

FINAL BILL REPORT

ESHB 1493

C 306 L 24
Synopsis as Enacted

Brief Description: Concerning impaired driving.

Sponsors: House Committee on Community Safety, Justice, & Reentry (originally sponsored by Representative Goodman).

House Committee on Community Safety, Justice, & Reentry
Senate Committee on Law & Justice
Senate Committee on Transportation
Senate Committee on Ways & Means

Background:

Felony Offender Scores.

For most felony offenses, the Sentencing Reform Act (SRA) 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.

Impaired Driving Offenses.

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 the person drives while under the influence of intoxicating liquor, marijuana, or any drug, and is guilty of PC if the person has actual physical control of a vehicle while under the influence of intoxicating liquor, marijuana, or any drug.

A person who drives a motor vehicle while under the influence of intoxicating liquor or any drug and causes the death of another person is guilty of Vehicular Homicide-DUI, a felony.

A person who causes substantial bodily harm to another person as a result of driving under

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the influence is guilty of Vehicular Assault-DUI, also a felony.

Penalties for Driving Under the Influence and Actual Physical Control of a Vehicle While Under the Influence Offenses. A DUI or PC offense is punishable as a gross misdemeanor if the person has two or fewer prior impaired driving offenses within the previous seven years. 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.

Driver's License Suspension. Upon conviction of a DUI or PC offense, the Department of Licensing (DOL) must suspend or deny the privilege to drive for a period of time between 90 days and four years, depending on the person's blood alcohol content at the time of the offense and the number of prior offenses. The DOL must give credit on a day-for-day basis toward a period of suspension following conviction for any days of suspension already served. After suspension, the person must meet certain criteria and pay a license reissue fee to reinstate the license.

Serious Traffic Offense. A serious traffic offense includes nonfelony DUI, nonfelony PC, reckless driving, hit-and-run, or similar nonstate offenses that would be classified as a serious traffic offense. Serious traffic offenses are not included in a person's offender score if the person has not been convicted of another crime within five years. When scored, a serious traffic offense counts as one point for each conviction.

Negligent Driving in the first degree includes operating a motor vehicle negligently and in a manner that endangers any person or property. The person must exhibit the effects of consuming liquor or drugs. Negligent Driving is a misdemeanor. Reckless Endangerment is conduct that creates a substantial risk of death or serious physical injury to another person. It is a gross misdemeanor.

Implied Consent. By driving a vehicle in Washington, the driver has given implied consent to a breath test for alcohol content in the event of arrest for impaired driving.

Ignition Interlock Requirements.

A person may apply to the DOL for an ignition interlock driver's license when the person has been convicted of DUI or PC, Vehicular Homicide while under the influence, or Vehicular Assault while under the influence. This includes convictions for charges originally filed as the prior offenses, or equivalent non-Washington convictions.

A person may only drive a vehicle equipped with a functioning ignition interlock device in certain circumstances, including:

- when required by court order as a condition of pretrial release;
- while the person has an ignition interlock driver's license;
- when a person is participating in a deferred prosecution for specified impaired driving offense;
- after any applicable period of suspension, revocation, or denial of driving privileges due to a conviction for specified impaired driving offenses; and
- upon order of a court restricting a person who is charged or convicted with any offense involving the use, consumption, or possession of alcohol while operating a motor vehicle.

In impaired driving cases, the court must immediately notify the DOL when an ignition interlock restriction is imposed as a condition of release or after conviction and the offense involves alcohol. Upon receiving notification from the court, the DOL must make a notation on the driving record of the restricted person stating that the person may only operate a motor vehicle equipped with a functioning ignition interlock device. This notation is visible to law enforcement.

When the ignition interlock restriction follows a conviction for an impaired driving offense, the period of restriction lasts one year, five years, or 10 years, depending on the number of prior offenses, and begins after any period of driver's license suspension. A person who is unable to operate an ignition interlock device due to a physical disability may apply to toll the restriction period. The DOL will not remove a restriction associated with a deferred prosecution or conviction until it receives a declaration from the ignition interlock vendor certifying that the 180 days prior to removal have been free of certain incidents, such as failed start attempts or required maintenance.

An ignition interlock user must pay the cost of installing, removing, and leasing the ignition interlock device, unless the company waives the costs or the person is indigent. In addition, the applicant must pay a monthly fee for the DOL's Ignition Interlock Device Revolving Account. If the ignition interlock device is removed or stops functioning, the person's license will be suspended until the device is reinstalled. It is a gross misdemeanor for a person to drive a vehicle without a properly installed device.

Ignition interlock devices are not required on an employer's vehicles that are driven by the convicted person when driving the vehicles is a requirement of employment during working hours. The person must provide the DOL with a declaration from the employer stating that the person is required to operate the employer's vehicle. The DOL must include a notation on the person's driving record applying the employer exemption. The employer exemption is not available if the employer's vehicle is assigned exclusively to the convicted person and is used solely for commuting to and from employment.

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. For

example, a petitioner is not eligible for more than one deferred prosecution for gross misdemeanor DUI or PC charges.

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. An approved treatment provider, health center, or government agency must prepare a case history and risk assessment. The entity preparing the case history and risk assessment is based on the petitioner's underlying problem. For example, a petitioner seeking a deferred prosecution related to criminal mistreatment must be evaluated by, and have a plan developed and facilitated by the Department of Social and Health Services.

Requirements for Deferred Prosecution. The court may refer the petitioner for a diagnostic investigation and evaluation to determine whether:

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

The entity conducting the evaluation must make a written report to the court stating its findings and recommendations. If the entity supports treatment, it must also recommend a treatment plan containing the type, nature, length, schedule, and cost of treatment. If the court approves the treatment plan and the petitioner agrees to comply with its terms and conditions, the court must accept the petitioner's request for a deferred prosecution.

A deferred prosecution based on alcoholism must be for a two-year period and requires:

- total abstinence from alcohol and all other nonprescribed, mind-altering drugs;
- participation in an intensive inpatient or 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;
- weekly outpatient counseling for a minimum of six months following the intensive phase of treatment;
- monthly outpatient contact for the remainder of the two-year deferred prosecution period;
- reservation of the decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment to the treating facility and the participant's physician; and
- petitioner's signature and agreement to the terms and conditions of the 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 court will dismiss the charges pending against the petitioner three years after completion of the treatment plan, after proof is provided to the court that the petitioner successfully completed the two-year treatment plan. If a petitioner is convicted of a similar offense prior to successful completion of the deferred prosecution, the deferred prosecution will be rescinded and the court will enter judgment. If the petitioner violates the deferred prosecution requirements, the court may terminate the deferred prosecution.

Probationary License.

If a person is accepted for deferred prosecution, the court will enter that information on the person's court docket. After entry, the DOL will order the person to surrender any non-probationary license and must issue the person a probationary license. The person's license will be on probationary status for five years from the date of the violation.

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 by 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 person participating in supervision and treatment. A person convicted of a felony is eligible for a DOSA if certain criteria are met, including:

- the conviction is for an offense that is not a felony impaired driving offense, a violent offense, or a sex offense, and the violation does not involve a firearm or deadly weapon sentence enhancement;
- the person has no current or prior convictions for a sex offense at any time, and no violent offense within the ten years before conviction of the current offense;
- if the offense is a violation of the Uniform Controlled Substances Act, a drug violation, or it involved only a small quantity of the particular substance as determined by the judge;
- the person is not subject to a federal immigration deportation detainer or order;
- the end of the standard sentence range for the current offense is greater than one year;

and

- the person has not received a DOSA more than once in the prior 10 years before the current offense.

When determining eligibility, the court may order the Department of Corrections (DOC) to complete either a risk assessment report or a substance abuse disorder, or both. If the court determines 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 abuse 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 the person has violated the conditions or has not satisfactorily progressed 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.

Oral Fluid Roadside Testing.

Oral fluid roadside screening devices test the saliva of an individual for the presence of specific drugs. A positive result indicates drug presence above a certain cut-off level and relatively recent drug use. A positive result obtained through such a screening device is preliminary and requires further testing to establish impairment. Such devices can aid law enforcement to develop probable cause and decide when to pursue laboratory-based confirmation testing or call a drug recognition expert (DRE), which is a law enforcement officer trained to recognize impairment in drivers under the influence of drugs other than, or in addition to, alcohol. The DRE program in Washington is coordinated by the Washington State Patrol.

Oral fluid confirmation testing may be conducted in a laboratory to obtain more accurate and detailed information, such as quantifiable drug levels, that can be used in an evidentiary capacity. Approximately two dozen countries and over a dozen states have implemented or are prepared to implement oral fluid roadside testing. Washington neither statutorily prohibits nor authorizes the use of oral fluid roadside testing in DUI enforcement.

Summary:

A series of changes are made to statutory provisions related to impaired driving.

Impaired Driving. The 10-year look back period for a person with three or more prior DUI or PC offenses is changed to a 15-year look-back, increasing the penalty from a gross misdemeanor to a felony offense for any person who has three or more prior DUI or PC offenses within that time.

Serious Traffic Offense.

The definition of a serious traffic offense for the purpose of a personal driver's license is amended to include first degree negligent driving and reckless endangerment in the situations where the conviction is the result of a DUI or PC charge, or a Vehicular Homicide or Vehicular Assault charge while under the influence.

Ignition Interlock Licensing and Restrictions.

License Applications and Suspensions. After the court accepts a deferred prosecution, the DOL is required to notify the person that an application for a probationary license is required within 45 days. A person whose license has been suspended, revoked, or denied for violation of a mandatory condition of probation may apply to the DOL for an ignition interlock driver's license.

If a person violates certain reporting requirements, the court has discretion not to impose a license suspension if the person proves the violation was cured within 30 days. These violations include failure to furnish proof of progress in a required alcoholism or drug treatment program, furnish proof of financial responsibility, respond to a traffic infraction notice or hearing, reinstate a suspended or revoked license, or comply with a child support order.

Waiver and Tolling. When a court grants a deferred prosecution, the time period for the ignition interlock device is calculated based on entry of the deferred prosecution and revocation as a single restriction. Drivers who received restriction start dates before June 9, 2016, may apply to the DOL to waive the restriction if they are unable to operate an ignition interlock device due to a physical disability.

Self-Employed Exemption. A person charged with failing to comply with the ignition interlock device requirement may assert an affirmative defense that the person is self-employed and qualifies for the employer exemption. The employer exemption does not apply unless the vehicle is used exclusively for the person's employment.

Eligibility for Deferred Prosecution.

A person who participates in a deferred prosecution for a first-time gross misdemeanor DUI or PC charge may petition the court for a second deferred prosecution for a subsequent charge. A second deferred prosecution is only available for the person's next violation

when the person has no other prior convictions defined as prior offenses. A first deferred prosecution is not considered a prior offense for the purpose of granting a second deferred prosecution. A person who did not participate in a deferred prosecution for a first-time gross misdemeanor DUI or PC charge is only eligible to petition the court for one deferred prosecution.

A person may petition the court for a second deferred prosecution while still under the jurisdiction of the court for a first deferred prosecution; however, the court must revoke the first deferred prosecution. A person may not participate in two deferred prosecutions at the same time unless the separate offenses were committed within seven days of each other and the person petitions to consolidate the offenses into a single deferred prosecution.

A petition for deferred prosecution must include a case history and risk assessment. The entity that prepares the case history and risk assessment must be based on the petitioner's alleged underlying problem. A petitioner's alleged substance use disorder or mental health co-occurring disorder requires assessment by a state-approved behavioral health agency. An alleged domestic violence behavior problem requires a state-certified domestic violence treatment provider. Alleged criminal mistreatment crimes require the Department of Children, Youth, and Families.

Proof that a petitioner has completed a domestic violence treatment plan will not result in the dismissal of charges against the petitioner until five years has passed following the entry of the order of deferred prosecution.

Requirements for Deferred Prosecution.

A program or department performing a diagnostic investigation and evaluation must determine whether the petitioner is either:

- amenable to treatment, demonstrated by completion of residential treatment or treatment based on the nature of the underlying problem; or
- willing to cooperate with child welfare services, for criminal mistreatment crimes.

A deferred prosecution based on either a substance use disorder or a mental health co-occurring disorder must be for a two-year period and impose the following requirements:

- total abstinence from alcohol and all other nonprescribed, mind-altering drugs;
- periodic, random urinalysis or breath analysis;
- treatment within or approved by a state-approved behavioral health agency;
- weekly outpatient counseling for a minimum of six months following the intensive phase of treatment;
- monthly outpatient contact for the remainder of the two-year deferred prosecution period;
- decision whether to include the use of prescribed drugs, including disulfiram, as a condition of treatment, is made by the treating facility and the participant's physician; and
- petitioner's agreement to the program.

The petitioner's progress under the treatment plan developed by the agency and approved by the court must be provided to the court monthly.

A deferred prosecution based on substance use disorder must also impose the following requirements:

- completion of an intensive outpatient or residential inpatient treatment program, depending on the severity of the diagnosis; and
- participation in at least two meetings per week of a self-help recovery support group for the duration of the treatment program.

A deferred prosecution based on a mental health co-occurring disorder must also impose the completion of:

- either the substance use disorder requirements or an outpatient program; and
- individual or group mental health services.

A deferred prosecution based on a mental health disorder where the conduct did not involve and was not caused by alcohol, drugs, or substance use, must include treatment recommended by a mental health provider.

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:

- request an abstract of the petitioner's driving record at least once every three months, if the petitioner's charge relates to operation of a motor vehicle;
- contact the petitioner at least once a month until treatment is completed;
- review the petitioner's criminal history at least once every three months until the end of the deferral period; and
- report violations or noncompliance 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, or an equivalent local ordinance, counts as one point on a defendant's offender score.

Impaired Driving Drug Offender Sentencing Alternative.

Eligibility. A person is eligible for the impaired driving DOSA if the person is convicted of a 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 defendant, or the state if the midpoint of the standard sentence range is 26 months or less. If the defendant has a higher midpoint, a joint agreement of the state and the defendant is required. If the sentencing court determines the person is eligible for an impaired driving DOSA, and the alternative sentence is appropriate, the court must waive imposition of the standard sentence and impose a prison-based DOSA if the low end

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

To assist the court in making its eligibility determination, 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;
- effective treatment for the person's substance use disorder is available from a provider licensed or certified by the Department of Health (DOH); and
- 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 no more than 30 days in a county facility, to facilitate direct transfer to a residential substance use disorder treatment facility;
- treatment in a licensed or 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 DOH—when establishing rules, the DOH must consider criteria established by the American Society of Addiction Medicine criteria;
- 24 months of partial confinement to consist of 12 months 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. A 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 treatment 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 the 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 treatment progress or determine whether there have been any violations of the conditions of sentence. If the person violates conditions or is failing to make satisfactory treatment progress, 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 sentencing range of the person's 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. 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 termination.

Oral Fluid Roadside Testing.

A law enforcement agency utilizing oral fluid roadside information to enforce DUI laws must ensure certain requirements are met, including that:

- the oral fluid test instruments used are valid and reliable;
- any officer who administers an oral fluid test is properly trained to do so;
- prior to administering the test, the administering officer advises the subject that the test is voluntary, test results may not be used against the person in court, and submission to the test is not an alternative to any evidentiary breath or blood test; and
- policies are established to protect personally identifying information from unnecessary and improper dissemination.

A law enforcement agency administering an oral fluid roadside test is strictly liable for any failure to destroy biological samples from such tests within 24 hours or for the unlawful entry of DNA samples or results from such tests into a database.

Miscellaneous.

Changes are made to clarify the impaired driving DOSA is separate from the traditional DOSA that exists in statute, and references to the impaired driving DOSA are added to relevant portions of the SRA. Unenforced provisions dealing with the DOL's revocation process for individuals failing to surrender their driver's license are removed.

Votes on Final Passage:

House	97	0	
Senate	48	0	(Senate amended)
			(House refuses to concur in Senate amendments. Asks Senate to recede from amendments.)
Senate	48	0	(Senate receded)
House	97	0	
Senate	49	0	(Senate amended)
House	69	27	(House concurred)

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