

# SENATE BILL REPORT

## E2SSB 5912

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As Passed Senate, June 26, 2013

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

**Brief Description:** Concerning driving under the influence of intoxicating liquor or drugs.

**Sponsors:** Senate Committee on Ways & Means (originally sponsored by Senators Padden, Kline and Conway; by request of Governor Inslee).

**Brief History:**

**Committee Activity:** Law & Justice: 4/18/13, 4/23/13, 5/14/13 [DPS-WM].

Ways & Means: 5/31/13 [DP2S].

**Second Special Session:** Passed Senate: 6/26/13, 46-0.

**Brief Summary of Engrossed Second Substitute Bill**

- Repeat offenders are arrested and must have an IID installed within 5 business days from the date of release.
- Penalties are increased for DUI with a child in the vehicle.
- Driving the wrong way to the normal flow of traffic may be considered as an aggravating circumstance for sentencing.
- Courts are prohibited from deferring DUI sentences.
- A statewide 24/7 sobriety program is created, effective January 1, 2014.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5912 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Padden, Chair; Kline, Ranking Member; Darneille, Kohl-Welles, Pearson and Roach.

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

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### SENATE COMMITTEE ON WAYS & MEANS

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Majority Report:** That Second Substitute Senate Bill No. 5912 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Hill, Chair; Hargrove, Ranking Member; Nelson, Assistant Ranking Member; Bailey, Braun, Conway, Dammeier, Fraser, Hasegawa, Hatfield, Hewitt, Keiser, Padden, Rivers, Schoesler and Tom.

**Staff:** Carma Matti-Jackson (786-7454)

**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 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. 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. 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.

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.

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.

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. The device must meet or exceed minimum test standards of the model specifications for ignition interlock devices published under federal law.

*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. 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 Engrossed Second Substitute 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 within ten years.

Ignition Interlocks. As a condition of release from custody before arraignment or trial, a defendant who has a prior DUI, PC, vehicular homicide, or vehicular assault offense must be ordered to have a functioning IID installed with proof filed with the court within five business days of the date of release, or comply with the 24/7 Sobriety monitoring program, or both. IID restrictions must remain in effect until DOL receives a declaration, in the four prior consecutive months (1) there have been no attempts to start the vehicle with a breath concentration of .04 or more unless a subsequent test performed within ten minutes registers a lower breath alcohol concentration and the digital image confirms that the same person gave both samples; (2) a review of the digital image confirms that, after a failure to take a random test, the vehicle was not occupied by the driver at the time of the missed test; or (3) failure to pass a random retest with a breath concentration of .025 or lower unless a subsequent test performed within ten minutes registers a lower breath alcohol concentration and the digital image confirms that the same person gave both samples.

Sentencing. No Prior DUI or PC Offenses. Forty-eight consecutive hours (instead of two days) 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 0.15 percent unless it would impose a substantial risk to the offender's health or wellbeing.

*One Prior DUI or PC Offense.* If available, EHM can be replaced with community-based treatment for six months, if indicated by an alcohol assessment, along with 24/7 sobriety program monitoring.

*Two or Three Prior DUI or PC Offenses.* If available, the offender must be ordered to have six months of 24/7 sobriety program monitoring and, if indicated by an alcohol assessment, community-based treatment.

*Felony DUI/PC.* 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 definition of a predicate 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.

The Department of Corrections (DOC) must supervise offenders convicted of vehicular homicide, vehicular assault, or felony DUI or PC regardless of risk classification.

Impaired Driving Offense With a Child In the Vehicle. If a person is convicted of DUI or PC and the offense was committed while a passenger under the age of 16 was in the vehicle, additional incarceration must be ordered as:

- 24 hours if the person has no prior offenses;
- five days if the person has one prior offense within seven years; and
- ten days if the person has two or three prior offenses within seven years.

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. For felony DUI and PC offenses, 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 can be an aggravating circumstance.

Civil Forfeiture. The court must consider whether a vehicle is subject to forfeiture in DUI, PC, and ignition interlock violation cases if a forfeiture has not already occurred.

Commercial Driver's License. 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.

Operating an Employer's Vehicle. DOL may not waive and no employer may exempt an ignition interlock requirement within the first 30 days following installation of an IID after a first offense or for the first 365 days after an IID has been installed for second or subsequent convictions.

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 pilot project is established and administered by the Washington Association of Sheriffs and Police Chiefs (WASPC), effective January 1, 2014. Up to three counties and two cities may be selected to participate in the pilot project. Selections are made through a request for proposal process. Criteria are enumerated. The cities selected must not be within counties selected for the project. Other local jurisdictions are encouraged to establish 24/7 programs as soon as practicable. WASPC reports findings and results biennially.

WASPC may adopt policies and procedures for the administration of the 24/7 sobriety program to (1) provide for procedures and apparatuses for testing; (2) establish fees and costs for participation to be paid by the participants; 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. Funds from the account are used to defray reoccurring costs of the program. Participants' payment of fees are collected contemporaneously or in advance to fund the program and may not be waived or reduced.

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. It is the intent of the legislature that the program be implemented statewide by January 1, 2017.

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.

A participant who violates the terms of participation must be taken into custody and held for an appearance before a judge on the next judicial day. Penalties for violations are specified.

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.

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

Ignition Interlock Program. Any officer conducting field inspections of ignition interlock devices under the ignition interlock program must report violations by program participants to the court. The WSP may not be held liable for any damages resulting from any act or omission in conducting activities under the ignition interlock program, other than acts or omissions constituting gross negligence or willful or wanton misconduct.

During the 2013-2015 fiscal biennium, funds provided for the ignition interlock program at the WSP must be used to provide field officers to work directly with manufacturers, service centers, technicians, and participants in the program, but may include one non-commissioned staff not for administrative support. The funds must be used to supplement and not supplant other funds being used to fund the ignition interlock program.

Impaired Driving Work Group. An impaired driving work group is established to study effective strategies to reduce vehicle related deaths and serious injuries that are a result of impaired driving incidents. The work group must report its findings and recommendations to the Legislature by December 1, 2013.

**Appropriation:** \$4,982,000 million General Fund-State; \$6,460,000 million Total Funds.

**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 (Law & Justice):** 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 (Law & Justice):** 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.



**Staff Summary of Public Testimony (Ways & Means):** PRO: This is a critically important piece of legislation to help combat the issue of impaired driving and the number of people it kills each year. The Governor supports this balanced approach of treatment, monitoring, and punishment. This treats drunk driving offenders in a similar fashion as domestic violence offenders where they are not just arrested but they are booked in jail and the prosecutors rush their file so they are not back out in the public without some public safety provisions. The 24/7 monitoring program and custodial booking are the most important pieces of this bill; however, we support all of its provisions. Research shows the most effective deterrent to driving under the influence is a swift and sure response. If individuals don't think they will suffer any consequences, then it's not going to change their behavior. This proposal does a great job of focusing on repeat offenders. There are adequate liability protections built in for local government and law enforcement.

CON: This bill seeks to establish draconian penalties for alcohol and the new allowable THC levels established by initiative 502. There is no scientific evidence on impairment based on a blood level with THC. This does not provide appropriate penalties. It provides a solution to problems that don't exist.

OTHER: Research says that changing penalties alone has very little effect on behavior. There has been a 30 percent drop in impaired driving in the past few years. The state has made many changes such as target zero teams, more collaboration with the courts, and better partnerships between prosecutors, local law enforcement and the state patrol. It is difficult to say what effect implementing a felony DUI has had towards the recent drop in impaired driving. The difficult part of this proposal is how it will be paid for. Local government does not have the resources available to implement this without state assistance. Some of the provisions are good ideas but the details are not worked out. Some of the revenue from fees is fictional because many of these individuals do not have jobs. Some costs not addressed in the fiscal note are litigation costs because of language. The court's jurisdiction ends at 72 hours. We are concerned about the ongoing costs to cities and jails. There are too many unknowns in this bill and how it will be paid for.

**Persons Testifying (Ways & Means):** PRO: James McMahan, WA Association of County Officials; Tom McBride, WA Association of Prosecuting Attorneys; John Lane, Governor's Office; Steve Lind, WA Traffic Safety Commission.

CON: Arthur West, John Novak, WA State citizens; Steve Sarich, Cannabis Action Coalition.

OTHER: Kirk Ludden, WA State citizen; Bob Cooper, WA Association of Criminal Defense Lawyers, WA Defender Association; Candice Bock, Association of WA Cities; Brian Enslow, WA State Association of Counties; Shankar Narayan, ACLU of Washington.