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A Half-Century](#)**New DUI Law Raises Legal Questions***By Kimberley Hoak, Staff Reporter*

Pennsylvania's new DUI law, the bulk of which went into effect February 1, "goes too far" according to local defense attorneys.

"It goes against our Constitution," said one. "I feel some legislators have become so reckless in trying to keep controls on social behavior - the system is going down the wrong road in terms of being as effective as it once was," he said.

The new law (Chapter 38 of the traffic code) is called Driving After Imbibing Alcohol and Utilizing Drugs and it enacts vast changes apart from lowering the BAC from .10% to a BAC of .08%, which occurred in October, 2003.

Mothers Against Drunk Driving (MADD) responded to the new law on its website by saying, "MADD is very excited that Pennsylvania has lowered the legal BAC level from .10% to .08% for PA motorists."

MADD said, "This is not a simple 'across the board' .08 bill, but rather a unique comprehensive DUI Reform Bill which addresses many areas that MADD feels need strong attention. Repeat offenders resistive to change, will be punished."

"For the .08 driver, this bill gives the opportunity to change. It offers the opportunity for assessment and Drug and Alcohol Treatment if deemed necessary. This bill has a strong treatment component. MADD feels strongly about treatment being a part of the sentence. A person involved in a successful recovery program is no longer a drunk driver," said MADD.

The new law has been met with some harsh criticism from defense attorneys throughout the Commonwealth.

The Leader-Enterprise interviewed eight defense attorneys for this article. All eight agreed to comment, but the majority asked the Leader-Enterprise not to use their names. They said they were concerned their opinions if attributed in print could negatively affect representation of their clients. The Leader-Enterprise agreed not to use anyone's name.

One defense attorney said, "This new law is not worth the paper it's written on... it is blatantly unconstitutional and so completely flawed. It completely ignores the hierarchy of the law from the Supreme Court all the way down to municipalities."

An attorney who has practiced for over 30 years said, "This is



another step toward a police state. I support the police and know that they need broad power and authority to perform their duties, but we are on a very slippery slope under the guise of assuring justice, and protecting society."

#### Significant Changes

Under the old DUI law, police officers had to have "articulable and reasonable grounds to suspect a violation..." before performing a traffic stop. Pennsylvania Supreme and Superior court rulings in *Commonwealth v. Gleason* and *Commonwealth V. Battaglia* interpreted that language to mean "probable cause."

The interpretation meant that police officers were required to show probable cause that a violation of the traffic code had occurred before they could lawfully conduct a traffic stop.

That is no longer the case under the law now in effect. The new law reads, "Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred..."

In effect, police officers are now able to conduct a traffic stop when they possess "reasonable suspicion" that someone is driving after having been drinking.

One defense attorney said the reasonable suspicion aspect is "only one of numerous aspects of this new law that is totally unconstitutional."

The new law also eliminates the requirement for scientific relation-back evidence.

Under the old law, the focus was on a (BAC) at the time of driving, with a presumption that BAC results taken within three hours could establish a prima facie case.

The new law states that a person is driving under the influence "if a test taken within two hours of driving indicates a BAC of .08%, 10% or above .16%."

This means the prosecution no longer has to bring an expert to testify as to what someone's BAC was at the time he was driving.

Now, as long as the BAC test is done within two hours after the person drove, and the BAC exceeds the legal limit, "the BAC is sufficient in and of itself to prove the defendant committed the offense."

One defense attorney said he has run at least a dozen scenarios through his mind as to what it means to have a BAC of .08% "within two hours of driving."

"What happens when someone is seen driving after leaving a local tavern, where perhaps they drank one beer, and they go home and drink two more beers? With probable cause out the window, can a police officer knock on the door an hour after witnessing the person drive, and require field sobriety tests and a blood test? What happens if the person refuses?"

"These are just a couple of questions raised under the new law," he said.

The new law also addresses operating a motor vehicle with any amount of a controlled substance, or any "residue" of a controlled substance found in the blood. If these are found in the blood a DUI has been committed. The law also provides for the offense of driving under the influence of inhalants.

By enacting the new law, Pennsylvania became the 9th state in the nation to adopt a per se driving under the influence of drugs offense. If a person is caught driving under the influence of any illegal drug, which is substantiated by the results of blood or chemical testing, that person is guilty of the offense.

There is no longer any need to establish the inability to drive safely or that the person was impaired by the use of the drugs.

This offense is categorized in the highest penalty tier, and for a first time offender, a jail term of 72 hours to 6 months is mandatory, a fine of \$1,000 to \$5,000 is imposed, and a 12 month drivers license suspension is incurred.

One attorney said while he is not in favor of anyone driving drunk, or under the influence of illegal drugs, he believes there has to be "probable cause" to justify law enforcement stopping Pennsylvania citizens in their vehicles.

"What is reasonable suspicion? Ask 20 people and get 20 different answers," he said.

"Where will it all stop? This new law flies in the face of people's constitutional rights. It's insanity - it makes no sense," said another.

#### Prior Offenses

Prior offenses under the new law are defined as any conviction, adjudication of delinquency, juvenile consent decree, acceptance of Accelerated Rehabilitative Disposition program (ARD) or other form of preliminary disposition "within ten years before the present violation occurred."

This means that the penalty imposed is based on a "10 year look back period" for any previous DUI convictions prior to the date of the offense

This replaces the seven year rule Pennsylvania had in effect for prior offenses under the old DUI laws.

#### Changes In Accelerated Rehabilitative Disposition (ARD)

The ARD program has undergone some changes with the new law.

ARD can not be offered to defendants if:

€ the defendant had a prior offense in the past 10 years;

€ an accident occurred in connection with the events surrounding the current offense;

€ if a child under the age of 14 years old was in the vehicle at the time of the offense.

ARD can be offered to a repeat offender only if the first violation was a charge of incapable of safe driving.

A defendant must, prior to receiving ARD, be evaluated using the Court Reporting Network (CRN) test to determine if he may be addicted to drugs or alcohol.

If the CRN test indicated the defendant is in need of treatment, he must undergo a full drug and alcohol assessment. If he is found to need treatment, he must remain under the Court's supervision for six months and it is mandatory that he "participate in and cooperate with a licensed alcohol or drug addiction treatment program at the level and duration called for in the full assessment."

Failure to comply with the treatment recommendations means ARD must be revoked.

The cost of treatment is paid for by the defendant, or the defendant's health insurance provider. If the defendant cannot pay for the services, "then ordinary drug and alcohol treatment public funding streams pay for the treatment."

ARD participants must continue to pay all fees, fines, costs, and surcharges as determined by the Court.

The following driver license suspensions will apply for ARD participants:

€ BAC less than .10% - no suspension

€ BAC of .10% to .16% - 30 day suspension

€ BAC of .16% and higher; if BAC is unknown; if an accident occurred with the events surrounding the current offense - 60 day license suspension;

€ No Occupational Limited Licenses would be permitted for ARD participants.

#### Sentencing Changes

Judge John B. Leete said, "There will be very serious penalties for chronic offenders with high BAC levels".

"People should also be aware refusal will put them into the highest BAC level without the test," said Leete.

Leete is saying that under the old DUI law, a first time offender refusing to submit to a blood alcohol or chemical test, automatically lost his drivers license for one year. There was no jail time.

Now the first time offender must spend at least 72 hours in jail, pay a fine of between \$1,000 and \$5,000, and lose his driver's license for one year.

The new law is broken down into a "three tiered system" with corresponding penalties for first, second, third and fourth offenses, each correlated to the level of blood alcohol content (See Sidebar).

"While the foundation of our new law is getting people into treatment, it also focuses on fitting the punishment to the crime," said C. Stephen Erni Executive Director of the PA Driving Under the Influence Association in Harrisburg.

"Drivers under the influence of illegal drugs face stiff penalties.

The new law defines drugged driving and includes driving under the influence of substances like inhalants. Drivers who refuse a chemical test are considered serious offenders and punished accordingly," he said.

"This law has two fundamental problems," said another member of the bar. "First it makes a criminal offense almost an administrative rather than a judicial matter. Second it creates a cottage industry for behavioral sciences, mental health, probation offices, the Pennsylvania Department of Transportation, and police officers," he said.

"There will be more people employed by this law than are arrested under it," he said.

An out of the area defense attorney said, "I think it is reasonable to suspect that the Pennsylvania Bar Association will challenge all of the issues that are in direct contrast to the Pennsylvania Constitution. The Legislature can not pass something that is unconstitutional."

"I don't even drink, but I have never been in favor of a BAC of .08%," he said.

"For the \$13 million or so Pennsylvania receives from the Federal Government for implementing the program, I think Pennsylvania got a bad deal. I am all for keeping drunk drivers off the road, but a .08% or .09% - why the h--- are we here? Are we going after the guy who has a couple of beers after work, and the couple who has a couple of glasses of wine with dinner?" he said.

"The system has made it so easy to put someone in jail in today's society - if you went to jail years ago people tended to look down at you - going to jail was pretty uncommon. That's not the case today - it's pretty easy to just look around and see someone who has been in jail," he said.

Leete said, "The new law is very complex and we all have an education coming.

"I'm sure we will have at least five years of test litigation," he said.

The final remark from one attorney was, "When it comes to representing my clients, I'm going to play my game.

"It's going to be, 'Have you ever heard of the constitution?'" he said.

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