after driving caused the person to have an alcohol concentration of .10 or more within 4 hours after the time of driving."

b. No person shall be guilty under subsection (a)(5) of this section when the person's alcohol concentration was .10 or more at the time of testing only as a result of the consumption of a sufficient quantity of alcohol that occurred after the person ceased driving and before any

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sampling which raised the person's alcohol concentration to .10 or more within 4 hours after the time of driving.

c. Any person who is being tried for a violation of this section or any offense defined by this Code in which a violation of subsection (a)(5) of this section is alleged and who requests or is provided discovery pursuant to the rules of procedure of the court in which that person is being prosecuted and who seeks to offer evidence pursuant to a defense under this paragraph shall provide notice of this defense to the prosecution within 15 days of the person's receipt of discovery materials from the prosecution. Such notice must include: (1) the quantity of alcohol alleged to have been consumed after the person ceased driving including the time and place of such alleged consumption; and, (2) if the person intends to introduce expert testimony in support of the defense, the name of such expert and any evidence the person may wish to present under Rule 702, 703, or 705 of the Delaware Uniform Rules of Evidence; and, 93) any other information or materials provided relating to such defense of which discovery is provided under the rules of the court.

d. If there is a failure to give notice as required by subparagraph (c) of this paragraph, the court shall exclude any evidence offered by a person in support of the defense defined under this paragraph, however, for good cause shown it may enter such other order as it deems just under the circumstances."

Section 5. Amend §4177(g), Title 21 of the Delaware Code, striking the last sentence of paragraph "(2)" in its entirety and substituting in lieu thereof the following:

"However, such evidence shall only be admissible in proceedings for the determination of guilt when other scientific evidence is admitted relating to the alcohol concentration of the person at a specific time."

Section 6. Amend § 4177(g), Title 21 of the Delaware Code, striking paragraph "(1)" in its entirety and redesignating the remaining paragraphs accordingly.

Section 7. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of the Act which can be given effect without the invalid provision or application, and to that end the provisions of this Act are declared to be severable.

Section 8. This Act shall become effective immediately upon its enactment into Law.

Following a view of some courts addressing per se Driving Under the Influence (DUI) statutes, the Delaware Supreme Court recently held that certain aspects of Delaware's DUI statutes were constitutionally deficient. State v. Baker, Del. Supr., No. 49, 1998, Walsh, J. (Del. 1, 1998) (Opinion).

This Act seeks to remedy any perceived constitutional infirmity by ensuring that what was implicit in 21 Del. C §4177 (Supp. 1995) is now explicitly set forth in the law - that persons who drove with a sufficient amount of alcohol in their system to raise their alcohol concentration to .10 or more within 4 hours of driving are subject to prosecution but persons whose drinking and driving are unrelated are not. Thus, the Act targets only those persons who are behind the wheel with a sufficient quantity of alcohol in their bodies to raise their alcohol concentrations to .10 or above within 4 hours.

In enacting this specific statutory language, the General Assembly again adopts the view of the majority of states with similar laws that it will not "allow drunk drivers -- 'moving time bombs' -- to escape prosecution simply because, at the time of the stop, their [alcohol concentration] had not yet reached the proscribed level" if, before they got behind the wheel, they had consumed enough alcohol to meet or exceed the limit when tested. State v. Tischio, N.J. Supr., 527 A.2d388 (1987). As states such as Arizona, Georgia, Nevada, New Jersey, North Carolina, North Dakota, and Washington have found, it is an admirable goal to keep drivers who have had enough to drink to raise their alcohol concentration to .10 or more (but whose test would not show the prohibited limit yet) away from cars and not encourage a race- perhaps to the death - to their next destination, whether it be home or their next barstool. Therefore, under the applicable provisions of the statute (§4177(a)(5)) the elements of DUI are: (1) driving; and (2) an alcohol concentration of .10 or above within fours hours of driving -- if that reading was the result of alcohol consumption prior to or during driving.

By providing the "nexus" element the Delaware courts found to be missing, the language is more specifically targeted at the drivers with a dangerous alcohol content. The language permits one to gauge one's drinking appropriately. With the wealth of public information available regarding alcohol consumption and driving, a driver can predetermine his or her limit much more easily than any expert can attempt to retroactively extrapolate that person's alcohol concentration using a test administered some time after the person was caught driving. This dichotomy is based on the driver's ready accessibility to resources such as widely-reported public health information, resources of state agencies (e.g. the Office of Highway Safety) or even the Internet (e.g. www.intox.com/Drink_Wheel.html). However, an expert attempting to relate test taken after driving back to determine the specific alcohol concentration when the person was behind the wheel is greatly hindered as the source of that information is the driver being prosecuted - who has no incentive give truthful information and a constitutional right to refuse to give any.

The Act addresses the goals of effective DUI enforcement and the concerns of the Delaware courts by: (1) making a technical change to the catch line; (2) re-enacting the "four-hour" provision with specific "nexus" elements which link alcohol content and driving; (3) re-writing the defense of drinking after driving to make such a simple defense without the preponderance of evidence burden imposed upon a defendant but with notice guidelines to insure effective preparation of DUI cases.

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