

MICHIGAN'S NEW DRUNK DRIVING LAWS EFFECTIVE SEPTEMBER 30, 2004

On October 23, 2000, President Clinton signed legislation that would financially penalize states that failed to enact .08 *per se* drunk driving laws. The .08 *per se* standard prohibits driving with a blood alcohol level of .08% as measured by a breath, blood or urine test without any regard to the driver's level of sobriety.

On September 30, 2003, significant changes to Michigan's drunk driving laws became effective throughout the state in response to the October 2000 mandate. These changes were purportedly passed unanimously by the Michigan Legislature to maintain federal highway funds, but several additional new laws were packaged along with the new .08% threshold.

While certain technical changes are not discussed in this article, the most significant changes to Michigan's drunk driving laws show that the Legislature hopes to raise revenues with the new law, and our lawmakers--ever receptive to political pressure-- are willing to sacrifice a few innocent drivers for good publicity. The new drunk driving laws go far beyond the requirements imposed by the federal government's requirements.

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LOWERING BAC TO .08 AND ALTERING "PRESUMPTIONS"

Semantically, the new laws re-defined the prior offense of OUIL (operating under the influence of intoxicating liquors) to OWI (operating while intoxicated). The prior charge of OWI (operating while impaired) was altered to OWVI (operating while visibly impaired) to avoid confusion. The new offense of OWI incorporates the .08 per se standard, lowering the prohibited blood alcohol content (BAC) level from .10 to .08.

Under Michigan's prior drunk driving laws, the offense of operating while visibly impaired, which prohibited driving with a blood alcohol level greater than .07 but less than .10, remains in effect, but the new impaired provisions do not have any numerical blood alcohol levels to define when a driver is impaired. In essence, there are few differences between a charge of OWI and OWVI, but an impaired charge carried slightly lower fines and slightly less harsh driving sanctions. As such, under Michigan's prior drunk driving laws, the federally mandated threshold of .08 was already effectively enforced in Michigan.

The new law removes the prior drunk driving laws' "presumptions," adding new presumptions in their place. While this is bit overly legalistic, under the former law, a motorist who drove with a BAC of .10% or greater was legally presumed to be intoxicated. This meant that a prosecutor had to prove based upon the *evidence* that a person drove with an illegal blood alcohol level, and chemical tests were only one part of that evidence. If a breath test was going to be used by a prosecuting attorney, the prosecutor had to show that the test was administered within a reasonable time following the arrest. Along with lowering the permissible amount from .10% to .08%, however, the new drunk driving laws have been changed to say that the chemical test result

is “presumed to be the same as at the time the person operated the vehicle.”

This change in the statutory presumptions is significant because police officers might not test motorists for several hours following an arrest; thus, the Legislature wrote into law a known falsehood. A driver’s blood alcohol absolutely will--without any scientific doubt--rise or fall during the course of an hour or two hours following an arrest, but the new law states that it is illegal to have a BAC in excess of .08% hours following an arrest.

Importantly, the new presumption is not intended to protect the innocent. Where blood test results are less than .08%, the presumption does not bar prosecution, and prosecutors will argue that the driver was in excess of .08% at the time of driving. This change in the law is designed solely to preclude a common challenge in drunk driving cases that is grounded in fact, common sense, and hard science.

Additionally, by removing the BAC presumptions regarding the difference between “impaired” driving and the more serious charge of OWI, the Legislature permitted local police and prosecuting attorneys the ability to argue that driving with *any* measurable blood alcohol level can qualify as OWVI. Prosecutors can now argue that a driver with a .01% (or other such amount) can be prosecuted for operating while impaired. This is certainly true: a prosecutor has discretion to prosecute, but it’s equally true that a person can be prosecuted for any other crime based upon the prosecutor’s discretion, even though there is no evidence of a crime.

Prosecutors argue, however, that a driver accused of drunk driving ought to plea to a lesser offense of impaired, because the prosecution can “always” win a conviction to at least impaired, even when the BAC is very low. This is pure nonsense, of course, because *evidence* is still required to establish that a person is “visibly impaired,” and a low breath alcohol amount is not probative of guilt. The Michigan Supreme Court held in 1975 that “To prove driving while ability is visibly impaired, the people must prove that defendant's ability to drive was so weakened or reduced by consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful and prudent driver. Such weakening or reduction of ability to drive must be visible to an ordinary, observant person.” *People v Lambert*, 395 Mich 296 (1975).

By essentially un-defining the offense of “impaired driving,” the prosecuting attorneys have additional arguments to attempt to convict innocent people. While prosecutors might enjoy this new unbridled discretion that they have been offered, the police can only lawfully arrest drivers when they have “probable cause” to believe that a motorist is driving drunk, and it is merely a matter of time before overly-aggressive police officers and prosecutors are sued for unlawfully arresting and jailing an innocent driver.

IMPLIED CONSENT SUSPENSION LENGTHENED

Under Michigan’s “implied consent” law, a driver who operates a motor vehicle has given his or her consent to provide a breath, blood or urine sample to a police officer who has probable cause to believe that the motorist is operating a vehicle while intoxicated. While it can be quite embarrassing to be compelled by the government to provide a urine sample and out-right harmful to provide a blood sample, you have agreed by virtue of driving on Michigan’s roads to provide these bodily samples to any police officer with probable cause upon the officer’s request. Usually, however, a breath test is requested because it is fast and inexpensive, albeit far less accurate than blood tests.

Under Michigan’s prior drunk driving law, anyone who wrongfully refused a police officer’s request would lose their driving privileges for a period of six months. Under the new law, the

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Motorists often times refuse to submit to a chemical test for a variety of reasons. Typically, however, it is because the driver is unsure of his or her legal rights, whether they should submit to the test, and the possible sanctions for refusing. Police officers are required to read a set of "chemical rights" to the driver prior to requesting the chemical

tests, but officers commonly rattle through these tests summarily and do not permit the driver an opportunity to review the form.

By refusing a breath test, a police officer must seek a search warrant from a judge before the officer can obtain the right to compel a blood sample. In the search warrant affidavit, the officer must detail probable cause to the judge in order to justify issuance of the search warrant.

While it may be difficult or tedious for an officer to seek a search warrant, the increased penalties are merely symbolic of how our Legislature is attempting to posture against "drunk driving." The burden incurred by the police is not very compelling and fails to justify the one-year suspension. If an officer actually has probable cause to compel production of blood, no Michigan judge is going to refuse the warrant request.

It seems unlikely that increasing the driving sanctions for refusing these chemical tests will do anything more than punish drivers that refuse, and the six month sanctions previously in effect were more than adequate. For first time offenders, no suspension period is likely at all, and for repeat offenders, the driving sanctions are severe enough that neither a six-month nor a one-year suspension is likely to encourage voluntary compliance with chemical test requirements. Moreover, it is important to understand that the accused may not even exceed the legal blood alcohol limit but still faces these serious driving sanctions.

The only logical conclusion is that Michigan Legislature feels that it is more important (and a more serious offense) for a driver to refuse to submit to a chemical test than it is to drive intoxicated.

OPERATING WITH THE PRESENCE OF DRUGS (OWPD)

One of the most dramatic changes under Michigan's drunk driving laws is a new provision prohibiting the presence "any amount" of a Schedule 1 controlled substance in the motorist's body. These new provisions include marijuana and cocaine, amongst a variety of other drugs that are commonly used illegally.

While the law already prohibits possession of a Schedule 1 substance, and the former drunk driving laws prohibited driving under the influence of drugs, the new statute claims to say that a person with "any amount"

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of a Schedule 1 drug in his or her system is guilty of OWI. Many prosecutors have already indicated that “any amount” means any measurable amount, without any regard or concession to the fact that the driver may not have been under the drug’s effect.

Many Schedule 1 drugs lack a distinct signature, and testing results can be ambiguous. Moreover, drugs such as marijuana that are legal in some states can remain in a person’s system for months. Throughout those months, a person driving through Michigan is “drunk driving.”

This plainly makes no sense, and the new provisions were approved with an eye towards the favorable publicity that these ridiculous pronouncements draw. The new provisions will not improve roadway safety in the slightest, and they were passed so haphazardly that no one anticipated how to implement the new law.

For example, the Legislature failed to detail what “any amount” might mean. Of course, in plain English, any amount does mean any amount, but scientifically--as a matter of courtroom evidence-- a Schedule 1 substance is detectable in nanograms and even smaller particles measured as picograms. These unfathomably small particles are absolutely meaningless, as picograms of traces of marijuana present in a person’s body may indicate inadvertent exposure at a concert or party.

Courtroom science demands that the evidence against the accused be relevant before it is admitted into evidence. The Legislature failed to describe what it felt was relevant, and no threshold levels were described in the statute. Almost everyone has certain elements present in their body that, in large amounts, indicate that the person has used a controlled substance. All drug screening tests used by the military, employers and hospitals recognize that where these elements are found in only minute traces, the results *do not* indicate usage of a controlled substance. Even if a person successfully passes an employment drug screen test, the police’s testing equipment can measure the presence of some trace amount of an element that may indicate that the person is “drunk driving.”

Under the former and current drunk driving laws, the Michigan State Police are required to promulgate rules regarding chemical testing. The Michigan State Police have passed rules regarding testing for blood alcohol, but they have not passed any rules regarding blood testing for controlled substances. These rules are mandatory under the drunk driving statute, but no new rules are proposed or anticipated by the Michigan State Police. Moreover, the instructions provided to Michigan State Police laboratory analysts permit the MSP forensic laboratory to conduct tests measured in a vacuum without standards or benchmarks. Finally, the instructions used by laboratory personnel permit broad latitude to the state laboratory in how it reports these results, including interpretations of data, how the analyst “feels” about a particular sample, and a supervisor’s discretion.

The Michigan Legislature passed this new draconian provision without much concern or thought, hoping that the new law would show how our law-makers are tough on crime, but this statute is neither new, nor innovative. Many states passed identical laws over a decade ago, and those laws proved unworkable. Our Legislature should have recognized the problems in implementing this type of law, but they passed this new provision without any greater care than similar law-makers from other states did earlier.

DRIVER RESPONSIBILITY PROGRAM

In addition to the changes to Michigan’s drunk driving laws, the Michigan Legislature passed another statute known as the “Driver Responsibility Program” Act. Although the new drunk driving

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law was purportedly passed unanimously in order to avoid losing federal dollars for highway construction, these funds were only estimated at \$91.8 million over four years. That's only a little shy of \$23 million per year. The new "driver responsibility program" act, which was passed along with the new drunk driving laws, provides additional fines to drunk drivers through the Secretary of State.

Although the statute does not solely target drivers convicted of drunk driving, it targets primarily those motorists. The new law

assess a \$1,000.00 fine for two years to every person convicted of OWI and a \$500.00 fine for two years to every person convicted of OWVI.

With local courts already charging excessive "court costs" far greater than the statutory fines for alcohol related offenses, simple math shows that this law was passed in order to tax Michigan's citizens as a steep "sin tax."

According to state records under the old law, 26,330 people were convicted of driving while intoxicated in 2002, and 28,770 were convicted of driving while impaired. That number alone adds up to \$40.7 million annually under the fees set forth in the "driver responsibility program" act, far more than our State faced losing with the new federal mandate of only \$23 million. The \$40 million figure does not include fines assessed against driver's facing nominal sums each year for driving points and various civil infractions.

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As a result of these new sanctions, the Prosecuting Attorney's Association of Michigan states that, "[i]t is expected that there will be an increase in the people driving on a suspended license . . ." Driving on a suspended license also incurs an annual fine of \$500.00 per year for two years.

CONCLUSION

Supposedly, reducing the blood alcohol level from .10% to .08% will result in saving 400 to 600 lives per year, and our state's prosecutors are routinely touting that number while discussing these fabulous changes to our laws. While certainly no one is in favor of promoting drunk driving or opposed to saving lives, that number is an absolute bald-faced lie, and the loudest proponents are the biggest liars. Our laws should not be based on lies. Worse, these are lies backed with more than \$63 million in financial gain per year to our State's government.

The truth is that our law-makers want to err on the side of convicting people who are driving while sober, hoping to catch in the mix those who are drunk. William Blackstone, one of the most authoritative authors of American jurisprudence, as well as the U.S. Supreme Court, have said that "under the American system of justice, it is preferable to let ten guilty men go free than to convict one innocent man." That's not quite the case in drunk driving cases, and it's certainly not our Legislature's goals.