

# SENATE BILL REPORT

## SB 5912

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As of April 18, 2013

**Title:** An act relating to driving while under the influence of intoxicating liquor or drugs.

**Brief Description:** Modifying provisions that address impaired driving.

**Sponsors:** Senators Padden, Kline and Conway; by request of Governor Inslee.

**Brief History:**

**Committee Activity:** Law & Justice: 4/18/13.

### Brief Summary of Bill

- Courts are prohibited from deferring DUI sentences.
- Prior DUI offenses are always counted in the offender score.
- Driving the wrong way to the normal flow of traffic may be considered as an aggravating circumstance for sentencing.
- Ignition interlock devices must be installed before a vehicle is released from impound.
- Minimum sentences for DUI and PC offenses are increased.
- DUI and PC offenders are prohibited from purchasing alcohol for ten years.
- An additional \$100 penalty assessment for various driving offenses goes to the city or county for enforcement purposes.
- A statewide 24/7 sobriety program is created effective January 1, 2015.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Staff:** Aldo Melchiori (786-7439)

**Background:** A person can commit driving under the influence (DUI) or being in physical control of a motor vehicle under the influence (PC) of intoxicating liquor or any drug if the person drives with a blood or breath alcohol concentration (BAC) of 0.08 percent or higher, or is under the influence of or affected by liquor or any drug. A DUI or PC offense is

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punishable as a gross misdemeanor offense. It becomes a class C felony, ranked at level V on the sentencing grid, if a person has four or more prior offenses within ten years.

Sentencing Reform Act (SRA) Scoring. Under SRA, an offender convicted of a felony receives a standard sentence range that is based on the seriousness of the offense and the offender's prior felony convictions. The number of points an offender receives for current and prior offenses varies according to certain rules. Serious traffic convictions are generally not included in a person's score if, since the last date of release from confinement pursuant to a felony conviction, the offender spent five years in the community without committing a new crime. Serious traffic offenses include the following non-felony offenses: DUI, PC, reckless driving, or hit-and-run attended vehicle.

If a person's current conviction is a felony DUI or PC offense, then all prior felony DUI, PC, and serious traffic offenses are included in the person's score if: (1) the prior convictions were committed within five years since the last date of release from confinement; or (2) the prior convictions are considered prior offenses within ten years. A prior offense is within ten years if the arrest for a prior offense occurred within ten years of the arrest for the current offense. By contrast, under felony sentencing laws the corresponding time period is generally from the end of the person's confinement for a prior crime to the commission of the new crime. Prior offenses include convictions for: (1) DUI or PC; (2) vehicular homicide and vehicular assault if either was committed while under the influence; (3) negligent driving after having consumed alcohol – known as a wet neg, reckless driving, and reckless endangerment, if the original charge was DUI, PCI, vehicular homicide, or vehicular assault; and (4) an equivalent local DUI or PC ordinance or out-of-state DUI law. In addition, a deferred prosecution for DUI or wet neg is a prior offense even if the charges are dropped after successful completion of the deferred prosecution program.

Electronic Home Monitoring (EHM). The mandatory minimum penalties for a DUI or PC offense vary depending on the person's BAC and whether the person has prior offenses. The mandatory minimum penalties may include EHM, to be paid for by the offender. The court may also require the offender's EHM device to include an alcohol detection breathalyzer and may restrict the amount of alcohol the offender may consume during the time the offender is on electronic monitoring. The court may waive EHM under certain circumstances, such as when the offender lacks a dwelling or telephone services. Whenever the mandatory minimum term of EHM is waived, the court must impose an alternative sentence that can include jail time, work crew, or work camp.

Penalty for Alcohol Concentration of at Least 0.15 Percent – With No Prior DUI or PC Convictions in Seven Years. In an impaired driving case where a person has a BAC of at least 0.15 percent, the offense is punishable by imprisonment of no less than two days, but no more than 364 days. Two consecutive days of the imprisonment may not be suspended or deferred unless the court finds that the imposition of the mandatory minimum sentence would impose a substantial risk to the offender's physical or mental wellbeing.

Impaired Driving Offense With a Child in the Vehicle. The state's drunk driving laws have a number of penalty enhancements for individuals convicted of DUI or PC offenses. Two enhancements apply to individuals arrested and convicted of DUI or PC when there is a minor passenger in the vehicle.

First, the court must order the person to use an ignition interlock device on the person's vehicle for six months on top of the mandatory ignition interlock requirement already applicable for a DUI or PC conviction. Second, if an individual is convicted of a gross misdemeanor DUI or PC offense with a child under the age of 16 years in the vehicle, monetary penalties are assessed based on the individual's prior convictions as such:

- no prior offenses – minimum of \$1,000 and maximum of \$5,000;
- one prior offense within seven years – minimum of \$2,000 and maximum of \$5,000; and
- two or three prior offenses with seven years – minimum of \$3,000 and maximum of \$10,000.

If an individual is convicted of a felony DUI, PC, vehicular assault DUI, or vehicular homicide DUI, and had a child under the age of 16 years in the vehicle at the time of the offense, a 12-month sentence enhancement for each child in the vehicle is added to the individual's standard sentence. The current statutory language is ambiguous as to whether these penalties and enhancements are in addition to or in lieu of the current penalties for DUI offenses.

In addition to the fines collected, the courts also impose and collect a public safety and education assessment (PSEA) fee equal to 70 percent of the fine.

Conditions of Probation. Whenever a court imposes up to 364 days in jail for a person convicted of an impaired driving offense, the court also has jurisdiction over the offender for up to five years in order to supervise probationary sentences. Courts must impose conditions of probation that include the following: (1) not driving without a valid license and proof of financial responsibility for the future; (2) not driving while having a BAC of 0.08 percent or more within two hours after driving; and (3) not refusing to submit to a test to determine BAC when a law enforcement officer believes the person was driving or was in physical control of a motor vehicle while under the influence of alcohol. A violation of probation can result in incarceration and suspension of a person's license, permit, or privilege to drive.

Arrest Without Warrant. A police officer with probable cause to believe that a person committed or is committing a felony has the authority to arrest the person without a warrant. A police officer may also arrest a person without a warrant for committing a misdemeanor or gross misdemeanor offense, but only when the offense is committed in the presence of the officer, except in certain enumerated situations.

Establishment of DUI Courts. Counties are authorized to establish and operate DUI courts for nonviolent offenders. Municipalities must enter into cooperative agreements with counties that have DUI courts to provide DUI court services. Any jurisdiction that establishes a DUI court must establish minimum requirements for the participation of offenders in the DUI court. The minimum requirements must include that:

- the offender would benefit from alcohol treatment;
- the offender was not previously convicted of a serious violent offense, sex offense, vehicular homicide, vehicular assault, or equivalent out-of-state offense; and
- the offender is not currently charged with or convicted of certain enumerated offenses, an offense during which the defendant used a firearm, or an offense during

which the defendant caused substantial or great bodily harm or death to another person.

Deferred Sentences. A deferred sentence means a sentence that will not be carried out if the defendant meets certain requirements, such as complying with the conditions of probation. A defendant who has a deferred sentence and who fails to appear for any hearing to address the defendant's compliance with the terms of probation will have the term of probation tolled until the defendant makes their presence known to the court. The deferral of a sentence may also be revoked if the defendant violates or fails to carry out any of the conditions of the deferral, and as a result the original sentence previously suspended or unexecuted may be imposed. Generally, deferred sentences are not available for gross misdemeanor DUI or PC offenses.

Sentencing Enhancements. Under SRA, the court must impose imprisonment in addition to the standard sentencing range if specific conditions for sentencing enhancements are met. Sentencing enhancements may apply in such situations as when the offender: (1) was armed with a firearm or deadly weapon while committing certain felonies; (2) committed certain felonies while incarcerated; (3) committed certain drug offenses; (4) committed vehicular homicide while under the influence of alcohol or drugs; (5) committed a felony crime that was committed with sexual motivation; or (6) attempted to elude a police vehicle while endangering one or more persons.

*Attempting to Elude a Police Vehicle.* In a case where a special allegation is made, if a court makes a finding of fact, or in a jury trial if the jury finds a special verdict, that: (1) an offender committed the crime of attempting to elude a pursuing police vehicle; and (2) the underlying offense involved the endangerment of one or more persons other than the defendant or pursuing law enforcement officer, then the court must impose a sentence enhancement of 12 months and one day of imprisonment.

Aggravating Circumstances. Generally, the standard sentencing range is presumed to be appropriate for the typical felony case. However, the law provides that, in exceptional cases, a court has the discretion to depart from the standard range and may impose an exceptional sentence, below the standard range with a mitigating circumstance, or above the range with an aggravating circumstance. SRA provides an exclusive list of aggravating circumstances that the court may consider aggravating circumstances or which a jury may consider in imposing an exceptional sentence above the standard range.

Ignition Interlock Device. *Ignition Interlock Certification Form.* The Washington State Patrol (WSP), by rule, provides standards for the certification, installation, repair, and removal of ignition interlock devices. Under WSP rules, the ignition interlock device must meet certain specifications. For example, the device must meet or exceed minimum test standards of the model specifications for ignition interlock devices published under federal law. Only a notarized statement from a laboratory that is certified by the International Organization of Standardization as capable of performing the tests specified will be accepted as proof of meeting or exceeding the standards. The notarized statement for certifying ignition interlock devices referencing the ignition interlock standards that must be met under the federal register is specified and referenced in WSP's statute.

*Ignition Interlock Test.* When a person's regular driver's license is reinstated and an ignition interlock device is required to be installed, that device must remain on the vehicle until the Department of Licensing (DOL) receives a declaration from the person's ignition interlock vendor certifying that there were no incidents in the four consecutive months prior to the date the requirement expires. An incident is an attempt to start the vehicle with a BAC of 0.04 percent or higher; failure to take or pass any required retest; or failure of the person to appear at the vendor when required.

Driver's License. *Marking of Drivers' Licenses.* If, after arrest for an impaired driving offense, a person is found to have an alcohol or drug concentration above the statutory legal limits, DOL must notify the person in writing of its intent to suspend, revoke, or deny the person's license or privilege to drive, and DOL or the arresting law enforcement officer must mark the person's driver's license. In addition, the court must also mark a person's driver's license when a person is convicted of an offense for which mandatory withholding of the driving privilege is required.

*Commercial Driver's License.* A person can be disqualified from driving a commercial motor vehicle for a period of not less than one year if DOL receives a report that the person was convicted of a first violation of DUI; driving a commercial motor vehicle while the person's BAC is 0.04 percent or more; leaving the scene of an accident; using a motor vehicle in the commission of a felony; refusing to submit to a test to determine the person's alcohol or drug concentration; driving a commercial motor vehicle with a revoked, suspended, or canceled driver's license; or causing a fatality through the negligent operation of a commercial motor vehicle, including but not limited to the crimes of vehicular homicide and negligent homicide.

The statute does not address the grounds for disqualification from driving a commercial motor vehicle when a person is found with a chemical tetrahydrocannabinol (THC) concentration in the person's system. THC is a chemical found in marijuana.

**Summary of Bill:** Arrest Without a Warrant. A police officer must arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without warrant when the officer has probable cause to believe that the person violated the DUI or PC laws and has a prior offence for DUI or PC.

Ignition Interlock Devices. *Installation.* When a driver is arrested for DUI or PC, and the driver is at least one of the registered owners of the vehicle that is impounded, the vehicle may not be released without a functioning ignition interlock device. The ignition interlock device must be installed regardless of who actually redeems the vehicle. At least one of the registered owners must arrange for the installation at the place of the vehicle's impoundment. After the vehicle is released, the owner must take it to the ignition interlock vendor's place of business within 24 hours so that it can be properly calibrated. The ignition interlock device must remain on the vehicle pending the driver's acquittal, dismissal, conviction, or other resolution of charges.

*Ignition Interlock Certification Form.* WSP is authorized to create, by rule, the statement for certifying ignition interlock devices. As a result, the ignition interlock certification form referencing the federal register and the federal standards is removed from WSP's statute.

*Ignition Interlock Re-test.* An ignition interlock restriction imposed on a person must remain in effect until DOL receives confirmation from the interlock device vendor stating that the offender did not try to start the vehicle in the four previous months with an illegal BAC level, unless a subsequent test was performed within ten minutes that registers a lower BAC level and a digital image is provided which confirms the same person provided both samples.

Sentencing. If a defendant's present conviction is for a felony DUI or PC offense, then all predicate crimes for the offense must be included in the offender score. The score must also always include all prior convictions for felony DUI or PC convictions. The definition of a prior offense is expanded to include cases where a deferred sentence was imposed in a prosecution for a negligent driving in the first degree, reckless driving, or reckless endangerment offense, when the original charge, which was pled down to a lesser charge, was filed as a DUI, PC, equivalent ordinance, vehicular homicide, or vehicular assault offense.

*No Prior DUI or PC Offenses.* Forty-eight consecutive hours of a sentence of two to 364 days must not be suspended or deferred for a person with no prior DUI or PC offenses and who either refuses a breath or blood test or has a BAC of at least .15 percent unless it would impose a substantial risk to the offender's health or wellbeing.

*One Prior DUI or PC Offense.* A person convicted of DUI or PC with a BAC under .15 percent, and who has one prior offense within the prior seven years, must be sentenced to six months' incarceration and 60 days of EHM, or, if available, to community-based treatment for six months along with 24/7 sobriety program monitoring. A person convicted of DUI or PC with one prior offense within the prior seven years, and who either refuses a breath or blood test or has a BAC of at least .15 percent, must be sentenced to six months' incarceration and 90 days of EHM, or, if available, to community-based treatment for six months along with 24/7 sobriety program monitoring.

*Two or Three Prior DUI or PC Offenses.* A person convicted of DUI or PC with a BAC under .15 percent, and who has two or three prior offenses within the prior seven years, must be sentenced to 364 days' incarceration – instead of 90-364 days, 120 days of EHM, and the person must be prohibited from purchasing alcohol for ten years. A person convicted of DUI or PC with a BAC of at least .15 percent, and who has two or three prior offenses within the prior seven years, must be sentenced to 364 days' incarceration – instead of 120-364 days, 150 days of home monitoring, and the person must be prohibited from purchasing alcohol for ten years. These offenders are issued a vertically oriented driver's license or identification card to indicate that they must not be served alcohol.

*Four or More Prior Offenses.* A person convicted of DUI or PC and who has four or more prior offenses within the prior ten years or who has a prior conviction for either vehicular assault or vehicular homicide, must be prohibited from purchasing alcohol for ten years. These offenders are issued a vertically oriented driver's license or identification card to indicate that they must not be served alcohol.

*Impaired Driving Offense With a Child In the Vehicle.* It is clarified that monetary penalties imposed upon a person who is convicted of a DUI or PC offense when a minor was in the

vehicle at time of the offense are in addition to any other mandatory penalties imposed by law. The fine is exempt from the PSEA fee that is imposed for other fines, forfeitures, and penalties.

When setting penalties for DUI and PC offenses, the court must particularly consider whether a minor was in the vehicle at time of the offense.

*Driving on the Wrong Side of the Road.* When setting penalties for DUI and PC offenses, the court must particularly consider whether during the commission of the offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple-lane highway with a posted speed limit of 45 miles per hour or greater. Driving in the opposite direction of the normal flow of traffic on a multiple-lane highway with a posted speed limit of 45 miles per hour or greater may be an aggravating factor allowing the court to impose a sentence above the standard sentencing range.

*Attempting to Elude a Police Vehicle.* The sentencing enhancement for attempting to elude a police vehicle offense is clarified to be mandatory, to be served in total confinement, and it must run consecutively to other sentencing penalties.

*Penalty Assessment.* An additional penalty assessment is imposed on those convicted of driving with a suspended or revoked license, circumventing an ignition interlock, failure to stop after striking an unattended vehicle, failure to stop after an accident involving injury or death, attempting to elude a police vehicle, reckless driving, DUI, driving after consuming alcohol by a driver under 21 years of age, vehicular homicide, vehicular assault, first degree negligent driving, or racing a vehicle on a public highway. The penalty assessment is forwarded to the city or county to fund traffic safety taskforces or for effective strategies to reduce motor-vehicle related deaths and injuries. The funds may not be used for indigent defense and are not subject to any state or local remittance requirements.

Driver's Licenses and Identicards. Provisions requiring driver's licenses of DUI and PC offenders to be marked are removed. DOL produces vertically oriented driver's licenses and identicards for persons with two or more DUI or PC convictions.

Driving Privilege. Perfection of a notice of appeal stays the execution of a sentence pertaining to the withholding of the driving privilege. A person is disqualified from driving a commercial motor vehicle for a minimum of one year if a report is received by DOL that the person was convicted of driving a motor vehicle with any measureable amount of THC in the person's system. Law enforcement must also issue an out-of-service order against a person who drives or is in physical control of a commercial vehicle while having THC in the person's system.

Courts. Municipalities are authorized to establish DUI courts and to provide DUI court services. Courts are prohibited from deferring sentences for DUI or PC of intoxicating liquor or any drug. If a court orders EHM to include an alcohol detection breathalyzer, an alternate alcoholic monitoring device may alternatively be required. If the court determines that a wireless alcohol monitoring device is reasonably available, the court may require that device during the period of EHM.

Statewide 24/7 Sobriety Program. The statewide 24/7 sobriety program is established and administered by the Attorney General, effective January 1, 2015. The Attorney General may adopt rules for the administration of the 24/7 sobriety program to: (1) regulate the nature, method, and manner of testing; (2) provide for procedures and apparatuses for testing including electronic monitoring devices and ignition interlock devices; and (3) require the submission of reports and information by law enforcement agencies within this state.

The 24/7 sobriety account is created to defray the costs of operating the program. The account can receive funds from a variety of sources, including activation and users fees. Fee ranges are set by rule annually. Funds from the account are used to defray reoccurring costs of the program. Fees collected by the Department of Corrections (DOC) are deposited in the general fund.

The program may include twice-per-day testing, drug-patch testing, urinalysis testing, electronic monitoring devices, electronic alcohol monitoring device testing, or ignition interlock devices. Participants payment of fees are collected to fund the program.

Each county, through its sheriff, may participate in the 24/7 sobriety program. If a sheriff is unwilling or unable to participate in the 24/7 sobriety program, the sheriff may designate an entity willing to provide the service. If twice-per-day testing is ordered, the sheriff, or designated entity, must establish the testing locations and times for each county but must have at least one location and two daily testing times approximately 12 hours apart.

The court may condition any bond, pretrial release, granting of a suspended imposition of sentence, suspended execution of sentence, probation, or release upon participation in the 24/7 sobriety program and payment of associated costs and expenses. DOC may condition release upon participation in the 24/7 sobriety program and payment of associated costs and expenses.

Marijuana and THC are added to a number of statutes dealing with DUI and PC.

**Appropriation:** None.

**Fiscal Note:** Available.

[OFM requested ten-year cost projection pursuant to I-960.]

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill contains several effective dates. Please refer to the bill.

**Staff Summary of Public Testimony:** PRO: This bill addresses prevention, intervention, and punishment. Certainty of quick punishment is more effective in reducing recidivism than punishment severity. The 24/7 sobriety program should be started as a pilot program in a few counties with the interest and capabilities to make it a success. The vast majority of offenders change their behavior after their first arrest. The state's increased efforts should be focused on second and subsequent offenders. Counties will need liability protection to encourage their participation in the 24/7 program. Ignition interlock use reduces recidivism. Most wrong-way drivers on our highways are driving impaired. It is essential that we do



more to address this problem as soon as possible. The use of electronic monitoring devices is cost effective. DUI courts are a proven countermeasure to recidivism. The restriction on deferred sentences will ensure that repeat offenders do not escape sanctions and cannot avoid increased penalties.

CON: It is not feasible to install interlock devices at the impound lot. The 24/7 program may work for people with the money to pay the fees, but indigent offenders will not have that choice. This is an effort to recriminalize marijuana. Medical marijuana patients will face prosecution when there is no evidence that the bill does not distinguish between first-time offenders and repeaters. Retailers will need to check the identification of every single patron if this bill passes. If the person uses a passport, military identification, or other form of picture identification, this provision will be ineffective.

OTHER: Increased sentences would have serious impacts at the county level. Alcohol supervision technology is evolving quickly, so the law should allow flexibility in regard to testing techniques. It is difficult to get police reports to the prosecutor quickly because the reports are complex and it sometimes takes time to obtain test results. If law enforcement is not able to complete their reports in a timely fashion, direct filing of charges will not get offenders in court any faster. The bill currently does not allow cities to participate in the 24/7 program. Penalties for refusing to take a breath test is not necessary because severe consequences already exist and this would invite litigation. Increased incarceration costs will require funding. A focus on repeat offenders would help control costs. Resources to enforce existing laws need to be increased. Laws should be designed to work well in both large and small counties. Officers often do not have accurate criminal history information at the roadside. There is no need for an ignition interlock if the offense was for an impairment caused by marijuana.

**Persons Testifying:** PRO: Shelly Baldwin, Steve Lind, WA Traffic Safety Commission; Rob Sharp, Rob Huss, WSP; Brian Moran, Office of the Attorney General; Stu Halsan, Towing and Recovery Assn.; Al Runte, Ibsen Towing; John Lane, Governor's Office; Seth Dawson, WA Assn. for Substance Abuse Prevention.

CON: Cody Arledse, United Food and Commercial Workers 21; Steve Sarich, Arthur West, Cannabis Action Coalition; John Worthington, Brian Stone, citizens.

OTHER: Judge Sam Meyer, District and Municipal Court Judges Assn.; Don Pierce, WA Assn. of Sheriffs and Police Chiefs; Tom McBride, WA Assn. of Prosecuting Attorneys; Patricia Fulton, WA Assn. of Criminal Defense Lawyers, WA Defender's Assn.; Candice Bock, Assn. of WA Cities; Shankar Narayan, American Civil Liberties Union-WA; Brian Enslow, WA State Assn. of Counties; Steve Luce, Coalition of Ignition Interlock Manufacturers; Bruce Beckett, WA Restaurant Assn.; James McMahan, Assn. of County Officials; Mark Johnson, WA Retail Assn.