Approved: 2-16-07
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on January 17, 2007 in Room 313-S of the Capitol.

All members were present except:
Kevin Yoder- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Athena Andaya, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Duston Slinkard, Office of Revisor of Statutes
Cindy O'Neal, Committee Assistant

Conferees appearing before the committee:
Willa DeCastro, Americans for Adoptions
Mary Prewitt, The Humane Society of the United States
Representative Pat Colloton
Kathy Olson, Kansas Bankers Association
Karen Wittman, Assistant District Attorney for Shawnee County
Major Mark Goodloe, Kansas Highway Patrol
Pete Bodyk, Bureau Chief of Traffic Safety, Kansas Department of Transportation
Richard Howard, Quality Improvement of State Labs, Kansas Department of Health & Environment
James Keller, Kansas Department of Revenue
Terri Roberts, Kansas State Nurses Association
Sheriff Randy Rogers, Kansas Sheriff's Association
Major Jim Woods, Sedgwick County Sheriff's Department
Doug Wells, Kansas Association of Defense Lawyers

Willa DeCastro, Americans for Adoptions, appeared before the committee with a bill request relating to the advertising for the adoption of children. Representative Watkins made the motion to have the request introduced as a committee bill. Representative Kinzer seconded the motion. The motion carried.

Mary Prewitt, The Humane Society of the United States, requested a bill that would apply all the provisions of the dog fighting statute to any other type of animal fights. Representative Owens made the motion to have the request introduced as a committee bill. Representative Colloton seconded the motion. The motion carried.

Representative Pat Colloton requested two bills:
1. providing for a grant program for counties to receive more funding to provide more services for community corrections
2. requiring treatment, job training, and counseling before an inmate is released from prison

Representative Colloton made the motion to have her requests introduced as committee bills. Representative Owens seconded the motion. The motion carried.

Kathy Olsen, Kansas Bankers Association, appeared before the committee with a bill request to assure that a lender's security interest in vehicles and manufactured homes remains perfected when challenged in court by a third party. Representative Kinzer made the motion to have the request introduced as a committee bill. Representative Owens seconded the motion. The motion carried.

Chairman O'Neal received a bill request from Representative Anthony Brown that would restrict wildlife & park permits from those who owe child support. Representative Kinzer made the motion to have the request introduced as a committee bill. Representative Owens seconded the motion. The motion carried.

The hearing on **HB 2012 - increased penalties for certain DUI violations**, were opened.

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on January 17, 2007 in Room 313-S of the Capitol.

Karen Wittman, Assistant District Attorney for Shawnee County, appeared before the committee in support of the proposed bill. She was a member of the subcommittee which made recommendations to the Special Committee on Judiciary during the interim.

Ms. Wittman suggested four changes to the proposed bill:

- provide a mechanism to pay KDHE for the expected challenges to the equipment used for DUI testing by law enforcement
- provide a mechansim to pay Kansas Department of Revenue for an increase in hearings that will be requested
- provided a mechanism to reimburse county jails for the increase in housing DUI offenders
- on page 5, line 1 strike the language "to another person" and replace with "to a person"

Chairman O'Neal stated that the first three proposal were issues that the budget committee would need to consider and pass legislation.

Ms Wittman spoke about the admission in court of assessments done by law enforcement officers certified as drug recognition evaluators (DREs). Kansas pays for officers to become DREs. Officers must go through extensive training. However, some courts are reluctant to allow testimony from DREs. The Kansas Court of Appeals, has recently, recognized the information obtained by an assessment by the DREs, and have found it useful in DUI cases. (Attachment 1)

Major Mark Goodloe, Kansas Highway Patrol, supported the enhanced penalties in the bill but was concerned there were no funding mechanisms to support counties which have to house the DUI inmates and funding for Kansas Department of Health & Environment & the Kansas Department of Revenue for the extra work they would be required to provide. (Attachment 2)

Pete Bodyk, Bureau Chief of Traffic Safety, Kansas Department of Transportation, appeared as a proponent of the bill. He informed the members that studies show an individual with a BAC of .15 or higher are at least 20% more likely to be involved in a fatality accident. The most frequently BAC recorded by those involved in fatal crashes is .18. (Attachment 3)

Mr. Bodyk proceeded to explain that under the current federal transportation funding authorization, each state needs to meet five criteria out of eight to qualify for federal safety monies. Those eight criteria being:

1. STEP = using DUI checkpoints and extra patrol to stop individuals from driving drunk
2. Having prosecution and judicial outreach programs
3. Increasing the number of BAC test given in a year. Kansas is currently at 40%, which is low.
4. Provide DUI courts and alcohol rehabilitation
5. Setting .15 as BAC level
6. Restricting anyone under the age of 21 from retaining alcohol
7. Administrative license and registration suspension for 90 days on the 1st offense
8. Earmark a portion of fines to go back too communities for DUI programs

With the passage of the proposed bill, Kansas would meet four of the requirements (1, 3, 4, & 6).

Richard Howard, Quality Improvement of State Labs, Kansas Department of Health & Environment, stated that they provide support for the breath alcohol testing program and expect that the bill will require their staff to attend more court hearings and would have a direct impact on the amount of money needed to be allocated to the department. (Attachment 4)

James Keller, Kansas Department of Revenue, does not expect any difficulty in administering the requirements of the proposed bill. However, they anticipate an increase in administrative hearings being held via telephone and need additional funding to offset the expense. (Attachment 5)

Terri Roberts, Kansas State Nurses Association, provided information on the level of consumption it takes to reach a BAC of .15. Additional information was offered about other states with different sanctions for persons with a higher BAC than Kansas. (Attachment 6)

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on January 17, 2007 in Room 313-S of the Capitol.

Sheriff Randy Rogers, Kansas Sheriff's Association, supported the proposed DUI enhancements and believed that there would actually be a cost savings to the counties due to administrative hearings being held by telephone, but was concerned with possible overcrowding of county jails. (Attachment 7)

Major Jim Woods, Sedgwick County Sheriff's Department, expressed his concern with the impact on bed space, medical expenses, and the possible requirement to have county jails provide rehabilitation services to inmates (Attachment 8)

Dan Hermes, lobbyist, stated that he was working on an amendment for the funding issue, such has having the increased fines being dedicated to assist in the cost of housing inmates in county jails.

Doug Wells, Kansas Association of Defense Lawyers, appeared as an opponent of the bill. He said municipalities and counties would be burdened by the increase costs of prosecuting and incarcerating people who are convicted. The increased penalties would cause hardships on those who are the breadwinners of the family and suggested that the court order mandatory ignition interlocks be placed on vehicles. (Attachment 9)

The hearing on **HB 2012** was closed.

The committee meeting adjourned at 5:15 p.m. The next meeting was scheduled for January 18, 2007.

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January 17, 2007

TESTIMONY-HB 2012
Amending K.S.A. 8-1567; 8-1005; 8-1020; 8-1014 and K.S.A. 21-4502
DUI

Good Afternoon, Mr. Chairman and Members of the Judiciary Committee.

My name is Karen Wittman. I am a Senior Assistant District Attorney in Shawnee County under District Attorney Robert Hecht. I am the attorney in charge of all traffic related offenses.

HB 2012 is a necessary change to the current law.

A number of agencies participated in the crafting of the language of these amendments:

Kansas Coordinators of Alcohol Safety Action Projects
Kansas Drunk Driving Prevention Office
Kansas Department of Health and Environment
Kansas Department of Transportation
Kansas State Nurses Association
The Office of Revisor of Statutes
Shawnee County District Attorney's Office
Kansas Highway Patrol
Kansas Legislature
Kansas Sheriff's Association
Kansas Department of Revenue
MADD

There are a few minor modifications to the bill which were a product of our meetings but were inadvertently left out of the bill:

1. A mechanism to pay for the expected challenges to the equipment used for DUI testing by law enforcement for KDHE.

2. A mechanism to pay KDOR for an increase in hearings requested.

3. A mechanism to reimburse county jails for the increase in housing of DUI offenders.

4. On Page 5, line 1 of HB 2012 strike the language "to another person" from K.S.A. 8-1001(k) and replace with "to a person".

House Judiciary
Date 1-17-07
Attachment # 1

I wish to highlight one portion of the bill concerning the admission in court of assessments done by law officers certified as a drug recognition evaluator, amending K.S.A. 8-1005. You will find this on Page 6 Lines 3-7.

1. Kansas pays for officers to become certified as DREs. Officers must go through extensive training and are tested before they can be designated DREs. However for whatever reason some courts are reluctant to allow for this testimony. Recently the Kansas Court of Appeals recognized the information obtained by an assessment by a DRE and found it to be useful in a DUI case. Please see State v. McHenry 136 P.3d 964 unpublished (June 30, 2006), which I have attached.

Please give serious consideration to these changes.

Thank you again for allowing me to speak.

136 P.3d 964, 2006 WL 1816305 (Kan.App.)
(Cite as: 136 P.3d 964)

H

Briefs and Other Related Documents

State v. McHenryKan.App.,2006.(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Yan R. MCHENRY, Appellant.

No. 93,872.

June 30, 2006.

Background: Defendant was convicted by a jury in the District Court, Douglas County, Robert W. Fairchild, J., of vehicular homicide. Defendant appealed.

Holdings: The Court of Appeals held that

(1) evidence was sufficient to support conviction for vehicular homicide, and

(2) testimony from police officer did not constitute scientific evidence, and thus the evidence was not required to be pass the *Frye* standard for admissibility.

Affirmed.

West Headnotes

[1] **Automobiles 48A ⚿355(13)**

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(13) k. Homicide. Most Cited Cases

Evidence was sufficient to support conviction for vehicular homicide; defendant was driving a heavy commercial vehicle at a speed of at least 60 miles per hour, he indicated that he was eight to nine car lengths behind the victim's car but he was unable to respond quickly enough to avoid a collision when victim indicated that he was turning, there was no evidence that defendant braked before the collision, and defendant admitted and laboratory tests confirmed that defendant had cocaine in his system at the time of the accident. K.S.A. 21-3405.

[2] **Criminal Law 110 ⚿1043(3)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1043 Scope and Effect of Objection
110k1043(3) k. Adding to or Changing Grounds of Objection. Most Cited Cases

Defendant failed to preserve for appellate review his claim that the trial court abused its discretion when it allowed police trooper to testify as to whether defendant was incapable of driving safely because his testimony invaded the province of the jury, in prosecution for vehicular homicide where defendant failed to object to the admission of the testimony on those grounds at trial. Rules of Evid., K.S.A. 60-404.

[3] **Automobiles 48A ⚿411**

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In General. Most Cited Cases

Criminal Law 110 ⚿457

110 Criminal Law
110XVII Evidence

110XVII(R) Opinion Evidence
110k449 Witnesses in General
110k457 k. Intoxication. Most Cited Cases
Testimony from police officer, who was a certified drug recognition examiner (DRE), concerning his observations of defendant at accident scene and DRE protocols employed by officer at the scene did not constitute scientific evidence, and thus the evidence was not required to pass the *Frye* standard for admissibility, in prosecution for vehicular homicide; the DRE protocol involved tests, such as field sobriety tests, blood pressure, temperature, and pulse rate, that were within the common experience and understanding of an average person, objective observations were not considered "scientific," and the State offered no testimony concerning the horizontal gaze nystagmus test (HGN). K.S.A. 60-456(b).

Appeal from Douglas District Court; Robert W. Fairchild, judge. Opinion filed June 30, 2006. Affirmed.

Jessica R. Kunen, of Lawrence, for appellant.
Brenda J. Clary, assistant district attorney, Charles E. Branson, district attorney, and Phill Kline, attorney general, for appellee.

Before MARQUARDT, P.J., LARSON, S.J., and WAHL, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Yan R. McHenry appeals his conviction of vehicular homicide. On April 13, 2004, at approximately 11:30 a.m., McHenry was involved in an automobile accident that killed Shawn Trager. McHenry was driving a semi-tractor trailer that collided with a Chevrolet Cavalier driven by Andrew Potts. Shawn Trager and his brother, Aaron, were passengers in that car.

Potts and the Trager brothers were on their way back from a job interview in Olathe. McHenry was following the Cavalier on Highway 56. As the Cavalier prepared to turn left off the highway onto a gravel road to Baldwin City, the truck rear ended the Cavalier, running it over and sending it into oncoming traffic where it hit a minivan.

Trooper Wayde Shea of the Kansas Highway Patrol listed the factors contributing to the accident on McHenry's part to be excessive speed, following too closely, and inattentive driving. He did not list driving under the influence as a factor.

Shea and Trooper Christopher Turner, also of the Kansas Highway Patrol, administered a variety of field sobriety tests on McHenry. Turner, who is a certified drug recognition examiner (DRE) officer, administered a DRE protocol to evaluate whether McHenry was under the influence. DRE protocol is a series of procedures used to help officers identify whether a suspect is under the influence of drugs other than alcohol. It involves an interview with the suspect, a variety of field sobriety tests, and the taking of vital statistics.

Although a preliminary breath test did not indicate a presence of alcohol in McHenry's system, Turner suspected McHenry was impaired and confronted McHenry with his suspicions. McHenry admitted to taking cocaine the day before the accident.

McHenry was taken into custody. He was initially charged with involuntary manslaughter, aggravated battery, and driving under the influence. McHenry was tried on one count of reckless involuntary manslaughter, and the lesser crime of vehicular homicide, three counts of reckless aggravated battery, and one count of operating a motor vehicle while under the influence of drugs.

A jury acquitted McHenry on the charges of reckless involuntary manslaughter, reckless aggravated battery, and driving under the influence. The jury convicted McHenry of the lesser crime of vehicular homicide.

On November 22, 2004, McHenry moved for a judgment of acquittal. He argued if the allegations of involuntary manslaughter, driving under the influence, and reckless aggravated battery were taken away by the jury's not guilty verdicts, there was insufficient evidence to support the vehicular homicide conviction. McHenry argued excessive

speed, inattentive driving, and following too closely did not support a finding that he had deviated from the standard of care which a reasonable person would have employed at the time of the accident.

McHenry was sentenced to 12 months in the county jail. McHenry appealed.

[1] McHenry argues there was insufficient evidence to support his conviction of vehicular homicide. He contends there was no evidence to support anything more than simple negligence on his part in relation to the accident that killed Shawn Trager.
*2 " 'When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.' [Citation omitted.]" *State v. Calvin,* 279 Kan. 193, 198, 105 P.3d 710 (2005).

K.S.A. 21-3405 defines vehicular homicide as follows:
"Vehicular homicide is the unintentional killing of a human being committed by the operation of an automobile ... in a manner which creates an unreasonable risk of injury to the person or property of another and which constitutes *a material deviation from the standard of care which a reasonable person would observe under the same circumstances."* (Emphasis added.)

The Kansas Supreme Court has determined that the material deviation element for a conviction of vehicular homicide under K.S.A. 21-3405 "is conduct amounting to more than simple or ordinary negligence [but] not amounting to gross and wanton negligence." *State v. Krovvidi,* 274 Kan. 1059, 1069, 58 P.3d 687 (2002). This conduct is judged on a case-by-case basis based upon the totality of the circumstances. 274 Kan. at 1069, 58 P.3d 687.

In *Krovvidi* the defendant was convicted of vehicular homicide after running a red light and causing an accident that resulted in the death of another driver. The Kansas Supreme Court ordered his conviction for vehicular homicide be reversed after it determined there were no aggravating factors causing the defendant's conduct to amount to a material deviation. 274 Kan. at 1075, 58 P.3d 687 . The court noted that the defendant "had not been drinking and was not under the influence of any drug, both factors which may provide the additional evidence to establish a material deviation." 274 Kan. at 1075, 58 P.3d 687. The court also noted there was no indication the defendant was speeding and had entered the intersection thinking the light was green. McHenry would compare his case to *Krovvidi,* arguing the State did not present evidence that his conduct was anything more than simple negligence.

At trial, the evidence indicated that Potts was driving the white car on Highway 56 on his way back from Olathe. When he prepared to turn onto a gravel road leading to Baldwin City, the car was struck by a blue semi-tractor trailer driven by McHenry. The tractor trailer ran over the white car, crumpling its back end. The truck then dragged the white car a short distance before it broke free and struck an oncoming minivan driven by Ronald Nelson. Potts and the front seat passenger, Aaron Trager, were both injured. The back seat passenger, Shawn Trager, was killed.

McHenry told an officer that he was following about eight to nine car lengths behind the white car when it slowed and came to a complete stop in the highway. He told the officer he "made an evasive maneuver to keep from colliding with the vehicle and locked up his brakes, but hit the vehicle in the rear end."

*3 Robert Beaman had been following the tractor trailer on Highway 56. He saw the tractor trailer brake suddenly a split second before it collided with something in front of it. He then saw a maroon colored van out of control and headed toward him from the opposite direction. The van eventually stopped in the ditch.

Ronald Nelson testified that he was driving a minivan towards Olathe on Highway 56 when he saw a white car headed in the opposite direction

stopped or slowing down at an intersection preparing to make a turn. He then saw a semi-tractor trailer behind the white car swerve to the right. The next thing he knew, he felt the impact of being hit and started spinning until eventually he ended up in the ditch.

An accident reconstructionist with the Kansas Highway Patrol testified that the witnesses' accounts of the accident were consistent with the physical evidence at the scene. Although he could not determine the speed McHenry was driving at the time of the accident because of the vast difference in the vehicles' weights, he did indicate the truck hit the car from behind, running over it. There was no indication of preimpact braking from the truck before the collision. After colliding, the truck dragged the car for a short distance until the car broke free and hit the maroon van. He also indicated that the car may have collided with the truck a second time.

Trooper Shea arrived at the scene approximately 30 minutes after the accident. Shea reported that although McHenry seemed receptive and cooperative, he also seemed tired and slow in some things. Shea had spoken to Trooper Turner, who had instructed Shea to begin administering the standardized field sobriety tests on McHenry. Shea conducted several sobriety tests and videotaped them. Shea noted that McHenry did have some difficulty with the field sobriety tests. Shea decided that Turner would also need to interview McHenry because Turner had more experience in determining whether a driver was under the influence of something other than alcohol.

In his report, Shea listed the contributing factors to the accident on McHenry's part as excessive speed, following too closely, and inattention. Beaman, who was using his cruise control and had been following McHenry, testified that McHenry was maintaining a constant speed of 60 mph.

Turner arrived at the accident scene at 12:46 p.m. When he first encountered McHenry, he noticed a few things about McHenry that made the trooper suspect that McHenry was impaired. Turner noted that McHenry's eyes were glazed over and bloodshot, he appeared dazed, and his speech was slurred and thick tongued. Turner took McHenry into custody at 1:25 p.m. He asked McHenry some more questions and conducted further field sobriety tests. Turner also measured and recorded the dilation of McHenry's pupils, his blood pressure, and pulse rate.

After this, he confronted McHenry saying, "I think you're under the influence." Before he could finish, McHenry said, "Man, you got me." Turner responded, "I'm sorry, I don't know what you mean." McHenry said, "Cocaine, man, cocaine." McHenry told Turner he had taken the drugs the day before the accident.

*4 McHenry was transported to the hospital to have his blood and urine tested. During the approximately half-hour drive to the hospital, McHenry asked for a hamburger and fell asleep.

Laboratory tests found cocaine and methylecgonine and benzoylecgonine, metabolites of cocaine, in McHenry's blood and urine. Based on the amount of cocaine and metabolites found in McHenry's blood and urine, a forensic toxicologist explained that McHenry ingested the cocaine over 6 hours but less than 12 hours from the time his samples were taken. This meant McHenry would have taken the drug between 4-10 a.m. the day of the accident.

Regardless of the fact that the jury found McHenry not guilty of the more serious offenses involving his cocaine use, there is sufficient evidence to support his conviction for vehicular homicide. See *State v. Beach*, 275 Kan. 603, 615-22, 67 P.3d 121 (2003) (citing *State v. Powell*, 469 U.S. 57, 83 L.Ed.2d 461, 105 S.Ct. 471 [1984]) (an inconsistent jury verdict based on a conviction of a compound offense and acquittal of the predicate offense does not provide grounds for a defendant to attack that conviction). Under the totality of the circumstances, McHenry's driving was a material deviation from the standard of care which a reasonable person would observe under the same circumstances.

McHenry was driving a very heavy commercial vehicle at a speed of at least 60 miles per hour. He indicated that he was about eight to nine car lengths

behind the Cavalier and had seen it stop in order to turn left. Nevertheless, he was unable to respond quickly enough to avoid a collision. The evidence indicated McHenry did not apply his brakes until a split second before the collision. McHenry admitted and laboratory tests confirmed that he had cocaine in his system at the time of the accident.

[2] McHenry argues the trial court abused its discretion when it allowed Trooper Turner to testify as to whether McHenry was incapable of driving safely because his testimony "was not within the scope of his special knowledge, skill and training."

Further, McHenry contends the trial court violated K.S.A. 60-456(b)(2), arguing:
"Officer Turner's testimony, clocked [*sic*] in a scientific veneer, invaded the province of the jury. Even though the jury acquitted Mr. McHenry of involuntary manslaughter, the officer's testimony that cocaine slowed down his system, and the state's reliance on it, could easily have contributed to the jury's decision that he did not use care when operating the truck and convicting him of vehicular homicide."

McHenry failed to object to any of Turner's testimony on the ground that it invaded the province of the jury by weighing the evidence on the ultimate issue in the case. McHenry objected to Turner's testimony, contending that there had not been enough foundation laid to comply with *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923). McHenry then renewed this objection throughout Turner's testimony.

*5 Under K.S.A. 60-404, the erroneous admission of evidence may not be raised on appeal unless the record shows there was a timely and specific objection to the evidence. The Kansas Supreme Court has refused to review issues related to the erroneous admission of evidence when it has found there was not a timely, specific objection made at trial. *State v. Graham,* 272 Kan. 2, 6, 30 P.3d 310 (2001) (no error with the admission of testimony regarding reports when the appellant failed to object at trial on the grounds of lack of confrontation). In *Graham,* the court explained if an objection is made at trial, the trial court is required to make specific findings providing an appellate court with a basis to review the trial court's reasoning. Without such an objection, there is no basis for review and an appellate court must assume the trial court acted within its discretion. 272 Kan. at 6, 30 P.3d 310. McHenry has not preserved this particular objection for review in accordance with K.S.A. 60-404, and it is not properly before this court for review.

[3] McHenry argues the trial court erred in admitting Turner's DRE testimony because the State failed to lay a sufficient foundation establishing the reliability of the DRE protocol. McHenry contends the DRE protocol constitutes a scientific test and fails to meet the *Frye* standard as being generally accepted by the relevant scientific community. Whether a trial court has correctly applied the *Frye* standard in determining the admissibility of expert testimony is a question of law subject to de novo review. *State v. Graham,* 275 Kan. 176, 180, 61 P.3d 662 (2003).
"In Kansas, the admissibility of expert testimony is subject to K.S.A. 60-456(b). The *Frye* test, however, acts as a qualification to the 60-456(b) statutory standard. *Frye* is applied in circumstances where a new or experimental scientific technique is employed by an expert witness. [Citation omitted.]
....
"[Kansas] adopted the *Frye* test in *State v. Lowry,* 163 Kan. 622, 629, 185 P.2d 147 (1947). *Frye* requires that before expert scientific opinion may be received into evidence, the basis of the opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. If a new scientific technique's validity has not been generally accepted or is only regarded as an experimental technique, then expert testimony based upon the technique should not be admitted. [Citation omitted.] In *State v. Washington,* 229 Kan. 47, 54, 622 P.2d 986 (1981), we identified the purpose of the *Frye* test:
" " 'Frye was deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles.... Several reasons founded in logic and common sense support a posture of judicial caution in this area. Lay jurors tend to give considerable weight to ' scientific' evidence when presented by 'experts'

with impressive credentials. We have acknowledged the existence of a '... misleading aura of certainty which often envelopes a new scientific process, obscuring its currently experimental nature.' " [Citation omitted.]" *Kuhn v. Sandoz Pharmaceuticals Corp.*, 270 Kan. 443, 454-455, 14 P.3d 1170 (2000).

*6 Turner explained that in order for him to become DRE certified, he attended a 72-hour class that was certified by the International Association of Chiefs of Police. The class was designed to instruct law enforcement officers on the effects seven categories of drugs have on the human body and how to recognize those effects. Participants were also taught how to administer the DRE protocol.

The DRE protocol is a 12-step procedure administered to help law enforcement officers identify intoxicants other than alcohol. These steps include (1) a breath alcohol test, (2) an interview with the arresting officer, (3) a preliminary examination requiring an officer to take a brief medical history and examine for illnesses or injuries, (4) an eye examination, (5) field sobriety tests including the Romberg balance test, walk and turn test, one-leg stand, the finger-to-nose test, and the horizontal gaze nystagmus (HGN) test, (6) vital signs such as blood pressure, temperature, and pulse rate, (7) dark room examination where the pupil size is measured and oral and nasal cavities are examined for signs of ingestion, (8) muscle tone is examined, (9) injection site checks, (10) post-*Miranda* interrogation where suspects are questioned about past or existing medical conditions, (11) DRE opinion where the examiner will conclude whether suspect is under the influence of a certain category of drugs, and finally (12) toxicological examination to confirm the presence of any drugs in the suspect's system. *Williams v. State*, 710 So.2d 24, 26-27 n. 4 (Fla.Dist.App.Dist.1998).

Turner testified that he administered the DRE protocol on McHenry after the accident. More specifically, Turner testified that after he asked McHenry a series of questions associated with DRE protocol, he administered the Romberg balance test, the walk and turn test, the one-leg stand, and the finger-to-nose test. Turner also testified that during these tests, he was able to pick up cues from McHenry that indicated he was under the influence. He also testified to the results of his clinical evaluation of McHenry. The State did not offer any testimony regarding the HGN test. During this portion of Turner's testimony, McHenry continuously objected on the grounds that Turner's testimony failed to comply with the *Frye* standard.

The trial court decided to limit Turner's testimony and allowed him to testify about the kind of symptoms different drugs elicit in a human body and what symptoms he saw McHenry exhibit. Turner was not allowed to testify that based on his DRE knowledge and training, he believed that McHenry was under the influence of a specific drug. The trial court also noted that there was better evidence regarding what drug McHenry had ingested.

The trial court commented that given his limitations on Turner's testimony, it believed Turner's testimony would be "much less scientific." This comment would seem to suggest that the trial court found the *Frye* standard to be inapplicable under these circumstances. The trial court appears to have relied on *State v. Sampson*, 167 Or.App. 489, 6 P.3d 543 (2000), and *State v. Klawitter*, 518 N.W.2d 577 (Minn.1994), in making its ruling on the DRE issue.

*7 Although there are no Kansas cases directly addressing this issue, courts in other jurisdictions have taken the same approach the trial court did in this instance. *Williams*, 710 So.2d at 28-29; *Klawitter*, 518 N.W.2d at 584 (protocol itself is not scientific but instead is a list of things a prudent, trained, and experienced officer should consider before formulating or expressing an opinion whether a suspect is under the influence of a controlled substance); see also *State v. Baity*, 140 Wash.2d 1, 18, 991 P.2d 1151 (2000) ("DRE evidence is admissible under *Frye* because it is generally accepted in the relevant scientific communities. A properly qualified expert may use the 12-step protocol."); *Sampson*, 167 Or.App. at 496, 511, 6 P.3d 543 (evidence of procedure and

results admissible as scientific evidence so long as there is a showing that the officer was qualified); *cf. State v. Aman,* 194 Or.App. 463, 472-73, 95 P.3d 244 (2004) (DRE evidence where a toxicology report is not included as part of the protocol is too subjective, not generally accepted by scientific community, and ultimately inadmissible).

"[R]egarding the general portion of the DRE protocol, the *Frye* standard does not apply because the protocol is not scientific. The protocol essentially consists of a twelve step systematic assessment of the defendant's vital signs and physical appearance, which in fact is the ususal DUI investigation, including the standard field sobriety tests, plus a physical examination. The physical examination incorporates a narrow application of techniques borrowed from the medical field, and includes measuring pupil size and observing pupil reaction to light, taking blood pressure and pulse rate, inspecting the oral and nasal cavities, and touch the arm to determine muscle tone.

"These tests are clearly within the common experience and understanding of the average person. For example, the average person has had his or her blood pressure, pulse rate, and temperature taken. Similarly, the fact that pupils become larger or smaller in different lighting conditions is well within the average person's common experience, as is examining someone's nose or mouth.

"Because the tests, signs and symptoms of the protocol are within the common understanding of the average layman, the general portion of the protocol is not 'scientific' within the meaning of *Frye.* The fact that some of the examinations in the protocol are borrowed from the medical profession, does not elevate the protocol to scientific status.

"Police officers and lay witnesses have long been permitted to testify as to their observations of a defendant's acts, conduct, and appearance, and also to give an opinion on the defendant's state of impairment based on those observations. [Citations omitted.] Objective observations based on observable signs and conditions are not classified as 'scientific' and thus constitute admissible testimony." *Williams,* 710 So.2d at 28-29.

*8 In this case, Turner's testimony offered his observations of McHenry's acts, conduct, and appearance. This is identical to a DUI investigation. Turner also offered his opinion on McHenry's state of impairment based on those observations. He did not, however, give an opinion based on scientific evidence that McHenry was under the influence. Instead, the toxicology report was the evidence the State presented that McHenry was under the influence of cocaine.

McHenry argues that this court should not take the approach adopted in other jurisdictions regarding DRE protocol because the protocol relies upon the HGN test. McHenry notes that the Kansas Supreme Court has determined that the HGN test is scientific, but has not recognized it as achieving general acceptance with the relevant scientific community. *State v. Chastain,* 265 Kan. 16, 22-23, 960 P.2d 756 (1998); see also *State v. Witte,* 251 Kan. 313, 329-30, 836 P.2d 1110 (1992) (finding the HGN test was not sufficiently accepted as reliable within the scientific community; therefore, HGN evidence required a *Frye* foundation before being admitted).

As noted earlier, the State did not offer any evidence regarding the HGN test. *Chastain* and *Witte* offer little support to a finding that the *Frye* standard applies in this case. The trial court did not abuse its discretion when it allowed Turner's testimony. Nor did the trial court misapply the *Frye* standard since the evidence offered by Turner that related to the DRE protocol did not constitute scientific evidence. Even without consideration of Turner's testimony regarding the DRE protocol, there was substantial evidence supporting McHenry's vehicular homicide conviction.

Affirmed.

Kan.App.,2006.
State v. McHenry
136 P.3d 964, 2006 WL 1816305 (Kan.App.)

Briefs and Other Related Documents (Back to top)

• 2006 WL 708692 (Appellate Brief) Brief of Appellee (Jan. 17, 2006) Original Image of this Document (PDF)
• 2005 WL 2888442 (Appellate Brief) Brief of Appellant (Sep. 12, 2005) Original Image of this

136 P.3d 964, 2006 WL 1816305 (Kan.App.)
(Cite as: 136 P.3d 964)

Document (PDF)

END OF DOCUMENT

K A N S A S

WILLIAM R. SECK, SUPERINTENDENT

KANSAS HIGHWAY PATROL

KATHLEEN SEBELIUS, GOVERNOR

Testimony on 2007 HB 2012
to
House Judiciary Committee

Presented by
Major Mark Goodloe
Kansas Highway Patrol

January 17, 2007

Good morning, Mr. Chairman and members of the committee. My name is Major Mark Goodloe, and on behalf of Colonel William Seck and Kansas Highway Patrol, I appreciate the opportunity to comment on 2007 House Bill 2012 and enhanced DUI penalties.

Under the direction of the legislative Special Committee on Judiciary, the Kansas Highway Patrol was recently honored to serve on a sub-committee to look at enhancing current DUI penalties in our state. The sub-committee was made up of representatives from multiple disciplines, including law enforcement, health, revenue, victim advocacy, transportation, and legal counsel. We began meeting in September, and we spent considerable time and debate on how to amend current DUI penalties to best protect all people living and traveling in Kansas.

As a law enforcement agency, we are sworn to protect citizens and visitors to our state, which includes removing impaired drivers from our roadways and holding them accountable for their decisions. Impaired driving is a senseless act that can be avoided. In fact, impaired drivers in Kansas killed 93 people and injured another 1,932 in 2005 alone. It's easy to call for a sober ride or arrange for a non-drinking designated driver, but yet so many people still choose to get behind the wheel when they should not. Those people should be held accountable for their decisions. Impaired drivers are a danger to everyone, regardless of age, gender, occupation, and so on. Our troopers respond to crashes involving impaired drivers, and it is never easy to tell someone's family that an impaired driver killed their loved one, or that their loved one was killed while senselessly driving drunk. We believe the proposed amendments to HB 2012 will act as a deterrent for impaired driving, in addition to existing proven countermeasures, such as saturation patrols and check lanes. Enhanced penalties, coupled with proven law enforcement countermeasures, will hopefully reduce injury and fatal crashes involving impaired drivers.

Although the Highway Patrol supports HB 2012, the sub-committee discussed and ultimately recommended three changes that need to be included in the bill.

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- First, we recommend striking the language "to another person" from 8-1001 (k). This is located on Page 5, line 1 of HB 2012. This change will allow law enforcement officers to draw blood from individuals involved in single-vehicle crashes.
- Second, the bill does not include a funding mechanism for local agencies, which expect an increase in jail time and the associated costs. To address these concerns, our sub-committee met with Coffey County Sheriff Randy Rogers, who attended one of our meetings as a representative of the Kansas Sheriff's Association. We feel increased jail time is an important part of enhancing DUI penalties, however doing so will place an additional financial strain on county jails and sheriffs' offices. We feel it is equally important to compensate the jails for the increased incarceration periods outlined in this bill.
- Third, the bill doesn't include a funding mechanism for the Kansas Department of Health and Environment and Kansas Department of Revenue, which also will experience increased costs due to litigation.

It has been a pleasure to work with the sub-committee on these recommendations, and the Patrol appreciates the opportunity to be a part of this process. The Kansas Highway Patrol supports HB 2012 with the three added recommendations discussed today. We ask that this committee give HB 2012 and the three proposed changes favorable support. I appreciate the opportunity to address you, and I will be happy to answer any questions you may have.

###

KANSAS

DEPARTMENT OF TRANSPORTATION
DEB MILLER, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

TESTIMONY BEFORE
HOUSE JUDICIARY COMMITTEE

REGARDING HOUSE BILL 2012
DRIVING UNDER THE INFLUENCE; ENHANCED PENALTIES

January 17, 2007

Mr. Chairman and Committee Members:

I am Pete Bodyk, Chief of the Bureau of Traffic Safety. On behalf of the Kansas Department of Transportation (KDOT), I am here to provide testimony in support of enhanced penalties for DUI offenders with a high blood alcohol concentration (BAC) level.

According to the National Highway Traffic Safety Administration (NHTSA), a driver with a BAC of .15 or greater is at least 20 times more likely to be involved in a fatality crash than a sober driver. During an average weekend night about two-thirds of fatally injured drunken drivers have a BAC of .15 or greater. In 2004, the most frequently recorded BAC level among drunken drivers involved in fatal crashes was .18. NHTSA estimates that half of all drivers convicted of DUI have BACs of .15 or above.

Under current federal transportation funding authorization (SAFETEA-LU), there are two ways for a state to qualify for additional federal safety monies. One is to have an alcohol-related fatality rate of .50 or lower, and the other is to meet a certain number of criteria that includes laws and programs in the state. There are eight criteria and in order to qualify states need to meet four in 2007, five in 2008 and five in 2009. Passage of this bill would qualify Kansas under four of the eight criteria. In 2006, Kansas qualified for these monies with a low fatality rate. However, future fatality rates are unknown and this legislation would put Kansas one step closer to qualifying based solely on laws and programs.

Regardless of additional funding opportunities, enhancing penalties for high BAC drunk drivers is good public policy for Kansas. Keeping DUI offenders off our roads while they submit to a pre-sentence alcohol and drug abuse evaluation will make our state safer. KDOT supports HB 2012.

Thank you for your time, I will gladly stand for questions.

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KANSAS
DEPARTMENT OF HEALTH
AND ENVIRONMENT

Kathleen Sebelius, Governor
Roderick L. Bremby, Secretary

www.kdheks.gov

Testimony on HB 2012

To

House Judiciary Committee

By
Richard Howard
Manager, Office of Quality Improvement

Kansas Department of Health and Environment

January 17, 2007

Mr. Chairman and members of the committee, thank you for the opportunity to testify in favor of House Bill No. 2012, which provides penalties for the crime of aggravated involuntary manslaughter while driving under the influence of an excessive concentration of alcohol or drugs. The provisions of this bill apply to persons determined to have an excessive concentration of blood or breath alcohol. A blood or breath alcohol concentration of 0.08 or greater is currently considered the legal limit regarding intoxication. This bill provides for penalties applicable to individuals having a blood or breath alcohol concentration of 0.15 or greater. This establishes a second concentration of concern to be considered by the courts.

The Kansas Department of Health and Environment (KDHE) provides support for Kansas Law Enforcement Agencies through the breath alcohol testing program. The Division of Health and Environmental Laboratories has responsibility for recommending breath alcohol instruments to be used by law enforcement agencies, providing instruments and calibration standards, and providing performance checks for the instruments. The KDHE/DHEL provides training for law enforcement officers to ensure testing is performed in accordance with the recommended testing procedures, manufacturer's recommendations for operation of the instrument and applicable statutes and regulations.

Kansas has taken an aggressive stance toward decreasing the incidence of driving under the influence of alcohol violations. The provisions of this bill will strengthen the severity of the penalties that may be imposed upon those that choose to ignore the potential consequences of their actions in regard to driving under the influence of alcohol.

CURTIS STATE OFFICE BUILDING, 1000 SW JACKSON ST., STE. 540, TOPEKA, KS 66612
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The KDHE also recognizes that as the severity of penalty increases, so does the desire to avoid conviction for the offense. Persons charged with driving under the influence with a blood or breath alcohol concentration equal to or greater than 0.15, twice the legal limit, will have greater motivation to seek to avoid conviction and/or limit the penalty by challenging the test results in a court of law. This action will have a direct impact upon the demand for court testimony by KDHE/DHEL employees working in the breath alcohol program. The agency acknowledges the responsibility for providing this service, but seeks to ensure funding for the additional expenses that will be incurred as a result of enforcement of this legislation. We would like to work with the Revisor's Office to work out appropriate language that would address this issue.

This bill was first introduced in January 2006 by Senate Bill 341. KDHE/DHEL testified at the senate hearing requesting funds to offset the increased expenses we would incur. Senate Bill 341 was tabled and then resurfaced in August 2006. At that hearing the Special Senate Committee requested that those agencies, who had testified in August, form a committee made up of those agencies to discuss the wording for enhancements and then present suggestions back to the Special Senate Committee. In November 2006 this committee submitted all these suggestions for changes that would enhance Senate Bill 341. At that time the Special Senate Committee adopted all the committees' enhancement suggestions. However, HB 2012 has dropped the funding portion for KDHE/DHEL from its bill. KDHE/DHEL would like for this to be reinstated to help provide the necessary funding needed for the Breath Alcohol staff to perform our duties. Attached is the suggested wording given to the Revisor's Office during the committee meetings for the Senate Special Committee in November 2006.

Thank you for your consideration of this request. I would be happy to answer any questions you may have.

House Bill 2012

Background

The following recommendation is the wording that was given to the Revisor's Office in November 2006 following a combined committee group appointed by the Senate Special Committee to develop and bring back enhancements for consideration to Senate Bill 341.

Recommendation

The following is our suggestion for wording to be amended to the Senate Bill 341 to help us generate dollars to be dedicated for the use of expenses incurred by our Breath Alcohol program. Similar wording could be used in HB 2012.

(i) (1) The court may establish the terms and time for payment of any fines, fees, assessments and costs imposed pursuant to this section. Any assessment and costs shall be required to be paid not later than 90 days after imposed, and any remainder of the fine shall be paid prior to the final release of the defendant by the court.

(2) (a) There is hereby established in the state treasury the driving under the influence expense fund for the department of health and environment.

(2) (b) Moneys in the driving under the influence expense fund shall be used by the department of health and environment for the purpose of, including but not limited to, funding employee positions, travel expenses, lodging, vehicles associated with the breath alcohol program for purposes relating to presentation of evidence in prosecution in cases involving driving under the influence, or establishing and maintaining drivers' safety programs.

(2) (c) All expenditures from the driving under the influence expense fund shall be made in accordance with appropriations acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the secretary of health and environment or the secretary's designee.

(2) (d) Money will generated by assessing the fines established by Senate Bill 341 at the rate of a minimum of $10 or 5%, which ever is greater, of the assessed fine to the defendant.

KANSAS
DEPARTMENT OF REVENUE

Kathleen Sebelius, Governor
Joan Wagnon, Secretary

www.ksrevenue.org

TESTIMONY

TO: House Judiciary Committee

FROM: James G. Keller
Deputy General Counsel
Kansas Department of Revenue

DATE: January 17, 2007

RE: House Bill 2012

Mr. Chairman and members of the committee, thank you for the opportunity to provide testimony today in support of House Bill 2012.

This bill is the product of a sub-committee formed during last year to assist the Special Committee on Judiciary in proposing legislation to further enhance efforts to combat drunk driving in Kansas, particularly as to those individuals who drive or attempt to drive while severely impaired.

This bill enhances both criminal and administrative sanctions for drunk driving. The language in this bill provides for enhanced driver's license sanctions for driving with an alcohol content of .15 or greater. The provisions in this bill will also assist the State in meeting federal guidelines for incentive grants, providing additional funds to combat drunk driving.

Because the Division of Vehicles, Kansas Department of Revenue, administers administrative hearings held under the Kansas Implied Consent Law, it is important to our agency that we be able to administer the substantive changes set out in this legislation. Although there will be some revisions of forms and procedures required by this legislation, the Department of Revenue does not expect any difficulty in administering the requirements of this bill.

In recent years, the numbers of administrative hearings and appeals from those administrative hearings have increased and the Department anticipates that there will be some further increases as a result of the enhanced sanctions in this legislation. This bill will assist the Division of Vehicles in handling those existing and anticipated increases by allowing the Division to hold administrative hearings by telephone.

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The bill adds language to K.S.A. 8-1020(d) to allow administrative hearings to be held by telephone conference call at the discretion of the Division or upon request of the licensee. This change will accomplish several goals.

1. Administrative hearings are currently set in a location requiring travel by law enforcement witnesses from adjacent counties. Attendance at administrative hearings involves extra time and travel expenses for law enforcement agencies and can leave a law enforcement agency without sufficient personnel to meet its responsibilities.

   The ability to use telephone hearings will help reduce the expenditure of time and resources to attend hearings.

2. Currently, administrative hearing officers are in certain locations on certain days and times. If the licensee, the licensee's attorney or the law enforcement officer who requested the test are not all available at the time and date the hearing officer is at the prescribed location, the hearing has to be rescheduled. Often, it is several months before all parties can be at the hearing location at the same date and time. The delay in holding a hearing results in a delay in resolution of the matter and impairs the effectiveness of the law.

   The ability to use a telephone conference when an in-person hearing has to be reset will allow greater flexibility in scheduling, so that there will not be several months of delay to find a new date.

3. Under current law, law enforcement officers, particularly KHP Troopers, who have been reassigned to other areas of the state, are sometimes required to drive for several hours to attend administrative hearings.

   The availability of telephone hearings will eliminate or reduce such travel.

4. Administrative hearing officers sometimes are required to travel for several hours to a location for only one or two hearings.

   The availability of telephone hearings will reduce such travel.

5. Administrative hearing officers employed by the Division of Vehicles spend many hours on the road driving to and returning from administrative hearings.

   The use of telephone hearings will allow greater productivity by allowing hearing officers to use that time to hold telephone hearings, to review evidence from other hearings or to draft hearing orders.

The amendment to K.S.A. 8-1020(d) will allow the Division of Vehicles and law enforcement agencies to continue to meet the requirements of the Kansas Implied Consent Law.

The enhancements to license suspensions for those who have a BAC of .15 or greater are in Section 3 of this bill. What is proposed is a one year suspension with lengthening period of ignition interlock restrictions, depending upon whether the offense is the first, second, third or fourth. The fifth offense results in a lifetime revocation of driving privileges, just as under current law.

There is also an amendment to the provision setting out sanctions for drivers under 21 who fail a test or are convicted of DUI. Under current law, a person under 21 suffers less of a sanction on a second occurrence failure or DUI conviction than does a person over 21. That is corrected in this bill so that a person under 21 has the same license consequence on a second or subsequent occurrence as a person 21 or over.

This legislation effectively deals with drivers who choose to drive with an alcohol content of .15 or greater. We would urge that the committee support the passage of House Bill 2012.

KSNA
KANSAS STATE NURSES ASSOCIATION

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EXECUTIVE DIRECTOR

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H.B. 2012 Enhanced BAC DUI Law

January 17, 2007

Chairman O'Neil and members of the House Judiciary Committee, thank you for this opportunity to present on the policy issue of enhanced BAC laws for greater effectiveness in reducing alcohol related traffic deaths. My name is Terri Roberts and I am the Executive Director of The KANSAS STATE NURSES ASSOCIATION. The KANSAS STATE NURSES ASSOCIATION is the current contractor with KDOT-Bureau of Traffic Safety (BTS) to provide resources for law enforcement, schools, and the public through the KANSAS DRUNK DRIVING PREVENTION OFFICE

.

I wanted to provide for you what the level of consumption it takes to reach a BAC of .15., courtesy of the KANSAS DRUNK DRIVING PREVENTION OFFICE. Attached to my testimony is a table with this information in it for males and females of varying body weights.

- ☐ In an adult male, 200 lbs, it would take 8 drinks *(Definition of 1 drink = 1.25 ounces of 80 proof liquor, 12 ounces of beer, or 5 ounces of table wine)*, or 10 ounces of liquor, 8 cans of beer, 5 glasses of wine; consumed in one hour to reach the .15 level.

- ☐ In an adult female, 140 lbs, it would take 5 drinks *(Definition of 1 drink = 1.25 ounces of 80 proof liquor, 12 ounces of beer, or 5 ounces of table wine)*, or 6.25 ounces of liquor, 5 cans of beer, 3.13 glasses of wine; consumed in one hour to reach the .16 level.

Compelling Data for Enhanced BAC Penalities

Attached is a set of pie charts to illustrate that "High BAC" drivers have accounted for approximately half of all Kansas Alcohol Related Traffic Fatalities in the past 3 years (54% in 2003, 54% in 2004, and 49% in 2005). From a pure epidemiological perspective it would seem logical to address "high BAC" from a policy perspective to attempt to reduce death and disability associated with accidents caused by these drivers. The pie chart only represents DEATHS, it does not reflect permanent injury, medical or property losses. Reducing the number of drivers driving impaired should be the policy objective in implementing a enhanced BAC DUI penalty.

A few more statistics about DUI's for Kansas:

- On an average day in Kansas, six persons die or are injured in alcohol-related crashes, and 50 are arrested for DUI.

- It will help to decrease the number of fatalities and injuries in Kansas that are suffered at the hands of DUI offenders; in 2004, there were 3,321 alcohol-related crashes in Kansas that [illegible] average of one person every three days), and injured 2,005 (an average of five p[illegible]

House Judiciary
Date 1-17-07
Attachment # 6

Kansas law-enforcement officers wrote more than 18,000 citations in 2004 for DUI, and approxi[illegible]ly half of those tickets cited drivers who had blood or breath alcohol concentrations (BAC) of .16 and higher.

- Pain and loss ripple out from each DUI incident, indiscriminately striking spouse, child, sibling, friend, employer, and co-worker. Every Kansan is affected as alcohol-related crashes cost us nearly $1.44 billion annually in lost productivity, medical costs, property damage, and other direct expenditures.

The NCSL collected data through January 10, 2005, which updated a report, which I will discuss, on State High-BAC Standards and Penalities. This is also attached to my testimony.

The Kansas Department of Transportation, Bureau of Traffic Safety had NHTSA conduct an Impaired Driving Assessment in July of 2006. One of the 22 PRIORITY recommendations included **"Enact an enhanced BAC offense for 0.15 or greater."** Attached is the document distributed at the Exit Summary conducted by the survey team with all 22 recommendations.

Study of Stronger Laws for High BAC Offenders

The Preusser Research Group (PRG) completed a study for the National Highway Traffic Safety Administration (NHTSA) to find out:

- if tougher sanctions are effective deterants to recidivism for high BAC offenders,
- if alcohol-related fatalities are reduced with tougher sanctions, and
- if new laws burden State prosecution and adjudication.

The study looked at Minnesota as a test case. (See attached Reports Summaries) MN launched its "High BAC" law in 1998, defining a high BAC as .20% or higher. License revocations, and mandatory jail time were doubled as well as license plate impoundment for BAC first-time offenders.

The enhanced punishments were effective in deterring recidivism. High-BAC sanctioning systems are viewed as a promising approach for reducing recidivism among "hardcore" impaired drivers." From the data analyzed in the Minnesota analysis they found:

- Despite concerns that the rate of alcohol test refusals would increase after the law took effect, the rate **declined** for first offenders and was **unchanged** for repeat offenders. *(This was likely attributable to Minnesota's strong law pertaining to test refusals.)*
- The law also appear to have been successful in increasing the severity of case dispositions for high-BAC offenders (although the severity apparently declined somewhat over time.) *The report indicates that Minnesota judges and prosecutors have become much more reluctant to allow a high-BAC offender to plead to a non-DUI-related charge, and some reportedly did not allow a high-BAC offender to plead to a standard DUI offense.*
- Lower BAC offenders had lower recidivism than the .20% BAC or higher drivers who came under the new law. Recidivism rates were higher for those who refused a breath test. *Survival analysis examined the one-year rate of recidivism among first offenders arrested in 1998. The results indicated that, after controlling for the offender's age and gender, the rate of recidivism was significantly lower for high-BAC offenders than for affenders who refused the alcohol test ($p<.01$) and offenders with BACs .17-.19 ($p<.02$), but was not significantly different than the rate among offenders wtih BACs less than .17. A significant association between the alcohol test result and the rate of recidivism was not detected for 2-year survival models examining recidivism among first offenders arrested in 1998, or in models for first offenders arrested in 1999 and repeat offenders arrested in 1998 and 1999.*

In preparing for todays testimony, I inquired from NHTSA if they had "model enhanced BAC DUI statutes"they would recommend, and they do not. KSNA has participated in the development of H.B. 2012 for your consideration and we would ask for your support and favorable passage out of committee.

Thank You.

WYOMING'S ALCOHOL IMPAIRMENT EDUCATIONAL GUIDE

FEMALES - APPROXIMATE ALCOHOL CONCENTRATION (AC) PERCENTAGE

Estimates based on physically fit adult females who consume the alchohol over a one hour period.

DRINKS	BODY WEIGHT IN POUNDS								Jul-02
	90	100	120	140	160	180	200	220	
0	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	The **Only** Safe Driving Limit
1	0.05	0.05	0.03	0.03	0.03	0.03	0.02	0.02	Impairment Begins
2	0.10	0.09	0.08	0.07	0.06	0.05	0.05	0.04	
3	0.15	0.14	0.11	0.10	0.09	0.08	0.07	0.06	Driving Skills Significantly Affected
4	0.20	0.18	0.15	0.13	0.11	0.10	0.09	0.08	
5	0.25	0.23	0.19	0.16	0.14	0.13	0.11	0.10	Legally Intoxicated Criminal Penalties
6	0.30	0.27	0.23	0.19	0.17	0.15	0.14	0.12	
7	0.35	0.32	0.27	0.23	0.20	0.18	0.16	0.14	
8	0.40	0.36	0.30	0.26	0.23	0.20	0.18	0.17	
9	0.45	0.41	0.34	0.29	0.26	0.23	0.20	0.19	
10	0.51	0.46	0.37	0.32	0.29	0.26	0.22	0.21	
11	0.56	0.50	0.42	0.36	0.32	0.28	0.25	0.23	
12	0.61	0.55	0.45	0.39	0.35	0.31	0.27	0.25	
13	0.66	0.59	0.49	0.42	0.37	0.33	0.29	0.27	
14	0.71	0.64	0.53	0.45	0.40	0.36	0.3	0.29	
15	0.76	0.68	0.57	0.48	0.43	0.38	0.34	0.31	
16	0.81	0.73	0.61	0.52	0.46	0.41	0.36	0.33	
17	0.86	0.77	0.64	0.55	0.49	0.43	0.38	0.36	
18	0.91	0.82	0.68	0.58	0.52	0.46	0.40	0.38	
19	0.96	0.87	0.71	0.61	0.55	0.49	0.42	0.40	Possible Coma or Death from Respiratory Paralysis
20	1.02	0.91	0.76	0.65	0.58	0.54	0.45	0.42	
21	1.07	0.96	0.79	0.69	0.61	0.56	0.47	0.44	

DRIVING IMPAIRED
AC = .05% - .07%

Subtract .01% for each 40 minutes of drinking.
One drink is 1.25 ounces of 80 proof liquor,
12 ounces of beer, or 5 ounces of table wine.

LEGALLY INTOXICATED
AC = .08% AND UP

NOTE: PERSONS UNDER THE AGE OF 21 CAN FACE CRIMINAL PENALTIES IF CAUGHT DRIVING WITH A DETECTABLE ALCOHOL CONCENTRATION OF 0.02% OR MORE.

WYOMING'S ALCOHOL IMPAIRMENT EDUCATIONAL GUIDE

MALES - APPROXIMATE ALCOHOL CONCENTRATION (AC) PERCENTAGE

Estimates based on physically fit adult males who consume the alchohol over a one hour period.

DRINKS	BODY WEIGHT IN POUNDS								Jul-02
	100	120	140	160	180	200	220	240	
0	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	The **Only** Safe Driving Limit
1	0.04	0.03	0.03	0.02	0.02	0.02	0.02	0.02	Impairment Begins
2	0.08	0.06	0.05	0.05	0.04	0.04	0.03	0.03	
3	0.11	0.09	0.08	0.07	0.06	0.06	0.05	0.05	Driving Skills Significantly Affected
4	0.15	0.12	0.11	0.09	0.08	0.08	0.07	0.06	
5	0.19	0.16	0.13	0.12	0.11	0.09	0.09	0.08	Legally Intoxicated Criminal Penalties
6	0.23	0.19	0.16	0.14	0.13	0.11	0.10	0.09	
7	0.26	0.22	0.19	0.16	0.15	0.13	0.12	0.11	
8	0.30	0.25	0.21	0.19	0.17	0.15	0.14	0.13	
9	0.34	0.28	0.24	0.21	0.19	0.17	0.15	0.14	
10	0.37	0.31	0.27	0.23	0.21	0.19	0.17	0.16	
11	0.41	0.34	0.29	0.26	0.23	0.21	0.19	0.17	
12	0.45	0.37	0.32	0.28	0.25	0.23	0.20	0.19	
13	0.48	0.40	0.35	0.30	0.27	0.25	0.22	0.20	
14	0.52	0.44	0.37	0.33	0.30	0.26	0.24	0.22	
15	0.56	0.47	0.40	0.35	0.32	0.28	0.25	0.23	
16	0.60	0.50	0.43	0.37	0.34	0.30	0.27	0.25	
17	0.64	0.53	0.45	0.40	0.36	0.32	0.29	0.27	
18	0.67	0.56	0.48	0.42	0.38	0.34	0.30	0.28	
19	0.71	0.59	0.51	0.44	0.40	0.36	0.32	0.30	Possible Coma or Death from Respiratory Paralysis
20	0.74	0.62	0.53	0.49	0.42	0.38	0.33	0.31	
21	0.78	0.65	0.56	0.51	0.44	0.40	0.35	0.33	

DRIVING IMPAIRED
AC = .05% - .07%

Subtract .01% for each 40 minutes of drinking.
One drink is 1.25 ounces of 80 proof liquor,
12 ounces of beer, or 5 ounces of table wine.

LEGALLY INTOXICATED
AC = .08% AND UP

NOTE: PERSONS UNDER THE AGE OF 21 CAN FACE CRIMINAL PENALTIES IF CAUGHT DRIVING WITH A DETECTABLE ALCOHOL CONCENTRATION OF 0.02% OR MORE.

STATE OF KANSAS

IMPAIRED DRIVING ASSESSMENT

July 10 – 14, 2006

National Highway Traffic
Safety Administration
Technical Assistance Team

Chief Thomas Michael Burns
Troy E. Costales
Robert P. Lillis
Manu Shah, P.E.
The Honorable G. Michael Witte

PRIORITY RECOMMENDATIONS

Priority recommendations are "bolded" in individual sections.

1-A: State, Local, and Tribal DWI Task Forces/Commissions

- Establish a Kansas DUI Advisory Committee that is appointed by the Secretary of the Kansas Department of Transportation, representing key partners and interest groups.

Executive Order

1-D: Data and Records

- Expand membership in the statewide TRCC to include participation by all stakeholders, including but not limited to ABC, Kansas Licensed Beverage Association, Kansas Association of Beverage Retailers, Kansas Social Rehabilitation Services, DUI Victim Center of Kansas, representation by county, district and municipal prosecutors.

1-F: Resources

- Establish an impaired driving program coordinator for full program oversight, not just for grants management.

2-D-1: Schools

- Structure designated driver programs so that they do not enable underage drinking or over-consumption by non-drivers.

2-D-3: Community Coalitions and Traffic Safety Programs

- Include traffic safety advocates and professionals in the planning, development and implementation of prevention strategies of all community coalitions addressing substance abuse, youth development and/or safety.

3-A: Impaired Driving Laws

- Improve the availability and accuracy of prior DUI conviction records.

- Enact an enhanced BAC offense for 0.15 or greater. NO federal impact but this is an issue.

3-B: Enforcement

EUDL

- Train law enforcement officers on the procedures and requirements of an administrative license hearing.

- Create a panel of prosecutors and law enforcement officials to meet quarterly and discuss issues with impaired driving prosecutions and officer's courtroom preparedness and testimony.

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3-C: Publicity to Enhance General Deterrence

Need To Double Outreach

- Ensure that there is a pre-blitz workshop for law enforcement personnel.
- Structure designated driver programs so that they do not enable underage drinking or over-consumption by non-drivers.

3-D: Prosecution

- Prohibit part time prosecutors from practicing any criminal defense work outside of their prosecutorial jurisdiction.
- Improve accuracy and accessibility to records of prior DUI convictions and diversions.
- Enact a legislative remedy to the ruling in *State v. Elliott*.

3-E: Adjudication

- Provide substantive DUI education regularly to all judges who adjudicate DUI cases and include SFST, HGN, DEC, and CDL curriculum.
- Enact a legislative remedy to the ruling in *State v. Elliott*.
- Prohibit part-time judges who preside over criminal cases from practicing any criminal defense work, including DUI, outside of their judicial jurisdiction. U.S. Supreme Ct. 2000 Enhancing trust in the Judicial System. Traffic Ct./Small Cla follow Juv. in adult court

3-F-1: Administrative License Revocation and Vehicle Sanction

- Streamline and improve the communication and dialogue between law enforcement and DMV hearing officers to improve the outcomes at the hearings and improve successful adjudication of DUI cases.

120,000 vs. 7,000 Citations

- Impose vehicle sanctions in a cost effective manner on repeat offenders and individuals who continue to drive with a license suspended or revoked for impaired driving.
- Permit the law enforcement officer at an ALR hearing to rebut his/her testimony given during the defendant's case in chief.

EUDL

3-F-3: Information and Records System

- Seek either legislative relief or administrative alternatives to rebuild the driver history file and use it as the only legislatively mandated source document for adjudicating DUI offenses.

4-C: Monitoring Impaired Drivers

- Improve monitoring and oversight of compliance with DUI sentence conditions.

Evaluation of Minnesota's High-BAC Law

Technical Summary

Summary of States' High-BAC Sanctioning Systems[1]

Thirty-one states, as of January 2002, have a statute or regulation that provides for additional or more severe sanctions for DWI offenders with a "higher" Blood Alcohol Concentration (BAC), that is, a BAC threshold above the level for a standard DWI charge. In 29 of the 31 high-BAC states, at least some of the high-BAC provisions are statutory; in the other two states, the high-BAC provisions are administrative rules. High-BAC sanctioning systems are based on evidence that DWI offenders with higher BACs are more likely (than DWI offenders with lower BACs) to be involved in a crash and more likely to recidivate. The objective of such systems is to reduce recidivism among this high-risk group of offenders by increasing the certainty and severity of punishment.

Most high-BAC statutes have been enacted since 1990. Thirteen states have implemented high-BAC laws since 1998, and eight additional states have recently strengthened an existing high-BAC statute. The high BAC threshold ranges from .15 percent to .20 percent; most commonly, the threshold is either .15 (14 states) or .20 (6 states). Even when focusing solely on first-time offenders, states' high-BAC sanctioning systems vary widely in terms of complexity, the types and severity of enhanced sanctions, and whether the sanctions are mandatory. Some states have adopted high-BAC sanctions for a first offense that are comparable to those for a second DWI offense, for a BAC test refusal, or for a DWI offense with another "aggravating" circumstance. The types of sanctions for first offenders ages 21 years and older include the following:

- Longer or more intensive education and/or treatment (11 states)
- Limitations on deferred judgment provisions (2 states)
- Limitations on plea reductions (3 states)
- Enhanced driver sanctions including jail (8 states), driver license sanctions (3 states) jail or jail/community service (5 states), and jail or jail/electronic home monitoring, fine, and license sanctions (5 states)
- Vehicle sanctions, including ignition interlock devices (6 states) and administrative plate impoundment (1 state) or vehicle registration revocation (1 state)
- Court consideration of high BAC as an aggravating or special factor (3 states) or requirement that court explain why certain sanctions are not imposed (1 state)
- "Hold for court" provision that restricts release from jail upon arrest (1 state)

Most states report few problems with implementing high-BAC sanctions and believe the sanctions have had a positive impact on the state's DWI system. However, some states report concerns and/or problems, including: 1) high-BAC sanctions may further complicate an already complicated DWI system; 2) enhanced sanctions may increase the number of alcohol test refusals; 3) courts and/or prosecutors may allow high-BAC offenders to plead to a lower charge and, thus, evade the enhanced penalties; 4) courts may view the high-BAC penalties as onerous and, thus, fail to impose the penalties; and 5) there may be inadequate capacity in jails and/or treatment facility to absorb additional offenders.

Evaluation of Minnesota's High-BAC Law

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Minnesota's high-BAC sanctioning law was implemented on January 1, 1998. This evaluation of Minnesota's law

represents the first systematic examination of the implementation or effects of a high-BAC sanctioning system. Data on alcohol test results, case dispositions, and recidivism were obtained from the state's driver license files, and interviews were conducted with approximately 20 experts in Minnesota's DWI laws and practices.

Description of High-BAC Law

Minnesota's system of DWI laws is characterized by substantial pre-conviction administrative license and vehicle sanctions. These sanctions are imposed for "implied consent" violations that involve either failing the alcohol test (per se BAC > .10) or refusing the test. Minnesota's laws related to test refusals are among the strongest in the nation; a refusal is a criminal offense. Effective January 1, 1998, statutes define a "qualified prior impaired driving incident" as either a prior DWI conviction or a prior DWI-related loss of license. All persons who are convicted of a DWI offense or plead guilty to a reduced offense must submit to an alcohol assessment.

Minnesota's high-BAC statute was enacted as part of an Omnibus DWI Bill that also increased penalties for repeat offenses. The state's statutes for impaired driving were restructured, simplified, and strengthened in a recodification that took effect January 1, 2001. This study evaluated Minnesota's high-BAC law during the years 1998-2000.

Minnesota's high-BAC threshold, .20, is relatively high, but in other respects the high-BAC law is among the strongest in the nation. Enhanced penalties for a high-BAC offense include more severe pre-conviction administrative sanctions and post-conviction court sanctions that are mandatory, substantial, and applicable to both first and subsequent offenses. The enhanced sanctions for a high-BAC first offender include a mandatory minimum jail sentence, compared to no mandatory minimum sentence for other first offenders; a doubling of the license revocation sanctions; a pre-conviction administrative license plate impoundment; stiffer fines; and other enhanced penalties. High-BAC repeat offenders receive more severe penalties than lower-BAC repeat offenders. For example, a second or greater offense involving a BAC > .20 results in the administrative forfeiture of the vehicle.

Profile of DWI Offenses and Alcohol Test Results

Persons arrested for DWI may have an administrative sanction only, a DWI court conviction only, or both an administrative sanction and a DWI court conviction. In this report, a "DWI offense" refers to DWI arrests that resulted in a pre-conviction administrative sanction, a post-conviction court sanction, or both, according to the state's driver license records. Persons who were arrested for DWI but did not receive either a court conviction or an implied consent driver licenses revocation (an estimated 1% -2% of DWI arrests) were not included in the study.

Data on DWI offenses were examined for 1997, the year prior to the high-BAC law, and for the years 1998-2000. The number of total DWI offenses increased from 32,625 in 1997 to 35,737 in 2000. In all four years, about 29% of total DWI offenses were repeat offenses.

BAC results became available on the driver license record effective January 1, 1998. From 1998 to 2000, the percentage of first offenders with BACs at or above .20 declined from 16.9% to 15.5%, a modest but statistically significant decline ($p < .001$). The percentage of repeat offenders with BACs at or above .20 declined negligibly from 21.0% to 20.4%.

The test refusal rate in 1997 was 12.7% for first offenses and 22.2% for repeat offenses. The refusal rate for first offenses experienced a gradual and significant decline to 10.5% in 2000; the rate for repeat offenses was essentially unchanged.

Severity of Case Dispositions

Among first offenders with BACs at or above .20 in 1998, 85.6% received enhanced sanctions, and therefore more severe penalties. The enhanced sanctions included an enhanced administrative sanction and enhanced court sanction (65.0%), an enhanced administrative sanction and standard court sanction (9.5%), an enhanced administrative sanction only (7.8%), and an enhanced court sanction only (3.3%). The remaining offenders received a standard administrative

sanction and standard court sanction (4.7%), a standard administrative sanction only (less than one percent), or a standard court sanction only (9.1%). The great majority of high-BAC first offenders received more severe case dispositions than offenders with lower BACs. This was due not only to the imposition of enhanced penalties, but also to the fact that the high-BAC offenders were more likely to receive both administrative and court sanctions, rather than only an administrative sanction. For example, in 1998, 8.4% of high-BAC first offenders received the implied consent administrative violation but were not convicted for a DWI-related offense, compared to 20.3% of first offenders with lower BACs.

The proportion of high-BAC first offenders receiving enhanced sanctions declined from 1998 (85.6%) to 1999 (77.6%) and 2000 (78.3%). The percentage of offenders who received both enhanced administrative and enhanced court sanctions also declined, from 65.0% in 1998 to 53.0% in 1999 and 52.6% in 2000. The decline in severity of disposition was particularly acute among first offenders with "borderline" high BACs (.20-.22). For example, the percentage of offenders receiving both enhanced administrative and enhanced court sanctions was 60.1% for offenders with BACs .20-.22 and 72.0% of offenders with BACs > .23 in 1998, but 44.2% of offenders with BACs .20-.22 and 65.4% of offenders with BACs > .23 in 1999.

From 1998 to 2002, the percentage of high-BAC repeat offenders who received enhanced administrative and/or enhanced court sanctions ranged from 96.6% to 98.0%. The dispositions received by high-BAC repeat offenders were more severe than those received by repeat offenders with lower BACs.

Rates of Recidivism

The rates of recidivism for offenders arrested in each of the years 1997, 1998, and 1999 were examined. The rates after one year were significantly lower for total first offenders arrested in 1998 than for those arrested in 1997 (6.7% vs. 7.3%) and significantly lower for total repeat offenders arrested in 1998 than for those in 1997 (7.9% vs. 9.0%). The total rates of recidivism for total first and total repeat offenders arrested in 1999 were similar to the rates in 1998.

Because BAC information became available only in 1998, recidivism rates by BAC level could not be examined for the period before the law . First offenders arrested in 1998 (the first year of the law) who had BACs at or above .20 and, thus, were subject to the high-BAC enhanced penalties, had significantly lower rates of recidivism than a "comparison" group of offenders who had BACs of .17-.19 but were not subject to the enhanced penalties. BACs of .17-.19, although lower than BACs of .20 and above, are also relatively "high" and considered indicative of a high-risk offender. For example, the rate of recidivism after one year was 8.0% for offenders with BACs .17-.19 and 6.3% for offenders with BACs at or above .20; the rate after two years was 14.2% for offenders with BACs .17-.19 and 12.6% for high-BAC offenders. These differences were statistically significant, based on the chi-square test ($p < .01$). For offenders arrested in 1999, after one year following the arrest, the difference in the rates of recidivism among first offenders in the "comparison" group (7.8%) and those with high BACs (6.7%) was marginally significant ($p < .05$). Recidivism among repeat offenders with high BACs and those with borderline BACs did not differ significantly in 1998 or 1999.

Survival analysis examined the one-year rate of recidivism among first offenders arrested in 1998. The results indicated that, after controlling for the offender's age and gender, the rate of recidivism was significantly lower for high-BAC offenders than for offenders who refused the alcohol test ($p < .01$) and offenders with BACs .17-.19 ($p < .02$), but was not significantly different than the rate among offenders with BACs less than .17. A significant association between the alcohol test result and the rate of recidivism was not detected for 2-year survival models examining recidivism among first offenders arrested in 1998, or in models for first offenders arrested in 1999 and repeat offenders arrested in 1998 and 1999.

Interviews

Most experts interviewed believed that the high-BAC law had resulted in more severe sanctions for persons with BACs at or above .20. In particular, it was reported that judges and prosecutors have become much more reluctant to allow a high-BAC offender to plead to a non-DWI-related charge, and some reportedly do not allow a high-BAC offender to plead to a standard DWI offense. However, it also was noted that some courts do not impose the statutory minimum

criminal sanctions for a high-BAC conviction, particularly the jail sanction for first offenders. However, there was general consensus that the administrative sanctions for DWI are consistently applied. There was considerable skepticism regarding the general or specific deterrent effects of the high-BAC law.

When the law was first implemented, there were concerns that the high-BAC law had added substantial complexity to the state's already complex DWI laws. It was believed that the recodification of the laws had alleviated some of this complexity.

Discussion

High-BAC sanctioning systems are viewed as a promising approach for reducing recidivism among "hardcore" impaired drivers." Many U.S. states have implemented high-BAC sanctioning systems, but the scope and severity of sanctions in these systems vary widely. Minnesota's high-BAC law has a relatively high BAC threshold (> .20), but also relatively strong mandatory administrative and criminal sanctions. Despite concerns that the rate of alcohol test refusals would increase after the law took effect, the rate declined for first offenders and was unchanged for repeat offenders. This was likely attributable to Minnesota's strong laws pertaining to test refusals. Minnesota's law appears to have been successful in increasing the severity of case dispositions for high-BAC offenders, although the severity apparently declined somewhat over time. There also is evidence suggestive of an initial effect on recidivism among high-BAC first offenders. These effects may in part be attributable to the high-BAC law's reliance on strong administrative sanctions.

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[1] This summary updates the report: McCartt AT. 2001. *Evaluation of Enhanced Sanctions for Higher BACs: Summary of States' Laws*. Washington, DC: National Highway Traffic Safety Administration (DOT HS 809 215). This report is available free-of-charge on NHTSA's website www.nhtsa.dot.gov.

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Evaluation of Minnesota's High-BAC Law

1. Introduction

One of the predominant recent concerns of the impaired driving safety community in the U.S. has been the development of countermeasures that target high-risk individuals variously referred to as hard core, persistent, chronic, or repeat drinking drivers. Although there is no single operational definition for this group, two criteria are often applied: evidence of repeated alcohol-impaired driving, such as repeat convictions, and driving with a "high" Blood Alcohol Concentration (BAC).

Although enhanced sanctions for repeat DWI[2] offenders have been part of most state legal systems for many years, a more recent phenomenon is a statute or regulation that applies more severe sanctions to first-time or repeat offenders with higher BACs. Historically some prosecutors have routinely negotiated, and some judges have routinely applied, stronger sanctions for high-BAC offenders within the framework of the general impaired driving statutes. Now an increasing number of states have enacted statutes that enable or mandate enhanced sanctions for these offenders. The primary objective of a high-BAC sanctioning system is to reduce recidivism among this high-risk group of offenders by increasing the certainty and severity of punishment and by reducing statutory or procedural "loopholes." In a high-BAC sanctioning system, the high-BAC threshold is established above the per se level for a standard offense, currently set by states at .08 or .10.

The rationale for high-BAC sanctioning systems is that DWI offenders with higher BACs pose a greater risk than offenders with lower BACs. There is evidence that DWI offenders with higher BACs are more likely than DWI offenders with lower BACs to be involved in a crash (Zador, Krawchuck, Voas, 2000; Compton et al., 2002). Data from the National Highway Traffic Safety Administration (NHTSA) indicate that in the year 2000, 64 percent of drinking drivers who were fatally injured had BACs of .15 or higher (Hedlund, McCartt, 2002). After adjusting for covariates such as driver age and gender, the relative risk of a crash of any severity increases as BAC increases (Compton et al., 2002). Compared to drivers with zero BACs, the relative risk of a crash is 4.8 for a BAC of .10, 22.1 for a BAC of .15, 81.8 for a BAC of .20, and 153.7 for BACs of .25 or higher.

It is estimated that over half the drivers arrested or convicted of DWI have BACs of .15 or above (Hedlund, McCartt, 2002). A study of DWI offenders in California found that first-time offenders with high BACs were more likely to recidivate than first-time offenders with lower BACs (Peck, Helander, 2001). Some studies suggest an association between a higher BAC and a higher likelihood of alcohol abuse or dependence (Ruud, Gjerde, Morland, 1993; Snow, 1996), but other research has not found this association (Wieczorek, Miller, Nochajski, 1992).

Several safety organizations advocate that states adopt high-BAC sanctioning programs. In 2001, Mothers Against Drunk Driving (MADD), the National Transportation Safety Board (NTSB), and The Century Council developed similar strategies for addressing "hard core" drinking drivers, defined as persons who drive at BAC levels of .15 and above or those who have a prior DWI offense. For example, according to the NTSB (2000), a model program to reduce DWI should include legislation that defines a BAC of .15 or greater as an aggravated DWI offense that "requires strong intervention similar to that ordinarily prescribed for repeat DWI offenders." According to the NTSB, the sanctions for high-BAC offenders should include mandatory treatment and administratively imposed vehicle sanctions.

TEA-21 High-BAC Incentive Grants

In passing the TEA-21[3] legislation in 1998, Congress amended the alcohol-impaired driving countermeasures incentive grant program ("410" program), which provides funding for states that meet certain criteria. Beginning in federal fiscal year 1999, a state could qualify for a basic 410 grant by meeting five of seven criteria to qualify for a programmatic basic grant or a performance basic grant. The criteria for the programmatic basic grant included a program targeting drivers with a high BAC.

According to the final rule issued by NHTSA in 2000, states qualifying under the high-BAC criteria must demonstrate the establishment of a graduated sanctioning system that applies enhanced or additional sanctions to drivers convicted of alcohol-impaired driving if they were determined to have a high BAC. To qualify as a high BAC system, the state's BAC threshold must be higher than the BAC level for the standard DWI offense, and also less than or equal to .20 percent BAC. The enhanced sanctions must be mandatory; must apply to the first DWI offense; and may include longer terms of license suspension, increased fines, additional or extended sentences of confinement, vehicle sanctions, or mandatory assessment and treatment as appropriate. The enhanced sanctions may be provided by state law, regulation, or binding policy directive implementing or interpreting the law or regulation.

Study Objectives and Approach

Despite the attention focused on enhanced sanctions for high-BAC offenders, the current project represents the first systematic study of the features, implementation, or effects of high-BAC sanctioning systems. The primary objectives of the study were to:

- determine the effectiveness of high-BAC sanctioning systems
- determine whether high-BAC offenders, in fact, receive the specified enhanced sanctions
- determine whether a high-BAC sanctioning system creates additional problems in the prosecution, adjudication, and/or sanctioning systems.

In the first phase of the study, a summary of states' high-BAC sanctioning systems was prepared (McCartt, 2001). It was based on a review of the literature and states' laws and on discussions with states with high-BAC sanctioning systems. States' high-BAC sanctioning systems as of January 2002 are summarized in Chapter II of this report.

In the second phase of the study, a process and outcome evaluation of Minnesota's high-BAC sanctioning system was conducted. Chapter III of this report presents an evaluation of Minnesota's statute.

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[2] In this report, the term "DWI" (Driving While Intoxicated) is used as a generic term for alcohol-impaired driving.

[3] Transportation Equity Act for the 21st Century.

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Evaluation of Minnesota's High-BAC Law

2. Summary of States' High-BAC Systems

As of January 2002, 31 states were identified as having a statute, regulation, or rule that provides differential sanctions for persons with a higher BAC (Appendix A). Illinois and Virginia have only administrative rules that provide for longer, more intensive education/treatment of offenders with BACs at or above .15 or .20, respectively. For all other 29 states, at least some of the high-BAC provisions are statutory.

Most high-BAC statutes have been enacted since 1990. Thirteen states have implemented high-BAC laws since 1998, and eight additional states have recently strengthened an existing high-BAC statute. Higher levels of publicity about the enactment of the high-BAC sanctions were reported by states with more extensive or more recent sanctions, states where other statutory changes were also implemented, and states where the high-BAC sanctions included jail or vehicle-based sanctions. The availability of 410 funding for high-BAC sanctions did not appear to be the primary motivation for the states that have recently enacted or strengthened a high-BAC statute.

Given the considerable differences in states' DWI laws, it is not surprising that state provisions for high-BAC offenders also vary widely. Some high-BAC statutes impose additional or enhanced penalties that are relatively clear-cut and limited. Other high-BAC statutes are complex and integrated into the full range of a state's DWI laws. In all states, high-BAC offenders may still be able to avoid the enhanced sanctions by, for example, pleading guilty to a lesser charge or completing a "deferred judgment" program. Also in all states, courts and prosecutors have considerable discretion in determining case adjudications and sanctions, even if there are statutory limitations on charge reductions or mandatory statutory penalties for DWI offenses.

High-BAC Threshold

The high BAC threshold in the 31 states ranges from .15 percent to .20 percent; within a given state, a different threshold may apply to different sanctions. The minimum threshold is at or above .15 percent in 14 states, .16 percent in five states, .17 percent in three states, .18 percent in three states, and .20 percent in six states. In some states the mean BAC for DWI offenders was selected as the threshold, and in other states the threshold is double the per se BAC level for a standard offense. In still other states, the threshold represented a compromise between a lower threshold advocated by the highway safety office and a higher BAC preferred by other groups. Following the lowering of the per se BAC level from .10 to .08 in their states, New Hampshire and Arizona lowered the high-BAC threshold from .20 to .16 and from .18 to .15, respectively.

In a few states, the new high-BAC statute became part of a "three-tiered" BAC system of graduated penalties. For example, in July 2000, Rhode Island established different penalties associated with each of the following three BAC levels: at or above .08 percent but less than .10 percent, at or above .10 percent but less than .15 percent, and at or above .15 percent.

410 Incentive Funding

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The number of states relying on a high-BAC program to qualify for Section 410 program funds[4] was 13 in federal fiscal year 1999, 16 in federal fiscal year 2000, and 15 in federal fiscal year 2001. Other states included in this study

had high-BAC programs, but did not rely on these programs to qualify for 410 incentive grant funding. There are various reasons for this. Some states may have had a high-BAC program that met the 410 requirements, but the state was able to qualify for a grant based on other laws and programs. Some states may have had a high-BAC program that met the 410 requirements, but the state did not apply for a 410 grant at all (perhaps because the state did not meet a sufficient number of the other requirements). Other states may have had a high-BAC program that did not meet the 410 requirements. For example, the state's program may have been discretionary rather than mandatory, or it may have applied only to repeat offenders.

Types of Enhanced Penalties

The following discussion focuses on states' high-BAC penalties for first-time offenders over 21 years of age, as summarized in Appendix A. The high-BAC penalties are contrasted to the penalties imposed for a first-time standard DWI offense, that is, a DWI offense not involving an extenuating circumstance (for example, involvement in an injury crash) that carries special penalties. Appendix A summarizes only the high-BAC penalties that differ from the penalties for a standard first-time offense. Thus, if a state's driver license sanctions are the same for high-BAC offenders and other offenders, driver license sanctions are not noted.

Even when focusing solely on first-time offenders, states' high-BAC sanctions run the gamut in terms of complexity, the types and severity of enhanced sanctions, whether the sanctions are mandatory, and whether the sanctions are court-imposed or administratively imposed. Some states have adopted high-BAC sanctions for a first offense that are comparable to those for a second DWI offense, for a BAC test refusal, or for a DWI offense with another type of "aggravating" circumstance. Several states have created a new, more serious offense for offenders with high BACs, for example, Driving Under the Extreme Influence, or Aggravated Driving While Intoxicated.

As detailed in Appendix A, the types of sanctions for high-BAC adult (21 years or older) first-time offenders include the following:

- Longer or more intensive alcohol education and/or treatment (11 states)
- Limitations on deferred judgment provisions (2 states)
- Limitations on plea reductions (3 states)
- Additional or enhanced driver sanctions (mandatory minimum and/or maximum)
  - jail (8 states)
  - driver license sanctions (3 states)
  - jail or jail/community restitution and fine (5 states)
  - jail or jail/electronic home monitoring, fine, and license sanctions (5 states)
- Vehicle sanctions, including ignition interlock devices (6 states), and administrative plate impoundment (1 state) or vehicle registration revocation (1 state)
- Court consideration of high BAC in sentencing as an aggravating or special factor (3 states) or requirement that court explain why certain sanctions are not imposed (1 state)
- "Hold for court" provision that restricts release from jail upon arrest (1 state).

Experiences with High-BAC Sanctions

Most states reported few problems with implementing high-BAC sanctions and believed the sanctions had had a positive impact on the state's DWI system. However, some states reported concerns and/or problems. The most common concern was that the imposition of high-BAC sanctions might increase the number of alcohol test refusals if the state's penalties for refusal were insufficiently strong. At least one state, Maine, increased the penalties for test refusals when a high-BAC statute was enacted. After the high-BAC law was implemented in Maine, the state reported that of the 11,000 DWI arrests in 1998, only 585 persons refused the BAC test. However, in several other states where the rate of refusals is one-third or higher, officials expressed concerns that this rate would increase as a result of the high-BAC sanctions.

The following additional concerns were noted by states: 1) high-BAC sanctions may complicate an already 6-16

complicated DWI system; 2) courts and/or prosecutors may allow high-BAC offenders to plead to a lower charge (directly or indirectly) and, thus, evade the enhanced penalties; 3) courts may view the high-BAC penalties as onerous and, thus, fail to impose the penalties; 4) and the limited availability of treatment programs and jail capacity in some areas may hinder the effectiveness of these sanctions.

Evaluations of High-BAC Sanctioning Systems

States noted the considerable obstacles to evaluating the effects of high-BAC sanctions. In particular, states' historical case records for DWI offenses generally have not included information on the BAC at the time of the arrest. In the process of conducting the review of states' high-BAC sanctioning systems, only one study of the relationship between BAC and the severity of penalties was located. The study, conducted by the California Department of Motor Vehicles (Tashima, 1986), examined the relationship between the severity of court sanctions and the BAC level and licensing status. The study was prompted by the state's 1985 law that provided that courts may consider a BAC of .20 or higher as a special factor in sentencing DWI offenders. Based on the DWI offenders with reported BAC levels (43 percent of all offenders), first-time offenders with higher BACs received a jail sanction more frequently than did those with lower BACs. Sanctions given to most second offenders did not vary with BAC level.

In discussions with states with high-BAC sanctioning systems, none reported that they had undertaken a systematic study of the implementation or the effects of high-BAC sanctions. As noted earlier, the second phase of this study involved a process and outcome evaluation of the high-BAC sanctioning system in Minnesota. The following chapter presents the evaluation of Minnesota's high-BAC statute.

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[4] States could apply for Section 410 program funds under five of seven criteria.

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EXECUTIVE SUMMARY

I. Introduction. As part of its goal to reduce alcohol-related traffic deaths and injuries, the National Highway Traffic Safety Administration (NHTSA) developed an assessment process that gives States an opportunity to conduct a review of their efforts to control impaired driving by an outside team of nationally recognized experts. Similar assessments are conducted also in other highway safety areas, including occupant protection, emergency medical services, motorcycle safety and traffic records.

Upon State request, NHTSA convenes the assessment team and facilitates the process. The assessment team meets with State officials including highway safety personnel, and hears testimony from individuals invited by the State to testify concerning the strengths and weaknesses of the State's program. The team then uses this information to assess the State's impaired-driving program. Each assessment examines the strengths and weaknesses of a State's overall impaired-driving program. It should be noted that these assessments are not typical or traditional program evaluation efforts (i.e., process or outcome evaluations, etc.). Assessments contain recommendations, some of which have been designated as priority recommendations, concerning ways in which the State can improve or enhance its impaired-driving programs. Since the assessment report "belongs" to the State, it is solely within the State's discretion how it will use the document. There are no sanctions if the State does not implement the recommendations. Based on State requests, NHTSA has facilitated 42 impaired-driving assessments since 1991, including 32 initial assessments and 10 re-assessments.

II. Background.

a. Assessment Process. The assessment process begins when a State Highway Safety Office submits a written request to one of the NHTSA Regional Offices. This request is then referred to the appropriate program office at NHTSA headquarters to initiate the assessment process. NHTSA selects and convenes a multidisciplinary assessment team consisting of experts from outside the agency. The team's experience correlates with the various components of a comprehensive impaired-driving program that are reviewed during the assessment process.

The requesting State arranges for State impaired-driving program representatives to meet with the assessment team during the weeklong technical review. The State representatives brief the assessment team and, as appropriate, provide written materials. Team members may initiate an open discussion with presenters to gain a clearer understanding of a subject.

The assessment team uses the information provided by these representatives to analyze the State's impaired-driving program by comparing it to a NHTSA-developed uniform guideline. The team members develop consensus recommendations (including priority recommendations) after considering what reasonably could be accomplished within the State and what actions are most likely to have an impact. While the uniform guidelines are the same for each State, the assessment team considers unique State factors that may impact the applicability of the State to adopt certain recommendations. These factors may include, but are not limited to, demographics, geography, political structure, and institutional support for impaired-driving activities. The assessment team then develops a written report containing its consensus recommendations, and the report is provided to the State Highway Safety Office.

b. Uniform Guidelines. The Highway Safety Act of 1966 called on NHTSA to promulgate uniform standards for highway safety. In 1976, the Act was amended to provide more flexibility. The amendment provided that the uniform standards were to become more like guidelines for the States to use. This change was codified in 1987, changing the uniform standards to uniform guidelines.

Uniform Guideline Number 8 **(see Appendix A)** of the State Highway Safety Program provides that each State, in cooperation with its political subdivisions, should have a comprehensive program to combat impaired driving. Guideline Number 8 describes the five standard program areas that State impaired-driving activities should address, including: (1) Program Management; (2) Prevention; (3) Deterrence; (4) Driver Licensing; and (5) Treatment and Rehabilitation. States are encouraged to use these guidelines as a framework for problem identification. countermeasur development, and program evaluation.

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Since 1991, assessment teams have used these NHTSA-developed guidelines to assess the status of State impaired-driving programs. The team compares State activities to these guidelines, and assesses each of the five areas individually as well as the inter-relationship between them. These guidelines were considered to be state-of-the-art when they were last published. They are currently in the process of being updated to reflect more recent changes in the impaired-driving arena.

III. Study Purpose. Each assessment examines the strengths and weaknesses of a State's overall impaired-driving program. Assessment teams seek to develop a variety of recommendations, including priority recommendations, for a State to use for the enhancement or improvement of its impaired-driving program. Therefore, the recommendations invariably address areas of need or weakness. This study effort was an attempt to sort, categorize, and quantify the very large number of diverse and often complex recommendations by guideline area. This includes summarizing the many recommendations and identifying those that are prevalent across the many States. The results of this effort are intended to assist NHTSA in a review of the assessment process and to serve as a catalyst for potential enhancements to the process. In turn, an improved assessment process will better help States to determine ways to improve the effectiveness and efficiency of their impaired-driving programs.

IV. General Findings. There were 2,982 recommendations produced in 38 (out of 42) examined assessment and re-assessment reports, including 852 that were identified as priority recommendations by the assessment teams. Two assessments were completed too late to be part of this effort (Illinois 2003 and Puerto Rico 2003). Records could not be located for two others (American Samoa 1991 and Utah 2001).

The number and breadth of recommendations reflect broad areas of impaired-driving program needs and limitations. In general terms, most of the recommendations fit into one of 10 broad thematic areas. Some of these themes (e.g., DUI data and records) cut across several different guideline areas. These themes include (listed in descending order based on number of recommendations):

(1) increasing the deterrence effect by prioritizing enforcement efforts and enhancing the arrest, prosecution, and adjudication process;

(2) providing or improving public information and education efforts related to prevention and deterrence;

(3) remedying problems involving DUI data and records (data reporting requirements, offender tracking systems, data linkages, uniform traffic citations, etc.);

(4) enacting new laws or revising existing laws aimed at increasing the deterrence and/or prevention of DUI;

(5) increasing or enhancing training for law enforcement, prosecution, and judicial personnel;

(6) evaluating programs and activities associated with the effort to combat impaired driving;

(7) providing sufficient resources for treatment and rehabilitation (screening, diagnosis, treatment, availability, trained treatment personnel);

(8) improving inter/intra-governmental coordination and cooperation regarding DUI efforts;

(9) providing funding (including self-sufficiency) to provide for adequate resources (personnel, equipment); and

(10) developing or increasing task forces and/or community involvement.

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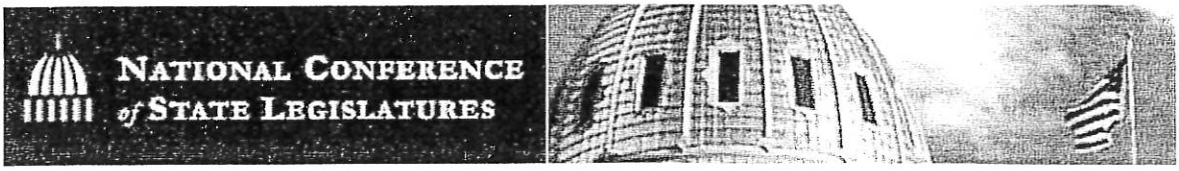

National Conference of State Legislatures

National Highway Traffic Safety Administration

State High BAC Laws
December 2004

This chart is based on Appendix A from "Evaluation of Minnesota's High BAC Law," a report issued by the National Highway Traffic Safety Administration showing the status of State High BAC laws as of as of January 1, 2002. The chart was updated through January 10, 2005 using the joint NCSL/NCSL Legislative Tracking Database.

State High-BAC Standards and Penalties

State	High BAC	Illegal Per Se BAC	Enhanced Penalty for High-BAC Offenses
Arizona	.15	.08	If high BAC, mandatory jail 30 consecutive days; all but 10 consecutive days may be suspended if screening/treatment program completed. Mandatory 10 consecutive days for standard 1st offense; all but 24 consecutive hours may be suspended if complete screening/treatment. Jurisdictions may provide work release program after 48 consecutive hours in jail for high-BAC offenders vs. 24 consecutive hours for other offenders. Jurisdictions also may provide home monitoring program after 15 consecutive days in jail for high-BAC vs. 24 consecutive hours. Maximum 6 months (with 30 consecutive days) vs. 6 months (10 consecutive days). Mandatory minimum fine $250 and $250 assessment vs. $250. Upon conviction, 12-month administrative ignition interlock required (or court may require) for high-BAC offenders after license suspension ends or conviction, whichever is later vs. no requirement.
Arkansas	.15	.08	For administrative license suspension, high-BAC offenders receive 180 days suspension or 30 days suspension followed by 150 days restricted driving privileges vs. 120 days suspension with restricted license. Restricted license can be available to all 1st offenders. Court can order ignition interlock.
California	.20	.08	Court may consider BAC = .20 as a special factor in imposing enhanced sanctions and determining whether to grant probation and may give high BAC "heightened consideration" in ordering an ignition interlock up to 3 years. In counties with licensed alcohol education/ counseling program, offenders placed on probation with high BAC must participate in program for at least 6 months vs. 3 months.
Colorado	.15 .20	.08	For state's mandatory treatment/screening program for all offenders, assessment tool recommends Level I if BAC ³. 15; judge, however, has discretion. If BAC = .20: mandatory 90 days jail (10 days if participate in alcohol education/treatment program) vs. 5 days unless participate in program. $500-1500 fine vs. $300-1,000. 60-120 days (mandatory 60) community service vs. 48-96 hours (mandatory 48). Administrative licensing action for BAC > .20: completion of alcohol education or treatment program required for license reinstatement. If driving under the influence (DWI)

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			charge is reduced to the lesser charge of driving while impaired, and if BAC = .20, then "because of such aggravating factor," sanctions imposed must be for (greater) DWI offense.
Connecticut	.16	.08	120 days administrative driver license suspension vs. 90 days, but all offenders may obtain restricted license after 30 days. Under state's diversion program, completion of pre-trial rehabilitation/alcohol education results in dismissal. If BAC = .16, offender attends more sessions at higher cost than other offenders.
Delaware	.16 .20	.08	BAC = .16: not automatically eligible, but can apply, for "First Offense Election Process" (dismissal of criminal charges upon completion of education/treatment program). BAC = .20: DMV conducts "character review" (references and interview) prior to reinstating license.
Florida	.20	.08	Fine $500- $1,000 vs. $250 -$500. Maximum 9 months jail vs. 6 months. Judge cannot accept guilty plea to lesser offense.
Georgia	.15	.08	Court cannot accept nolo contendere plea if violate illegal per se law and BAC = .15.
Idaho	.20	.08	Mandatory minimum 10 days jail (beginning with 48 consecutive hours) vs. no mandatory minimum; maximum 1 year vs. 6 months. Fine up to $2,000 vs. $1,000. Mandatory minimum 1 year driver license court suspension after release from confinement vs. mandatory minimum 30 days suspension followed by restricted license for 60-150 days.
Illinois	.15 .20	.08	BAC one of several criteria for assignment to "risk category" for completion of treatment program for license reinstatement: BAC < .15 = minimal risk (10 hours education); .15-.19 BAC = moderate risk (10 hours education and 12 hours early intervention); BAC = .20 = significant risk (10 hours education and 20 hours treatment). High risk multiple offenders must receive = 75 hours of treatment for reinstatement.
Indiana	.15	.08	BAC = .15 is a Class B felony. Maximum fine $5000 vs. $500. Maximum jail 1 year vs. 60 days.
Iowa	.15	.08	High-BAC offenders excluded from deferred judgment or sentence generally available to 1st offenders. Mandatory minimum 48 hours jail vs. no mandatory jail. Mandatory minimum $500 fine. For other offenders, minimum is $500, or $1,000 if personal injury or property damage crash. However, court may order unpaid community service in lieu of fine.
Kentucky	.18	.08	BAC = .18 is one of several "aggravating circumstances"; enhanced penalty is mandatory minimum 4 days jail, which "shall not be suspended, probated, conditionally discharged, or subject to any other form of early release." Must also be detained 4 hours after arrest. Other 1st offenders must receive one of the following: $200-$500 fine, 48 hours-30 days jail or community labor, or 48 hours-30 days community service.
Louisiana	.15	.08	Mandatory 48 hours jail prior to probation. For other 1st offenders, in lieu of minimum 10 days jail, may participate in substance abuse/driver improvement program and 1) serve 2 days jail, or 2) perform 4 days community service.
Maine	.15	.08	Mandatory minimum 48 hours jail prior to probation alternatives vs. no mandatory jail.
Minnesota	.20	.08	Effective 1/1/2001, DWI offenses are categorized into three degrees based on the number of aggravating factors present, which include a prior DWI offense, BAC > .20, and driving with passenger < 16 years old and > 36 months

			younger than driver. Criminal penalties if high BAC only aggravating factor, i.e., second degree DWI, include maximum jail 1 year vs. 90 days, mandatory minimum fine $900 vs. $210, maximum fine $3,000 vs. $700. If BAC > .20 court also may impose additional penalty assessment of $1,000. In addition, court may stay sentence except license revocation if offender submits to level of care recommended in required chemical use assessment report. Court must order high-BAC offenders person to submit to recommended level of care. Mandatory "hold for court": unless maximum bail is imposed after arrest, high-BAC offender released from jail only if agree to abstain from alcohol with daily electronic alcohol monitoring. Mandatory administrative pre-conviction license revocation 180 days (30 days hard revocation) vs. 90 days (15 days hard); mandatory post-conviction license revocation 60 days (30 days hard revocation) vs. 30 days (15 days hard). Administrative plate impoundment equal to license revocation period if BAC = .20.
Missouri	.15	.08	Upon conviction, the court must order offender to complete substance abuse program. For persons with administrative per se violations, driving privileges cannot be restored until successfully complete program. For cause, court may modify but may not waive this requirement if BAC > .15
Montana	.18	.08	Court may restrict driving to vehicle with ignition interlock device, if device is reasonably available, for BAC = .18.
Nevada	.18	.08	Offenders with BAC = .18 must be evaluated for alcohol/drug abuse prior to sentencing, with $100 fee. Also serve minimum 2 days jail or 48 hours community service. Other 1st offenders may receive suspended sentence if participate in treatment program but must serve 1 day jail or 48 hours community service.
New Hampshire	.16	.08	Class A misdemeanor vs. violation. Up to 1 year jail vs. no jail. Mandatory minimum fine $500 vs. $350; maximum $2,000 vs. $1,000. Mandatory minimum 1 year license revocation vs. 90 days. Administrative revocation of registration of vehicle registered to offender revoked for same period as license revocation; hardship registration available vs. no revocation. May receive conditional discharge, which may include up to 50 hours community service.
New Mexico	.16	.08	Mandatory minimum 48 consecutive hours jail vs. no mandatory jail.
North Carolina	.15 .16	.08	Person convicted with BAC = .15 must complete substance abuse assessment and treatment program, if indicated, to reinstate license. BAC = .16 considered gross impairment and an aggravating factor in sentencing; level of punishment is determined by weighting aggravating and mitigating factors. Also, to obtain restricted license after hard suspension, ignition interlock must be installed for one year, and driving with BAC = .04 prohibited.
Ohio	.17	.08	Mandatory jail time doubled from 3 consecutive days (may attend 3 consecutive days driver's intervention program in lieu of jail) to 6 days (may attend program for 3 days in lieu of 3 days jail but must serve 3 days jail).
Oklahoma	.15	.08	In addition to other penalties for all offenders, offenders convicted of driving with BAC = .15 receive mandatory minimum 28 days inpatient treatment, followed by minimum 1 year of supervision, periodic testing, and aftercare at defendant's expense, 480 hours of community service following aftercare, and minimum 30 days ignition interlock device. This shall not "preclude the defendant being charged or punished under other DWI statutes." Note: For any type of DWI offense, probation before judgment available. Deferred judgment also available upon guilty plea if complete alcohol/drug program.

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Rhode Island	.15	.08	In contrast to .10 = BAC <.15, offenders with BAC = .15 receive $500 fine vs. $100-$300 fine, 20-60 hours public community restitution and/or imprisonment for up to 1 year vs. 10-60 hours public community restitution and/or imprisonment for up to 1 year. Note: .08 < BAC < .10 is a civil offense.
South Dakota	.17	.08	Courts must require pre-sentencing alcohol evaluations vs. no such requirement
Tennessee	.20	.08	Mandatory minimum 7 consecutive days of jail vs. 48 consecutive hours. It appears that in certain counties with more than 100,000 residents, court may allow 200 hours community service in lieu of jail term.
Utah	.16	.08	As an alternative to imprisonment or community service, an offender may be allowed to participate in home confinement electronic monitoring program; alcohol testing may be part of program. Court also may order alcohol or drug treatment and may require ignition interlock as condition of probation. For each of these sanctions court must give reasons on record if not imposed/ordered if offender had BAC > .16.
Virginia	.15	.08	Mandatory minimum jail: 5 days if BAC .15 - .20; 10 days if BAC > .20; no mandatory minimum if BAC < .15. Ignition interlock required for any high BAC offense. First offender may attend Virginia Alcohol Safety Action Program (VASAP) to obtain restricted license. BAC = .20 is one of several criteria used to indicate longer and more intensive education.
Washington	.15	.08	Mandatory minimum 2 days jail or 30 days electronic home monitoring vs. 24 hours or 15 days for standard offense. Ignition interlock device (after license suspension or revocation period) not less than 1 year vs. court discretion. Mandatory minimum fine $925 vs. $685. Mandatory court driver license suspension/revocation 1 year vs. 90 days. Deferred prosecution program for all 1st offenders results in issuance of 5-year probationary license and dismissal of charge upon completion of 2-year treatment program. Court must order ignition interlock if BAC = .15.
Wisconsin	.17 .20 .26	.08	Fine penalties for persons convicted of 3rd, 4th, and 5th DWI are doubled if BAC .17-.199, tripled if BAC .20-.249, and quadrupled if BAC = .25. The law does not include enhanced penalties for high-BAC 1st offenders. Wisconsin law also provides that if BAC is known (for first or subsequent offenses), the "court shall consider that level as a factor in sentencing."

Sources: Appendix A from "Evaluation of Minnesota's High BAC Law," issued by the National Highway Traffic Safety Administration; 50-state bill searches for 2002, 2003 and 2004 via joint NCSL/NHTSA bill tracking database; Westlaw searches; Lexis searches.

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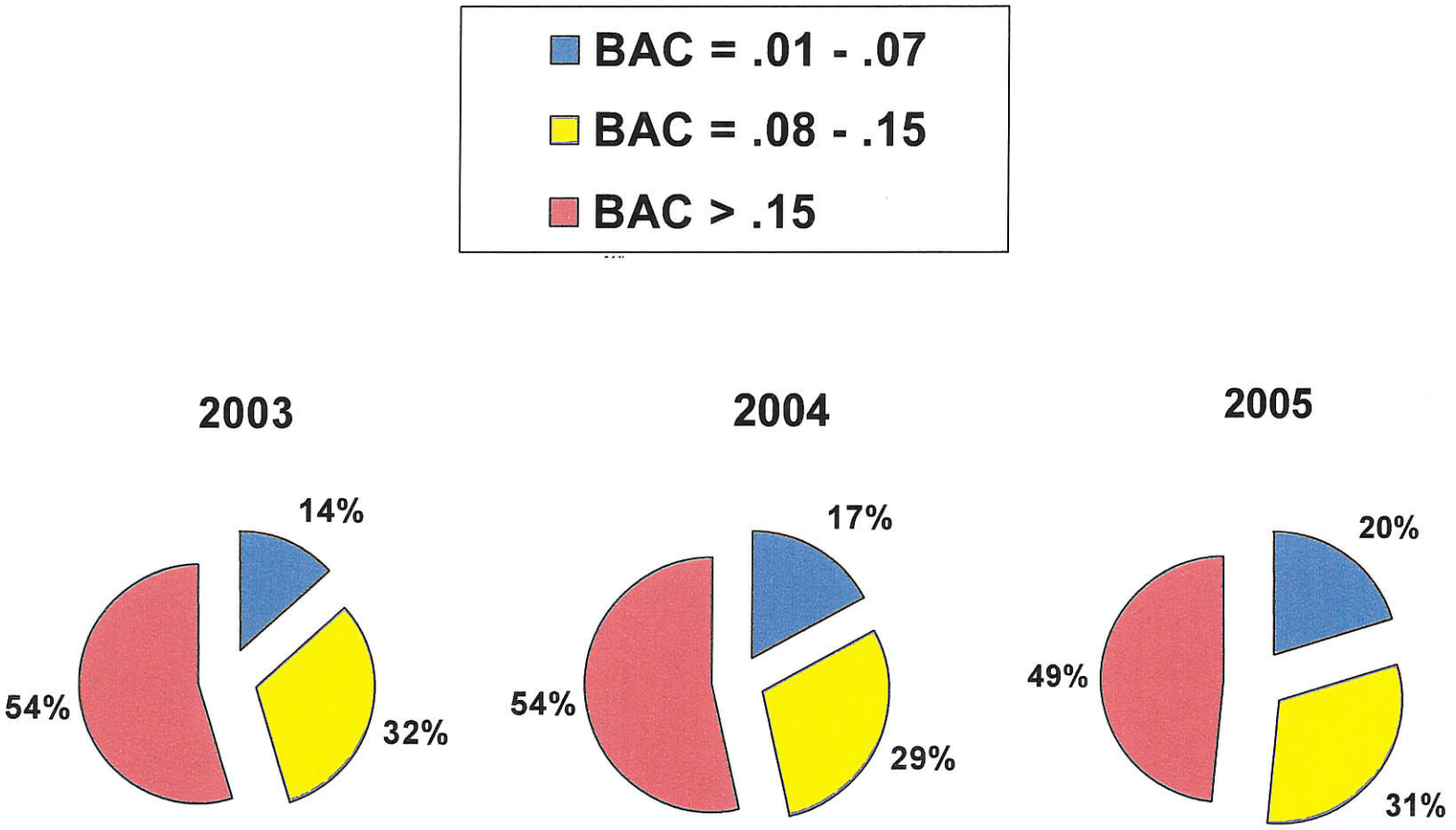
Kansas Alcohol-Related Fatalities by Driver BAC Level



Motor vehicle crash fatalities by year and driver or motorcycle operator BAC level.
National Center for Statistical Analysis, 2006

To: House Judiciary Committee
Re: HB2012

I come before you today on behalf of the Kansas Sheriff's Association to testify in regard to HB2012. Kansas Sheriff's are the first to stand up and say that we want to be tough on crime and remove those drivers that choose to drink and drive from Kansas roads, Especially those with high BAC levels. Kansas Sheriff's know all too well how dangerous extremely drunk drivers are. There is nothing more dreaded by Sheriff's than having to deliver death notifications to families of people that have died at the hands of a drunk driver.

However, Kansas Sheriff's have deep concerns about HB2012 and the lengthy incarceration periods that have been recommended in this bill. County jails are busting at the seams already. The increased jail time recommended will compound this problem. Kansas Sheriff's have for some time expressed our concerns with the legislature concerning sentencing guidelines and the creation of laws that enhance sentences and puts convicted felons in our county jails. County jails were not designed or intended to hold prisoners for long periods of time. Originally county jails only housed prisoner's long term that were convicted of misdemeanor crimes. We now house felons for long periods of time in our jails.

Kansas Sheriff's understand that Kansas Dept. of Corrections faces overcrowding issues, we at the County level are facing the same issues. We cannot continue to adjust sentencing guidelines that would traditionally send a person to prison but instead allows for incarceration in our County jails. We must stop making new laws that make certain crimes felonies, yet sends them to serve time in our county jails.

Counties throughout Kansas are at a crucial point concerning County Jails. Counties must either build new jails or pay to house prisoners in other counties at a daily rate of $40 to $50 per day per prisoner. In addition to the overcrowding, there are additional financial issues. The longer a prisoner is held there is a strong likely hood that there will be medical expenses and health issues that counties must pay for. The solution is simple, if we truly want to get tough on crime and make a statement then the State of Kansas must either build additional facilities for DOC or allow private prisons to be built in Kansas and let's get felons incarcerated at the State level. If we do not address this issue at the State level than county government will have no chose but to increase local taxes to pay for county prisoners.

House Judiciary
Date 1-17-07
Attachment # 7

I attended a meeting of a task force that was working to make recommendations and at that meeting I expressed these very concerns. I understand that they in fact recommended that there be a funding source to compensate Kansas Sheriff's for the cost of the enhanced jail time. In reviewing HB2012 I see that there has not been any allowance for any type of compensation. If this committee passes this bill out of committee favorably then it would be the hope of Kansas Sheriff's that would either create compensation or would change the language in this bill that would require incarceration with the Kansas Dept. of Corrections.

Thank You for your time.

Randy L. Rogers
Legislative Chair
Kansas Sheriff's Association

SEDGWICK COUNTY, KANSAS

SHERIFF'S OFFICE
GARY STEED
Sheriff

141 WEST ELM * WICHITA, KANSAS 67203 * TELEPHONE: (316) 383-7264 * FAX: (316) 660-3248

TESTIMONY
Before the House Judiciary Committee
January 17, 2007

Honorable Chairman Michael O'Neal and members of the committee, I appreciate the opportunity to testify on the increase in the penalties on DUI for those with a blood or breath alcohol concentration of 0.16 or more. I am the Detention Bureau Commander for the Sedgwick County Sheriff's Office and have been in law enforcement for the past twenty-nine years. I am appearing on behalf of Sedgwick County and the Sedgwick County Sheriff's Office.

Law Enforcement officers in Kansas are well aware of the need to reduce the number of drunk drivers on the roadways. The Sedgwick County Sheriff's Office supports legislation that will make our streets safer and reduce the number of DUI's. Our main concerns with this proposed legislation is it will seriously impact our already strained jail resources and bed space that doesn't exist. The associated medical costs will also directly impact our budget.

From October 1, 2005, through September 30, 2006, the total number of Sedgwick Sheriff's Office DUI cases was 843. Of those cases, 228 had a blood or breath alcohol concentration of 0.16 or more. If we apply a conviction rate of only 50% to the 228 arrested suspects, 114 would be subject to the double sentence under the proposed legislation.

The Wichita Police Department arrested 1750 people on DUI in 2005. Using the same 50% conviction rate for those that were over the 0.16, then 875 arrested persons would be subject to the doubling sentences.

Using these figures the number of convicted persons between the Sheriff's Office and the Wichita Police Department, alone, would be 989. All of which will create a tremendous increase in the number of days sentenced and housed in our facility. This does not include the number or DUI arrests made by the Kansas Highway Patrol and the other local agencies throughout our county.

House Judiciary
Date 1-17-07
Attachment # 8

By multiplying that number to the extra mandatory days that each person would be required to serve in detention, we will be burdened with an additional $114, 269 in housing cost, using the daily per diem rate of $57.77 for Sedgwick County as calculated by the Department of Corrections. This dollar amount would be significantly higher if we added in other county costs, such as revenue bonds, not included by KDOC.

Another cost related issue is our associated medical expenses would also increase as a result of the proposed legislation. Leaving the felons in a County facility for their sentence or a portion of it relieves the State of the burden of this cost. This especially important when you look at those who are sentenced to their third or fourth DUI. These inmates usually suffer from a number of alcohol related illnesses.

The proposed legislation allows for the convicted person to be eligible for community service or a work release program. This does little to remedy the situation Sedgwick County will be faced with. We are currently at the maximum number of beds we have for the work release program. Invariably, it will only add more to our strained resources. Our work release facility is already double bunked and at maximum capacity.

An additional issue is, those who are convicted of the felony and given the mandatory sentence under this proposed legislation, would not receive a reduction in their sentence for good behavior during incarceration in a county facility as they would if they were sent to the Department of Corrections.

The primary mission of the local jails is that of a pre-trial holding facility. We are not designed to offer programs or rehabilitation services to long term inmates.

Prepared By:
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WRITTEN TESTIMONY OF DOUGLAS E. WELLS
FOR KANSAS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
HOUSE COMMITTEE ON JUDICIARY
HOUSE BILL 2012
OPPONENT
JANUARY 17, 2007

The following points are submitted in opposition to House Bill 2012. I am available to provide further detail. Points and opposition are as follows:

- In the criminal case, the Judge can impose enhanced punishment beyond a minimum penalty when needed. The prosecutor can argue for more than the minimum sentence and the Judge can invoke more than the minimum sentence regardless of whether the prosecutor requests it. Why fix something that is not broken?

- The public policy purpose of the proposed severe DUI statute is to encourage people not to refuse a breath test and not to drive with a breath alcohol content of .15 or greater. Excessive consumption of alcohol causes a person to become mentally impaired. A person who is impaired is not mentally capable of receiving this public policy message. This proposed statute assumes that a person who is mentally impaired by alcohol knowingly refuses a test or knowingly consumes alcohol in an amount that causes them to have a breath test of .15 or greater. If a person is already under the influence with a breath test of .08, hence already mentally impaired, how can such a person gain better mental comprehension of enhanced penalty if they are at or above a .15?

- The cost to society outweighs the benefits of punishment. Municipalities and counties will be burdened with greater expense with increased costs of incarceration. The cost of prosecution will increase as penalties increase because more cases will be contested. More jury trials will result. The Department of Revenue will also incur additional expense as more hearings are requested and more

petitions for judicial review are litigated. Increased penalties and driving sanctions will cause more people to loose their employment, including persons who are the sole provider for their family.

- Not all prosecutors offer diversions. Some prosecutors severely restrict who may be eligible for a diversion. There are no statutory guidelines. The enhanced penalties are too severe for a 1st offender who happens to drive in a jurisdiction where diversion is not offered or is limited.

- A person who refuses a breath test is already punished more severely with a long license suspension.

- Increased driving sanctions encourage people to drive without insurance, thereby increasing the risk to the public. A suspended person cannot get operator's insurance.

- A chronic offender can be punished more severely under the current system.

- The drug recognition examination (DRE) should not have a special rule permitting its admission into evidence. When a DRE is attacked by a knowledgeable defense attorney, courts are routinely not permitting admission of a DRE for the following reasons:

    - Horizontal gaze nystagmus (HGN) has been ruled to be inadmissible by the Supreme Court on three occasions. It does not meet the Frye test. HGN is a critical part of the DRE.

    - The DRE is not supported by any validation studies. The Walk and Turn test and One Leg Stand test are supported by validation studies commissioned by the National Highway Traffic Safety Administration. We should not allow a lesser standard for the DRE.

    - The DRE officer is required to make medical determinations which he/she is not qualified to administer.

    - A DRE is a "prediction", not a measurement.

- There is no requirement to calibration check instruments used in the DRE.

- You should not authorize admission of one piece of evidence unless you are certain it is reliable. The DRE is unreliable.

- The DRE does not even have to be properly and fully administered under the wording of the proposed changes.

- K.S.A. 8-1020 should be modified as follows if driver's license sanctions are increased:

  - Discovery should be permitted of law enforcement reports, breath test machine repair records, breath test log sheets, and KBI worksheets in blood cases. K.S.A. 8-1020(e).

  - Witnesses should not be limited to law enforcement witnesses. K.S.A. 8-1020(g).

  - Breath test procedures should be "reliable" rather than merely in substantial compliance with KDHE procedures. K.S.A. 8-1020(h)(2)(F). The State will begin using the Intoxilyzer 8000 in the next year or two. I have personally tested the Intoxilyzer 8000 and have caused the machine to falsely read mouth alcohol at a level of over .2. It is susceptible to radio frequency interference. These mechanical and program deficiencies should be able to be raised even if the Intoxilyzer 5000 was operated in accordance with KDHE procedures.

- If driver's license sanctions and criminal penalties are enhanced based upon a test refusal or based on a .15 or greater test result, the implied consent advisory, K.S.A. 8-1001(f), should be modified to advise the suspect of the enhanced license penalties and criminal penalties for refusing and for testing .15 or greater. If a primary reason for amendment of DUI statutes is to notify the public of increased penalties and sanctions to enhance responsible driving, the implied consent notice must be modified to provide contemporaneous notice. Providing notice of penalties encourages completion of a breath test rather than refusal.

- Not all people who refuse a breath test or have a .15 or greater breath test deserve enhanced penalties. The Judge should have discretion based on the facts and actions of the defendant. Persons that I have represented that would not deserve the enhanced penalties include, but are not limited to the following:

    - A person who immediately enters treatment.

    - A person who has just lost their spouse, by death, divorce, or because they joined the priesthood.

    - A person participating in a bachelor party, birthday, or graduation. I have had one person who rode a limosine for a bachelor party but consumed so much alcohol that he drove himself home from the drop off point.

    - A Good Samaritan who stopped to assist a stranded motorist.

    - A person who is the victim of a rear end collision caused exclusively by the fault of another person.

    - A person returning from bowling, karaoke, or a lodge meeting.

    - An over the road trucker, farmer or custom cutter driving their personal vehicle.

    - People who must travel to work - over the road sales, construction, etc.

    - Business men, doctors,

Douglas E. Wells,
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