

ALABAMA'S FELONY DUI STATUTE- A HISTORY

[This document was originally prepared by AOC and was later revised and updated by Patrick Mahaney.]

Felony DUI, as a statutory offense under the Alabama Code, was introduced in 1994 with the amendment of Section 32-5A-191, "Driving while Under Influence of Alcohol or Controlled Substances," (Act 94-590 effective August 20, 1994). That amendment created the offense of Felony DUI in Alabama (a Class C felony) applicable to fourth or subsequent convictions of DUI within a five year period.

Section 32-5A-191, Alabama's current DUI statute, was first enacted by Act No. 80-434, Section 9-102, Ala. Acts 1980, effective May 19, 1980, repealing Section 32-5-170, "Driving While Intoxicated." The purpose of Section 32-5A-191 was not only to bring the law on driving under the influence of alcohol and controlled substances in line with other states in order to achieve a degree of uniformity of treatment with Alabama sister states, but also to make the DUI statute more enforceable and to do a better job of helping identify the problem of the 'drinking driver' and to keep the offender off the highway. Under the prior law, proper treatment of a person convicted of DWI was not clear. For example, Section 32-6-16(f)(2) which provided that the Director of Public Safety was authorized to revoke the license of any driver convicted of "driving a motor vehicle by a person who is an habitual user of narcotic drugs or while intoxicated," there was no clear distinction between first and subsequent convictions.

When Section 32-5A-191 repealed Section 32-5-170 in 1980, a blood alcohol content (BAC) limit was introduced, the phrase "intoxicated" was replaced with "under the influence of alcohol", and the scope of the offense was broadened to include DUI when 'in actual physical control of a vehicle'. The resulting Section provided that a DUI violation occurred when "a person drives or is in actual physical control of any vehicle where they: (1) have a BAC is 0.10 or more; (2) are under the influence of alcohol; (3) are under the influence of a controlled substance that renders the driver incapable of safely driving; or (4) under a combined influence of alcohol and a controlled substance which renders him incapable of driving safely." The DUI statute also imposed penalties and sanctions for first, second and subsequent convictions.

A first conviction was subject to imprisonment in a county or municipal jail of not more than one year and/or a fine of not less than \$100, but no more than \$1,000. The sentencing court could also prohibit the driver from driving for up to 6 months. First time offenders convicted of driving under influence of alcohol were also required to complete a DUI referral program (commonly referred to as the "CRO program."). Second and subsequent convictions, within a five year period, were subject to a fine of not less than \$250, but no more than \$1,500, and/or imprisonment for no more than one year. In addition the Director of Public Safety was to revoke the driver's driving privilege for 6 months.

In 1983, Act 83-620 made several amendments to the DUI statute. Among these amendments was the addition of subsection (a)(5) extending the prohibition of driving under the influence to include 'while under the influence of any substance which impairs the mental or physical faculties' and mandatory driver license suspension of 90 days upon conviction of first offense DUI. The minimum fine imposed for a first conviction of DUI was increased from \$100 to \$250.

Under Act 83-620, the fines and license suspension for second convictions within a 5 year period were also increased as follows: minimum fine from \$200 to \$500, maximum fine from \$1,500 to \$2,500 and the license suspension from 6 months to 1 year. A mandatory penalty a jail sentence of 48 consecutive hours or 20 days community service was also added for a second conviction. Additionally, a penalty provision for a third and subsequent conviction within a 5 year period was introduced, which was punishable as a misdemeanor offense with a penalty of a fine no less than \$1,000, but no more than \$5,000, and a mandatory term of imprisonment of 60 days, but no more than one year (which may include hard labor) and a mandatory license suspension for 3 years.

In 1994, Felony DUI became part of Alabama law. Act No. 94-590 amended Section 32-5A-191, introducing a penalty provision for, fourth and subsequent convictions within a 5 year period. This subsection provided penalties as follows: a minimum fine of \$2,000, maximum fine of \$5,000, and imprisonment for a term not less than one year and one day nor more than more than 10 years, and mandatory 5 years license revocation. The provision allowed the minimum sentence of one year and one day to be suspended or probated, if the defendant enrolled and successfully completed a state certified chemical dependency program recommended by and approved by the sentencing court. The amendment also provided that the Alabama Habitual Felony Offender (AHFO) law was not to apply nor was a DUI felony conviction to be used for purposes of enhancements under the AHFO statute. Provision was also made to provide that any person convicted DUI must be referred to a CRO officer for evaluation and at a minimum be required to complete a DUI or substance abuse court referral program approved by the Administrative Office of Courts.

In 1995, Section 32-5A-191 was amended by Act 95-784, effective August 9, 1995, reducing the presumptive level for driving under the influence of alcohol violations from 0.10 to 0.08 blood alcohol concentration. All fines, minimum and maximum, were doubled. The amendment also provided specific dispositions for fines collected, diverting these from the State General Fund. It should also be noted that the Chemical Test for Intoxication Act, Section 32-5A-194, was amended to further provide for presumptions based a defendant's BAC level at the time the test was taken.

There were two amendments in 1996: the first effective April 23, 1996 (Act 96-341) which introduced a prohibition of the operation of a school bus or day care driver while in performance of their duties with a BAC of greater than 0.02. This amendment also amended the fine distribution provision. The second amendment in 1996, Act 96-705, effective May 28, 1996, introduced subsection (b), a prohibition on the operation of a motor vehicle by a person under 21 who has BAC greater than 0.02. This amendment recognized the jurisdiction of the juvenile court and youthful offender status by providing for adjudications and finding of delinquency. It also provided that upon conviction, adjudication or finding of delinquency under this subsection the imposition of fines would be in accordance with the DUI statute unless it was the first offense under subsection (b) and the BAC was between 0.02 and 0.08, whereupon the person's driver's license would be suspended for 30 days in lieu of any penalties provided for first offenders over 21 years of age with a BAC of 0.08 or more. The subsection also provided that there was to be no disclosure of any records or findings, made other than to courts and law enforcement agencies.

The 1997 amendment, (Act 97-556, effective October 1, 1997), increased all minimum and maximum fines provisions by \$100. It also removed the 5 year time period previously imposed for third, fourth and subsequent convictions. [This was done by apparent oversight or inadvertence by the Legislative Reference Service when preparing the engrossed bill, and not as an intentional decision of the legislature.] The subsection relating to the distribution of funds was also amended to include the Impaired Drivers Trust Fund.

In 1999 the DUI statute was amended by Act 99-432 effective August 1, 1999 to enhance the minimum sentence of persons older than 21 years who are convicted of driving a motor vehicle while under the influence of alcohol or a controlled substance if a child under the age of 14 years was in the vehicle at the time of the offense. The effect of the enhancement was that the minimum sentence to be imposed was doubled.

In 2000 by Act 2000-677, effective August 1, 2000, amended the DUI Statute to increase the minimum term of imprisonment for second convictions from 48 consecutive hours to 5 days and the alternative minimum community service from 20 days to 30 days. A minimum mandatory term of imprisonment of 10 days, to be served in the county jail, was introduced with respect to fourth or subsequent DUI (Felony DUI) convictions. The amendment also introduced the requirement for persons under 21 who are convicted with a BAC between 0.02 and 0.08 pursuant to subsection (b) to attend and complete a DUI or substance abuse referral program. The amendment also added subsection (o) providing for the suspension of the motor vehicle registration for all vehicles owned by a repeat offender for the duration of the offender's driver's license suspension. A repeat offender was defined as a person convicted of DUI in violation of the DUI Section, a municipal ordinance adopting the DUI Section or similar state law more than once in a five year period. Subsection (o) did provide for discretion should a co-owner of a vehicle be completely dependent on the vehicle for necessities of life.

The amendment in 2002 by Act 2002-502, effective July 1, 2002, made no substantive changes to the offense and penalty provisions, but further provided for the distribution of fines for offenses charged as municipal ordinance violations, including when the fine is paid on an installment basis. It also provided that the records of a person convicted, adjudicated or subject to a finding of delinquency under subsection (b) (person under the age of 21 convicted of DUI BAC greater than 0.02) could be also be disclosed to the defendants employer as well as law enforcement agencies.

In 2005, effective August 5, 2005, the DUI Statute was amended by Act 2005-326, to prohibit driving or physical control of a commercial motor vehicle when a person has a BAC of 0.04 or greater. The penalties imposed were made subject to CFR part of the Federal Motor Carrier Safety Regulations.

The most recent amendments were in 2006, effective April 28, 2006. There were two amending Acts, 2006-298 (effective 7/1/06) and 2006-654 (effective 4/28/06). The former was repealed by the latter before it came into effect. The latter amendment introduced a new subsection providing that a prior conviction for a DUI within a five year period from Alabama, a municipality within Alabama, or another state or territory or a municipality of another state or territory shall be considered by a court for enhancement of the sentence of a person who is convicted for DUI. This amendment was the result of the Alabama Supreme Court decision in *Ex parte Bertram* 884 So.2d 889 (Ala. 2003). In that case the Court interpreted the word 'conviction' in Section 32-5A-191 to mean "conviction of violating this Section". This interpretation when applied to subsection (h) meant that it would read as follows: '[O]n a fourth or subsequent conviction [of violating this Section], a person is guilty of a Class C felony...' The Court concluded that an out-of-state DUI conviction could not be used as "prior convictions" necessary to constitute a felony defined the Section.

The 2006 amendment which allowed DUI convictions other than ones in violation of Section 32-5A-191, has subsequently been interpreted by the Alabama Court of Criminal Appeals to reinstate the 5 year time period that the 1997 amendment removed. In *Hankins v. State*, 989 So. 2d 610 (Ala.Crim.App. 2007), the Court held that the insertion of (o) (2006

amendment) did clarify the ambiguous nature of the word "conviction" in subsections (f), (g), and (h), by stating that it was to include prior out-of-state DUI convictions as well as prior in-state municipal convictions. But the Court concluded that in accordance with the traditional and well settled rules of statutory interpretation that the 2006 amendment "has restricted the use of prior DUI convictions for sentencing purposes to only those convictions that occurred within the five-year period immediately preceding the current conviction. In other words, the five-year requirement that was removed from subsections (g) and (h) in 1997 has now been reinstated."

The effect of the 2006 amendment with respect to municipal DUI convictions has recently been considered in *Ex parte Holbert*, ___ So.2d ___, 2008 WL 2699684 (Ala. July 11, 2008). In this case the Alabama Supreme Court was presented with facts that required it to determine whether a municipal DUI conviction could be counted as a 'conviction' for the purposes of a felony DUI conviction pursuant to Section 32-5A-191(h). The Court concluded that because the municipal DUI conviction was recorded before the 2006 amendment, the municipal DUI conviction could not be counted. The court did acknowledge the 2006 amendment introducing subsection (o) and noted that it was not applicable in that case as the municipal DUI conviction was recorded before that subsection became effective.

In summary, the Alabama DUI statute has significantly evolved since 1980 to cover second, third, and fourth (felony) DUI offenses, with increasingly severe penalty provisions. The penalty scheme is intended to deter the commission of the offense, but also provides avenues for rehabilitation of offenders. Although the legislature has reinstated the 5 year decaying period for sentencing enhancement purposes, the DUI statute now provides a system that clearly allows sentencing courts to take into account all in-state and out-of-state DUI convictions (within a five year period), as well as municipal ordinance DUI convictions. One area of concern is with juvenile and youth offender that are adjudicated or subject to a finding of delinquency for violating the DUI statute, as such findings are not considered 'convictions' under the Code of Alabama and cannot be used for sentence enhancements for any subsection except in accordance with subsection (b).

ALABAMA DUI STATUTE HISTORY

Act No 80-434, § 9-102 Ala. Acts 1980, Effective August 16, 1980. Act 80-434 rewrote and replaced the "Rules of the Road" and with the introduction of §32-5A-191, repealed §32-5-170 "Driving While Intoxicated" with "Driving Under the Influence," and prohibiting driving while BAC 0.10, under the influence of alcohol; under the influence of a controlled substance rendering the driver incapable to drive or under the combined influence of alcohol and a controlled substance rendering the driver incapable to drive.

The Section provided misdemeanor penalties for 1st offenders and 2nd and subsequent convictions within a five year period.

Act No. 81-803, § 9-102 Ala. Acts 1981
Effective No substantive change.

Act No. 83-620, Ala Act 1983 Amendment strengthened various sentencing provisions, including increasing the fine to be imposed, revocation of licenses, adding mandatory jail sentence of 48 hours or 20 days community service upon a second conviction. It also added an additional penalty provision for a third or subsequent conviction within a 5 year, imposing a fine, no less than \$1000 but no more than \$5000, imprisonment for (mandatory) 60 days but no more than 1 year.

Act No. 84-259, Ala Acts 1984, Effective No substantive change.

Act No. 94-590, Ala. Acts 1994, Effective August 20, 1994: Amendment inserted a penalty and sanction provision for a fourth and subsequent conviction within 5 years. The provisions imposed a minimum fine of \$2,000 and maximum of \$5,000, minimum term of imprisonment for one year and one day, maximum 10 years. The minimum imprisonment could be suspended or probated if the defendant enrolled and successfully completed certified chemical dependency program. The amendment recognized that the HFO statute should not be applicable and expressly provided that a felony DUI conviction could not be considered for enhancement under that statute. The amendment also provided for court referrals for all persons convicted of DUI (not just 1st offenders) to appropriate community resources.

Act No. 95-784, Ala. Acts 1995, Effective August 9, 1995: Substituted BAC "0.08" for "0.10" and doubled all fines, minimum and maximums. Introduced fine distribution provision, diverting fines from the State General Fund.

Act No. 96-341, Ala. Acts 1996, Effective April 23, 1996: Amendment introduced prohibition on the operation of a school bus or day care vehicle while in performance of duties had a BAC of greater than 0.02. An offender of the subsection was subject to the same penalties except the first conviction would result in a 1 year license suspension. Also amended fine disbursement provision.

Act No. 96-705, Ala Act 1996, Effective May 28, 1996: Amendment added subsection (b) prohibiting the operation of a motor vehicle by a person under 21 who has BAC between over 0.02. Subsection (b) provided all violations including adjudications and findings of delinquency were subject to the penalties provided in the DUI statute with the exception of 1st offenders who had a BAC between 0.02 and 0.08; the penalty was limited to 30 day license suspension. The conviction, adjudication or finding of delinquency was deemed confidential

Act No. 97-556, Ala. Acts 1997, Effective October 1, 1997: Amendment increased all minimum and maximum fines by \$100. Act 97-556 also removed the 5 year time period for third, fourth and subsequent convictions. [This was done by apparent oversight or inadvertence by the Legislative Reference Service when preparing the engrossed bill, and not as an intentional decision of the legislature.] Amended distribution of funds subsection to include the Impaired Drivers Trust Fund.

Act No. 99-432, Ala. Acts 1999, Effective September 1, 1999: Amendment introduced sentence enhancements (doubled the minimum punishment) with respect to any person over 21 who is convicted of a DUI offense where a child under the age of 14 years was in the vehicle at the time of the offense.

Act No. 2000-677, Ala. Acts 2000, Effective August 1, 2000: Amendment to subsection (b) introduced requirement for persons under 21 who are convicted with a BAC between 0.02 and 0.08 are to attend and complete a DUI or substance abuse referral program. The amendment also increased the minimum terms of jail and community service for second convictions from 48 hours imprisonment or 20 days community service to 5 days imprisonment or 30 day community service. It also introduced a minimum term of imprisonment of 10 days to be served if sentence is suspended or probated sentenced imposed for fourth and subsequent DUI convictions. A subsection providing for the suspension of a repeat offender's vehicle registration for as long as their driver's license is suspended was also introduced.

Act No. 2002-502, Ala. Acts 2002, Effective July 1, 2002: The amendment in 2002 made no substantive changes to the offense and penalty provisions. It did provide for further distribution of fines for offenses charged as municipal ordinance violations including when the fine is paid on an installment basis. It also provided that the records of a person convicted, adjudicated or subject to a finding of delinquency under subsection (b) (person under the age of 21 convicted of DUI BAC greater than 0.02 – 0.08) could be also be disclosed to the defendants employer.

Act No. 2005-326, Ala. Acts 2005, Effective August 5, 2005: Amendment provided that the driver of a commercial motor vehicle would be guilty of driving under the influence of alcohol if the person had a BAC of 0.04 or greater than a certain percentage of alcohol in his or her blood.

Act No. 2006-298, Ala. Acts 2006 Repealed before effective by Act No. 2006-654

Act No. 2006-654, Ala. Acts 2006, Effective April 28, 2006: Amended to provide that a prior conviction for DUI in Alabama, a municipality in Alabama, or another state or territory or a municipality of another state or territory within a five year period could be considered by a court for enhancement of the sentence of a person who is convicted for DUI pursuant to Section 32-5A-191. Consequential effect as interpreted by Alabama Court of Criminal Appeals was to reinstate the 5 year limitation period for all previous DUI convictions. [Note: The five year limitation for prior DUI offenses had previously existed in Alabama law until removed by Act 97-556.]