

# HOUSE BILL REPORT

## ESB 5054

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**As Reported by House Committee On:**  
Public Safety

**Title:** An act relating to impaired driving.

**Brief Description:** Concerning impaired driving.

**Sponsors:** Senators Padden, Frockt, Conway, McCune and Short.

**Brief History:**

**Committee Activity:**

Public Safety: 3/12/21, 3/23/21 [DP], 2/17/22, 2/24/22 [DPA].

**Brief Summary of Engrossed Bill**  
**(As Amended By Committee)**

- Increases the classification for an impaired driving offense from a gross misdemeanor to a felony when the person has three or more prior impaired driving offenses within 15 years, rather than within 10 years.
- Creates a new Drug Offender Sentencing Alternative for persons convicted of felony impaired driving offenses.
- Authorizes a person who participates in a deferred prosecution for their first gross misdemeanor impaired driving charge to participate in a deferred prosecution for their second gross misdemeanor impaired driving charge in certain circumstances, and makes other changes related to deferred prosecutions in impaired driving cases.
- Provides that a deferred prosecution for a second or subsequent impaired driving offense counts as one point toward a defendant's offender score for felony traffic offenses.

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### HOUSE COMMITTEE ON PUBLIC SAFETY

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.*

**Majority Report:** Do pass as amended. Signed by 9 members: Representatives Goodman, Chair; Johnson, J., Vice Chair; Klippert, Assistant Ranking Minority Member; Davis, Hackney, Orwall, Ramos, Simmons and Thai.

**Minority Report:** Without recommendation. Signed by 3 members: Representatives Mosbrucker, Ranking Minority Member; Graham and Griffey.

**Staff:** Omeara Harrington (786-7136).

**Background:**

A person may be convicted of impaired driving under either the Driving Under the Influence (DUI) statute or the Actual Physical Control of a Vehicle While Under the Influence (PC) statute. A person is guilty of DUI if he or she drives while under the influence of intoxicating liquor, marijuana, or any drug, and is guilty of PC if he or she has actual physical control of a vehicle while under the influence of intoxicating liquor, marijuana, or any drug.

A DUI or PC offense is punishable as a gross misdemeanor. However, a DUI or PC offense becomes a felony offense if the defendant has three or more prior impaired driving offenses within the previous 10 years, or has previously been convicted of felony DUI or PC, or of Vehicular Homicide or Vehicular Assault while under the influence of intoxicating liquor or any drug. Prior impaired driving offenses include convictions of DUI, PC, Vehicular Homicide, and Vehicular Assault, as well as other impaired driving-related offenses and offenses involving impaired operation of commercial vehicles, vessels, aircraft, snowmobiles, and nonhighway vehicles.

Felony DUI is classified as a class B felony. Felony PC is classified as a class C felony. The statutory maximum sentence for a class B felony is 10 years in prison, a fine of \$20,000, or both imprisonment and a fine; and for a class C felony is five years in prison, a fine of \$10,000, or both imprisonment and a fine. The standard range sentence for a DUI or PC offense for a person with three prior impaired driving offenses is 13 to 17 months of incarceration, followed by one year of community custody.

Sentencing Alternatives.

When a person is convicted of a felony offense, a sentencing court is generally required to impose a term of confinement based on a standard range provided in statute. In some circumstances, sentencing courts have discretion to order sentencing alternatives.

Sentencing alternatives generally result in a person serving a shorter term of confinement, and sometimes serving no term of confinement. Instead, the person may be required to participate in certain programs or treatment, or to submit to a form of partial confinement.

*Drug Offender Sentencing Alternative.* The Drug Offender Sentencing Alternative (DOSA) either reduces or eliminates incarceration time in exchange for the convicted

person participating in supervision and treatment. A person convicted of a felony is eligible for a DOSA only if certain criteria are met, including that the conviction is for an offense that is not a felony impaired driving offense.

In determining eligibility, the court may order the Department of Corrections (DOC) to complete either a risk assessment report or a substance use disorder screening report, or both. If the court determines that the person is eligible for the alternative, it must waive imposition of the standard-range sentence and impose a sentence consisting of either a prison-based alternative or a residential substance use disorder treatment-based alternative.

Under the prison-based alternative, the person is sentenced to a term of incarceration equal to one-half the midpoint of the standard range or 12 months, whichever is greater, and one-half the midpoint of the standard range as a term of community custody. The incarceration and community custody terms must include substance use disorder treatment.

Under the residential substance use disorder treatment-based alternative, the person is sentenced to a term of community custody equal to one-half the midpoint of the standard sentence range or two years, whichever is greater, conditioned on the person entering and remaining in residential substance use disorder treatment for a period set by the court between three and six months. The term of community custody must also include a condition to participate in treatment.

The court may bring a person serving a DOSA back to court at any time to monitor progress or determine whether there have been violations of the conditions of sentence. If conditions have been violated or there is unsatisfactory progress in treatment, the court may modify the conditions of community custody or impose other sanctions, including ordering the person to serve a term of total confinement within the standard range for the offense.

#### Partial Confinement.

For certain incarcerated persons, a term of total confinement may be converted to partial confinement. Partial confinement is confinement for up to one year in a facility operated or contracted by the state or other unit of government, or in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Home detention is a program of partial confinement in which the person is confined in a private residence 24 hours a day, unless otherwise authorized by the court or other supervising agency, and is subject to electronic monitoring. Work release is a program of partial confinement available to persons who are employed or engaged as a student in a regular course of study at school.

During the period of partial confinement, the person may be required to comply with crime-related prohibitions and affirmative conditions imposed by the court or the DOC. If the person violates the rules of the partial confinement program, he or she may be required to serve the remainder of the term in total confinement.

### Community Custody.

Community custody is a portion of a criminal sentence served in the community, subject to conditions imposed by the court and the DOC. Courts must order community custody for persons convicted of certain crimes or in accordance with a sentencing alternative. If the person violates the conditions of community custody, he or she may be subject to confinement or nonconfinement-based sanctions.

### Deferred Prosecution.

A person charged with a misdemeanor or gross misdemeanor in district or municipal court may petition the court for a deferred prosecution, subject to certain conditions. Under a deferred prosecution, the person must complete a course of treatment and abide by specified conditions in exchange for having his or her charges dismissed following completion of the program. To qualify for a deferred prosecution, the petitioner must allege that a substance use disorder, mental health problem, or domestic violence behavior problem caused the petitioner to commit the charged offense and that treatment is necessary to prevent reoccurrence. A person is not eligible for more than one deferred prosecution for gross misdemeanor impaired driving charges.

The court may refer the petitioner for a diagnostic investigation and evaluation by a designated program or department to determine:

- whether the petitioner suffers from the problem described;
- whether the problem, if left untreated, has a probability of causing similar misconduct in the future;
- whether extensive and long-term treatment is required;
- whether effective treatment for the petitioner's problem is available; and
- whether the petitioner is amenable to treatment.

A deferred prosecution based on alcoholism must be for a two-year period and impose the following requirements:

- total abstinence from alcohol and all other nonprescribed mind-altering drugs;
- participation in an intensive inpatient or intensive outpatient program in a state-approved substance use disorder treatment program;
- participation in a minimum of two meetings per week of an alcoholism self-help recovery support group for the duration of the treatment program;
- participation in an alcoholism self-help recovery support group from the date of court approval of the plan to entry into intensive treatment;
- no less than weekly approved outpatient counseling, group or individual, for a minimum of six months following the intensive phase of treatment; and
- no less than monthly outpatient contact, group or individual, for the remainder of the two-year deferred prosecution period.

Additionally, all treatment must be within or approved by a state-approved substance use disorder treatment program. The decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment is reserved to the treating facility and the participant's

physician. The petitioner must sign and agree to the terms and conditions of the treatment program.

As a condition of granting a deferred prosecution, the court may appoint a probation department or other appropriate person or agency to supervise the petitioner. The supervisor must:

- at least once every six months, request an abstract of the petitioner's driving record if the petitioner's charge relates to operation of a motor vehicle; and
- at least once every month, contact the petitioner or any agency to which the petitioner has been directed for treatment.

The facility or service provider administering treatment or services to the participant must provide the court with a statement every three months for the first year, and every six months for the second year, regarding the participant's cooperation with the treatment plan and progress or failure with treatment. If the participant successfully completes the two-year treatment program and at least five years have passed following entry of the order for the deferred prosecution, the court must dismiss the pending charges. If the participant violates any terms or conditions of the deferred prosecution, the court must determine whether to revoke the deferred prosecution and enter judgment on the charge.

#### Felony Offender Scores.

For most felony offenses, the Sentencing Reform Act provides a determinate sentencing system in which sentencing courts generally impose sentences within a standard range. The standard range for a person is determined by reference to a grid, which provides a base sentence according to the person's offender score and the seriousness level of the present offense. The offender score is a point total based on the person's prior dispositions and convictions. Non-felony offense history is not included in the offender score unless an exception applies.

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### **Summary of Amended Bill:**

#### Classification of Impaired Driving Offenses.

Three or more prior impaired driving offenses within 15 years, rather than 10 years, elevates the classification of a DUI or PC offense from a gross misdemeanor to a felony.

#### Impaired Driving DOSA.

The "Drug Offender Sentencing Alternative for Driving Under the Influence" (impaired driving DOSA) is created.

*Eligibility.* A person is eligible for the impaired driving DOSA if he or she is convicted of felony DUI or felony PC and does not have a prior conviction for Vehicular Homicide, Vehicular Assault, felony DUI, or felony PC. A motion for an impaired driving DOSA may be made by the court, the convicted person, or the state if the midpoint of the standard

sentence range is 26 months or less. If the person's standard sentence has a higher midpoint, a joint agreement of the state and person is required.

If the sentencing court determines that the person is eligible for an impaired driving DOSA and that the alternative sentence is appropriate, the court must waive imposition of the standard sentence and:

- if the low end of the standard range sentence is greater than 24 months, impose a prison-based DOSA; or
- if the low end of the standard range sentence is 24 months or less, impose a residential treatment-based alternative specific to impaired driving offenders.

To assist the court in making its determination as to eligibility, the court may order the DOC to complete a risk assessment report, a substance use disorder screening report, or both. If the court is considering imposing a sentence under the residential treatment-based alternative, the court may also order the DOC to examine the person and assess: whether the person suffers from a substance use disorder; whether effective treatment for the person's substance use disorder is available from a licensed or certified provider; and whether the person and the community will benefit from the use of the alternative sentence.

*Requirements.* When the court imposes a prison-based impaired driving DOSA, the court must impose a sentence equivalent to, and subject to the same requirements and restrictions as, the traditional prison-based DOSA program already established in statute.

A person who is eligible for a residential treatment-based alternative is sentenced to all of the following:

- if necessary, an indeterminate term of confinement of no more than 30 days in a county facility in order to facilitate direct transfer to a residential substance use disorder treatment facility;
- treatment in a certified residential substance use disorder treatment program for a period set by the court up to six months, with treatment completion and continued care delivered in accordance with rules established by the Department of Health;
- 24 months of partial confinement to consist of 12 months of work release followed by 12 months of home detention with electronic monitoring; and
- 12 months of community custody.

The court must impose treatment and other appropriate conditions during the periods of partial confinement and community custody. In addition, the person may be required to pay \$30 per month while on community custody to offset the cost of monitoring for alcohol or controlled substances. Within available resources, the DOC must make substance use disorder assessment and treatment services available to the person.

*Monitoring and Enforcement.* When a person is sentenced to the residential treatment-based alternative DOSA, the treatment provider must send the treatment plan to the court within 30 days of the person's arrival to the residential program. The court must schedule a

progress hearing during the period of treatment and a treatment termination hearing for three months before the expiration of the term of community custody. Before these hearings, the treatment provider and the DOC must submit written reports to the court and parties regarding compliance with treatment and monitoring requirements and recommendations regarding termination from treatment.

At a progress hearing or treatment termination hearing, the court may: authorize termination of community custody on the predetermined expiration date; continue the hearing, with or without modifying the conditions of partial confinement or community custody; or impose a term of total confinement equal to one-half the midpoint of the standard sentence range, followed by a term of community custody.

Under either the prison-based or residential-based program, the court may bring the person into court at any time to evaluate progress in treatment or determine whether there have been any violations of the conditions of sentence. If the person violates conditions or is failing to make satisfactory progress in treatment, the court may modify the conditions of partial confinement or community custody or order the person to serve a term of total confinement within the standard range for the current offense.

A person sentenced to total confinement after termination from an impaired driving DOSA is entitled to full credit for any time previously served under the impaired driving DOSA in total confinement or residential treatment, and 50 percent credit for any time previously served in partial confinement or community custody. However, a person serving a term of community custody following termination from the impaired driving DOSA is granted no credit for time served in community custody prior to the termination.

#### Deferred Prosecution.

In general, a person charged with a gross misdemeanor DUI or PC offense may only participate in a deferred prosecution once in his or her lifetime; however, a person is eligible to petition for a second deferred prosecution for his or her second gross misdemeanor DUI or PC offense when: the person participated in a deferred prosecution for the person's first gross misdemeanor DUI or PC offense; the person otherwise meets eligibility criteria; and the person has no prior out-of-state convictions that qualify as a prior impaired driving offense as defined in statute. If a person petitions the court for a second deferred prosecution while still under the jurisdiction of a court on a first deferred prosecution, the first deferred prosecution must be revoked before the court considers the person's petition for a second deferred prosecution.

In addition to existing requirements, in deferred prosecutions of DUI and PC offenses, a court-ordered diagnostic investigation and evaluation by a designated program or department must determine whether the petitioner is amenable to treatment as demonstrated by completion of residential treatment or completion of a minimum of 18 hours of intensive outpatient treatment. The minimum treatment requirement may be waived by the court for good cause.

A court-appointed probation department or other supervisor responsible for supervising a person participating in a deferred prosecution for DUI or PC must: at least once every three months request an abstract of the person's driving record; at least once every month make contact with the person until treatment is completed; review the person's criminal history at a minimum of every 90 days until the end of the deferral period; and report known violations of supervision or law and noncompliance with conditions of the deferred prosecution to the court within five business days or as soon as practicable.

#### Felony Offender Scores.

A deferred prosecution for a second or subsequent DUI or PC offense counts as one point on a defendant's offender score for felony traffic offenses.

#### **Amended Bill Compared to Engrossed Bill:**

The provisions of the underlying bill are retained, and provisions are added related to deferred prosecutions in gross misdemeanor impaired driving cases. Specifically, provisions are added providing that:

- generally, a person charged with impaired driving may only participate in a deferred prosecution once in his or her lifetime; however, a person who has previously participated in a deferred prosecution for his or her first charge of impaired driving may participate in a second deferred prosecution for his or her second impaired driving charge if certain criteria are met;
- a determination must be made of the petitioner's amenability to treatment as demonstrated by completion of residential treatment or at least 18 hours of intensive outpatient treatment, unless waived by the court for good cause;
- the requirement for the court to enter an order prohibiting the petitioner in a deferred prosecution from operating a motor vehicle without a valid driver's license and liability insurance applies specifically to deferred prosecutions for impaired driving;
- entities supervising persons participating in a deferred prosecution for impaired driving must request an abstract of the person's driving record at least every three months, make contact with the person at least monthly until treatment is completed, review the person's criminal history at least every 90 days until the end of the deferral period, and report known violations of supervision or law and noncompliance with conditions to the court within five days or as soon as practicable; and
- a deferred prosecution for a second or subsequent impaired driving offense counts as one point toward a defendant's offender score for felony traffic offenses.

In addition, terminology is changed to use the term "substance use disorder" in place of references to alcoholism or drug addiction, and other minor changes are made to conform underlying statutes to other parts of the code.

A current law provision is reinstated that requires court-ordered evaluations of persons who are being considered for a residential Drug Offender Sentencing Alternative to address



whether the person's substance use disorder is such that there is a probability that criminal behavior will occur in the future.

The effective date for all provisions of the bill is July 1, 2022, except those provisions related to deferred prosecutions of impaired driving offenses and offender scoring, which go into effect January 1, 2023.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Amended Bill:** This bill takes effect July 1, 2022, except for sections 6 and 11 through 17, relating to deferred prosecutions in impaired driving cases, which take effect January 1, 2023.

**Staff Summary of Public Testimony:**

(In support) This bill relates to the lookback period for felony impaired driving and also to treatment for impaired drivers. Expanding the lookback period for counting prior offenses toward a felony impaired driving offenses will get more impaired drivers off the roadways. Vehicular Homicide and Vehicular Assault are most often committed by repeat offenders. As the pandemic has caused court shutdowns, it is very difficult for a person to be convicted of four offenses within 10 years. People on average drive up to 80 times before being arrested for impaired driving, and most people who have an impaired driving conviction have only one; once someone is at the felony level there are chronic issues that need to be addressed. This change is needed to improve public safety. The state is under a tsunami of impaired driving and something different has to be done to balance the need for treatment and providing for public safety. Treatment works, as demonstrated by persons who have had success in therapeutic courts after multiple impaired driving offenses. Treatment has also been shown to be effective even when a person does not want to participate. The impaired driving DOSA created in the bill is different than a regular DOSA. People also need an incentive to take a deferred prosecution for their first offense, and it is okay to allow a second deferral as long as that deferral counts toward the person's offender score.

Being hit by a drunk driver should not be a consequence of driving on our roads. Impaired driving is totally preventable, and measures should be taken to reduce impaired driving and hold those accountable who make the selfish and voluntary decision to put themselves and others on the roadway in peril. These changes are necessary now more than ever. Traffic fatalities have increased to around 600 for last year, which is an increase of over a hundred, and half of those cases were due to drunk driving. Sixteen years of progress in reducing fatalities has been erased. Pedestrian deaths are up 7 percent. Drug use is rising and poly-drug use has become a significant problem. Another consideration is the widespread availability of alcohol. When people have the opportunity to drink any place they drive, it

affects public safety. Families have suffered tragic circumstances due to drunk driving accidents. In one incident, a 17-time repeat drunk driver hit a group of people participating in a parade, resulting in death and severe injuries. This measure is a step to stop repeat offenders, get people into treatment, and protect people using the roadways.

(Opposed) None.

(Other) By itself, this bill expands felony incarceration when treatment is a better option. However, this bill should be combined with the provisions of another current measure related to deferred prosecution, in order to enhance the theme of treatment in the bill. The provisions that should be added would allow for two deferred prosecutions for impaired driving when a person participates in a deferred prosecution for their first offense. This avoids the current incentive to not use the one authorized deferred prosecution and save it for a subsequent offense. In turn, this will help people avoid felony charges in the future. Then, if a person does end up with a felony, the DOSA provisions will encourage treatment over incarceration.

**Persons Testifying:** (In support) Senator Mike Padden, prime sponsor; Senator John Lovick; James McMahan, Washington Association of Sheriffs and Police Chiefs; Amy Freedheim, King County Prosecutor's Office; and Linda Thompson, Greater Spokane Substance Abuse Council and Washington Association for Substance Abuse and Violence Prevention.

(Other) Jason Lantz, Washington Association of Criminal Defense Lawyers and Washington Defender Association.

**Persons Signed In To Testify But Not Testifying:** None.