

A History of Alabama's Driving Under the Influence Statutes: Over 90 Years of Evolution

By Patrick Mahaney

Alabama's DWI laws, 1911-1980:

Alabama's first traffic laws originated in 1911, shortly after the automobile was placed into mass production and began appearing on Alabama's limited number of roads and highways. Act 535 of the 1911 Legislature was titled "The Motor Vehicle Law" and became effective October 1, 1911. Although much of Act 535 was intended to generate revenue and designed to require uniform license fees on automobiles, the act also included, among other parts, a speed limit law;¹ a law requiring operational brakes, horns and lights; and a law prohibiting driving while intoxicated. The DWI statute was found at Section 28 of the Act. For some unstated reason, the DWI statute was combined with a Leaving the Scene statute and entitled: "Punishment for operating motor vehicles while in an intoxicated condition and for going away without stopping after accident and making himself known."

Act 535, Section 28, first line, stated: "Whoever operates a motor vehicle while in an intoxicated condition shall be guilty of a misdemeanor." That single sentence was the entire DWI law for the state until revised in 1919.

The 1919 Legislature, by Act 696, amended the 1911 statute to include the requirement for the trial court clerk to report to the State Tax Commission, the predecessor agency to the Department of Revenue, a conviction for violation of the DWI law so that the operator's license could be suspended. The 1919 amendment also set the DWI penalty of a fine "not exceeding twenty-five dollars for the first offense and not in excess of five hundred dollars for the subsequent offense."

In 1927, the Alabama legislature enacted a comprehensive revision of the state's traffic code by passage of Act 347 as part of a legislative act reorganizing the State Highway Department. Set forth in the legislation was the requirement to enforce the state's traffic laws and the authorization for the State Highway Department to commission selected individuals to enforce the "road laws."

The 1927 Act also established Alabama's first systematic "Rules of the Road" and incorporated a specific statute prohibiting driving under the influence. By comparison to today's DUI law, it was a model of simplicity:

"It shall be unlawful for any person whether licensed or not who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon any highway within this State;..."

¹ "No person shall operate a motor vehicle upon the public highways of this State recklessly, or a rate of speed that is reasonable and proper.... a rate of speed in excess of thirty miles per hour for a distance of a quarter mile shall be presumed evidence of traveling at a rate of speed which is not careful and prudent."

That single paragraph constituted the entire DWI law for the state in 1927. In large part, the wording of the state's DWI statute remained unchanged until 1980.² Although the terms were not self-defining, using the ordinary understanding at the time, it basically meant a driver should not be "intoxicated" and attempt to drive a vehicle on the state's highways.³ The term "intoxication" was generally synonymous with "drunk" or demonstrating the symptoms of "drunkenness." The arresting officer would commonly describe gross motor skill impairment, or drunkenness, as well as dangerous and erratic driving, as being the basis for the arrest.

Breath Test Instruments Introduced to Enforce DWI laws:

In the years following WWII, technology developed during the war was adapted and applied to police work. Stationary radar to determine the speed of motor vehicles was one of the earliest forms of post-war technology adapted for police work. The installation of two-way radios for base to car and car to car communications was another post-World War II innovation widely implemented. Additionally, work was undertaken to develop a mechanism to test a motorist for suspected alcohol impairment. A reliable and accurate, yet low-cost to administer and capable of being conducted by a non-scientist operator, device was required to meet the needs of the police service. Scientific methods to establish the amount of alcohol the motorist had consumed to constitute the level of being "intoxicated" or "under the influence" were also needed to prosecute the offender.

In 1954, after extensive research by forensic scientist and inventor Robert Borckenstein, the "Breathalyzer" was placed on the market and proved to be an immediate commercial success. The "Breathalyzer" met all the stated requirements for alcohol testing: it was accurate to 1/100 gram per cent blood alcohol concentration; the cost per test administration was low; the initial cost to purchase the instrument was modest; the instrument was easy to operate and did not require scientific training on part of the operator; and best of all - administering a breath test on a motorist was quick, clean, and convenient.

For over two decades, the Breathalyzer was the most commonly used evidentiary breath test instrument and was widely adopted by the majority of states and Canadian provinces as part of a nationwide movement to utilize scientific evidence in the prosecution of alcohol related traffic

² In 1923, the Legislature incorporated the DWI act of 1919 into the *Code of Alabama* as Section 3324. As noted, the comprehension revision of the "Rules of the Road" in the 1927 Act included the prior DWI statute. The 1928 *Code of Alabama* placed the DWI statute in Section 1397 of the Code. Some years later, in the 1936 Extraordinary Session, the Legislature amended the DWI act to include a mandatory revocation of driving privilege. However, this revocation requirement was later amended in 1947 by limiting the period of license revocation to one year, subject to the discretion of the trial court.

³ As Judge Samford commented in *Holley v. State*, 25 Ala. App. 260, 144 So. 535, cert. denied 144 So. 537 (1932): "The argument is made that there is a material substantial difference between 'being under the influence of intoxicating liquors' and 'being intoxicated.' The difference is that of 'Tweedle dee and Tweedle dum.' If a man is under the influence of intoxicating liquors, he is intoxicated, and if he is intoxicated within the meaning of this statute, he is under the influence of intoxicating liquor. There are perhaps as many stages of intoxication as there are varieties of Heinz pickles, and the party affected rarely knows when he passes from one to another. But, whatever stage he is, if he drives a vehicle upon the public road he becomes a menace to the public and subjects himself to the penalties of the statute."

offenses.⁴ At the same time, during the decade of the 1950's, most states passed legislation establishing chemical test programs to incorporate the various states "implied consent law."

However, it was not until 1969 that the Alabama Legislature enacted the state's first implied consent and chemical test statute with the passage of Act 699. The act was a two part piece of legislation providing in the first section of the act the state's implied consent law:

"Any person who operates a motor vehicle upon the public highways of this State shall be deemed to have given his consent, . . . to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense . . . committed while the person was driving a motor vehicle on the public highways of this state while under the influence of intoxicating liquor." [Note: The 1969 act is now found at current Code section 32-5-192 (a)].

Section 2 of the Chemical Test for Intoxication Act legislatively provided a three tier presumptive standard for intoxication: The level of .05% or less presumed not under the influence; in excess of .05% but less than .10%, no presumption given, "but such fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor"; and .10% or more alcohol was a presumption of intoxication. Using the prevailing national standards in effect at the time, a .10% blood alcohol concentration or greater at the time of the test was deemed "under the influence" of intoxicating liquor for the state's "Driving While Intoxicated" law.

The 1969 act provided law enforcement officers in Alabama with a scientifically based and legislatively determined standard to prosecute motorists for "driving while intoxicated."⁵ This standard remained in effect until the DUI statute was enacted in 1980, when the presumptive standard was modified by the enactment of a *per se* law, not requiring proof of intoxication once the requisite blood alcohol level had been established.⁶

⁴ In fact, the Breathalyzer was so widely adopted for evidentiary breath testing that the trademark name "Breathalyzer" became synonymous for all breath alcohol testing devices. The Breathalyzer was also widely adopted outside the United States and Canada by such countries as Australia, Israel, and a number of European countries for evidentiary breath testing. At late as 2005, some 50 years after being placed into active police service, the Breathalyzer 900/900A model was still in regular service as the approved breath testing instrument for several Canadian provinces and the state of New Jersey. It remains on the U.S. Department of Transportation's list of federally approved breath test instruments.

⁵ Prior to the enactment of the state's chemical test for intoxication act, the fact-finder was without scientific based standards to apply in adjudging the defendant's guilt. In *McMurry v. State*, 28 Ala. App. 253, 184 So. 42 (1938), the Court held whether the accused is guilty of driving under the influence is a question for the jury, but the prosecution need not prove the degree of intoxication. "It is not for the State to prove that the intoxication had reached a stage where it would or did interfere with the proper operation of the motor vehicle. The law assumes, without further proof, that when a person is under the influence of intoxicating liquors that it is dangerous to the public, as well as to the driver, to operate a motor vehicle upon the highways of this State." 184 So. at 42-43.

⁶ *Curren v. State*, 620 So.2d 737 (Ala.Cr.App. 1992), reversed, *State v. Curren*, 620 So.2d 739 (Ala. 1993) – judicial recognition that 32-5A-191(a)(1) is an "illegal per se" statute and the rebuttable presumption standard did not apply to prosecutions under the (a)(1) sub-section of 32-5A-191.

The 1980 Driving Under the Influence Statute and Its Impact:

In contrast to the one paragraph 1927 “Driving While Intoxicated” statute, the current DUI statute now exceeds four single spaced pages. The current Alabama DUI statute was originally enacted in 1980 as part of Act 434 of the 1980 Legislature, the “Alabama Rules of the Road Act,” which represented a comprehensive revision of the state’s prior rules of the road. The 1980 Alabama DUI statute was based on the “model DUI statute” contained in the 1972 Uniform Vehicle Code.

The first major change in the new 1980 DUI statute was the removal of the term “intoxication” as part of the nomenclature of the offense. The prior statute, 32-5-170, titled “Driving While Intoxicated,” placed the burden of proving intoxication -- commonly interpreted as being substantial impairment of an individual’s gross motor skills caused by the consumption of alcohol -- on the prosecution. The requirement of proving intoxication was always a heavy burden to prove, even with the state’s implied consent law providing the statutory presumptive level of intoxication at .10% blood-alcohol concentration. Since the presumptive standard was a rebuttable presumption, effective counsel could, and often did, argue that the blood or breath alcohol results of the defendant was not a true representation of the defendant’s driving ability, and that the reading on the instrument was merely an artificial number that did not equate to the charge of “driving while intoxicated” in the case at trial. Commonly, defense counsel would argue that the accused was “over the limit on the machine” but in no way was the defendant “intoxicated” as required for conviction.

The “rebuttable presumption” standard established by Act 699 also established the chemical test standards for intoxication. Included in the section as the presumptive standards sub-section of the act was the following: “The foregoing provisions of paragraph (a) shall not be construed as limiting the introduction of any other competent evidence bearing on the question whether the person was under the influence of intoxicating liquor.” This was judicially construed to mean a blood alcohol reading of .10% or higher was not “proof” of intoxication; rather, the trial court or jury could only infer the motorist was under the influence.⁷

Under the 1980 statute, the term “driving while intoxicated” was replaced with “driving under the influence.” Although the two statutes were designed to counter the same issue-- that of impaired or intoxicated drivers operating vehicles on the highway-- the more innocuous phrase “under the influence” removed the onerous burden of proving actual physical intoxication as a requirement for conviction. Prosecutors could now argue convincingly to the jury the defendant was “under the influence” of alcohol without a showing of “intoxication.”

The second major change that took effect with the enactment of the 1980 statute was, for the first time in this state, a *per se* violation of the DUI statute based strictly on the blood or breath test reading. No actual physical impairment of the vehicle operator was required to obtain and uphold

⁷ As the Court held in *Salazar v. State*, 505 So. 2d 1287 (Ala. Cr. App. 1986), the use of the word “presumption” in (b)(3) of the statute gave the trial court a permissive inference or rebuttable presumption and was not a conclusive presumption. The jury was entitled to consider the breath test evidence as part of the state’s overall case and acquit the defendant if there was insufficient evidence of “intoxication.”

a conviction.⁸ Where the prior DWI statute required proof that impaired driving by caused by intoxication, and that breath or blood test results were corroborative or supplemental evidence in the state's case, the new *per se* violation only required the state to prove an illegal concentration of alcohol in the motorist's blood at the time the test was administered. In other words, the test result was the state's case; no additional evidence of hazardous driving or impaired physical condition was required to prove a DUI case.

The *per se* violation constituted a major shift in the prosecution of the impaired driver. Prosecution testimony now centered on test administration rather than on the indications of physical impairment of the motorist. Additionally, with two later pieces of legislation, the state's case was made even easier to prove than previously. Act 660 of 1988 re-wrote the chemical test for intoxication statute. That act transferred all responsibilities for the breath test program from the State Board of Health to the Department of Forensic Sciences, and also included as part of the legislation the "2100 to 1 ratio" as a fundamental part of state law governing the administration of breath tests.

Some years later, in 1995, the Legislature re-wrote the DUI statute lowering the *per se* violation from .10% to .08%, and incorporated the same changes into the chemical test act, now found at *Code of Alabama*, 1975, section 32-5A-194.

The cumulative effect of both lowering the *per se* level to .08% and statutorily mandating the 2100:1 partition ratio for evidentiary breath tests has significantly changed DUI enforcement in the state of Alabama. Under current judicial interpretation of Alabama's DUI offense, the *per se* offense found at *Code of Alabama*, 1975, section 32-5A-191(a)(1) is established upon offering evidence of the blood-alcohol concentration of .08% grams per cent or greater present in an individual at the time the test is given. No further evidence is required to convict the defendant. The "under the influence of alcohol" violation, found at section 32-5A-191(a)(2), is based on the traditional "impairment" concept, requiring evidence of impaired vehicle operation caused by the consumption of alcoholic beverages.

Proposed Amendments to Alabama's DUI Statute:

Alabama's DUI laws will continue to evolve as new legislation is enacted and court decisions further interpret the state statutes. The fundamental problem of drunk and impaired motorists operating vehicles on the public highways remains. Over 90 years of legislation has failed to stop the problem of drunk and impaired driving.

Proposed legislation for the 2009 legislative session was pre-filed on October 7, 2008 to amend the current DUI statute found at 32-5A-191. These amendments include:

- Establishes a 4 hour "time of test" extrapolation rule for any breath test result of .15% BAC or greater at the time the test is administered.

⁸ As noted by the Court in *Frazier v. Montgomery*, 565 So. 2d 1255 (Ala. Cr. App. 1990), the prosecution must prove the defendant's blood had .10% or more alcohol content, but need not prove the defendant's ability to drive or operate the vehicle was impaired.

- Abolishes and removes sub-section 'O' from current 32-5A-191 which created a five year time limitation for look-back of prior convictions. The proposed statute uses the term "prior convictions" without regard to time and removes all references to "five years."
- Establishes as a class C felony offense, when the arrested subject's record shows three prior convictions, without regard to when the prior convictions were entered, and requires a 120 day minimum period of incarceration; the remainder can be placed on supervised release.
- Establishes the concept of "double minimum punishment" in the DUI statute for any chemical test result that was .15% or greater at the time the test was administered. If the conviction is a misdemeanor, minimum jail time is 5 days for the first offense if the breath test reading was .15% BAC or greater, plus imposes a fine in double the amount of the minimum required by statute. A second DUI offense with a chemical test result of .15% or greater will require ten days incarceration, as compared to 5 days for "regular" DUI.

In addition to the proposed amendments to 32-5A-191, the "Ignition Interlock" bill will be re-introduced for the 2009 session. The "Ignition Interlock" bill will require, as an express term of re-licensing after second or subsequent DUI conviction, the installation of an electro-mechanical device, similar in design and application to a preliminary breath test device, on the vehicle operated by the convicted offender. Failure to have the device installed, or failure to operate an "ignition interlock" equipped vehicle when required, will be a separate motor vehicle offense under the state traffic code.