

HOUSE BILL REPORT

SHB 1104

As Passed House:

March 3, 2023

Title: An act relating to eligibility and requirements for deferred prosecutions.

Brief Description: Concerning eligibility and requirements for deferred prosecutions.

Sponsors: House Committee on Transportation (originally sponsored by Representatives Goodman, Wylie, Davis and Ormsby).

Brief History:

Committee Activity:

Community Safety, Justice, & Reentry: 1/10/23, 1/19/23 [DP];

Transportation: 2/13/23, 2/23/23 [DPS].

Floor Activity:

Passed House: 3/3/23, 64-31.

Brief Summary of Substitute Bill

- Authorizes a person who participates in a deferred prosecution for a gross misdemeanor Driving Under the Influence (DUI) or Physical Control of a Vehicle Under the Influence (PC) charge to participate in a second deferred prosecution.
- Authorizes a second deferred prosecution in two circumstances: on a person's subsequent DUI or PC charge when eligible for treatment, or while under the court's jurisdiction for a first deferred prosecution, if the first deferred prosecution is revoked.
- Modifies requirements for participation in a deferred prosecution depending on the nature of the petitioner's underlying problem.
- Provides that a second deferred prosecution for a DUI or PC offense counts as one point on a defendant's offender score.

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

HOUSE COMMITTEE ON COMMUNITY SAFETY, JUSTICE, & REENTRY

Majority Report: Do pass. Signed by 6 members: Representatives Goodman, Chair; Simmons, Vice Chair; Davis, Farivar, Fosse and Ramos.

Minority Report: Without recommendation. Signed by 3 members: Representatives Mosbrucker, Ranking Minority Member; Griffey, Assistant Ranking Minority Member; Graham.

Staff: Martha Wehling (786-7067).

HOUSE COMMITTEE ON TRANSPORTATION

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 26 members: Representatives Fey, Chair; Donaghy, Vice Chair; Barkis, Ranking Minority Member; Hutchins, Assistant Ranking Minority Member; Low, Assistant Ranking Minority Member; Robertson, Assistant Ranking Minority Member; Berry, Bronoske, Chapman, Cortes, Dent, Doglio, Duerr, Entenman, Goehner, Griffey, Hackney, Klicker, Mena, Ramel, Ramos, Schmidt, Taylor, Volz, Walsh and Wylie.

Minority Report: Do not pass. Signed by 1 member: Representative Orcutt.

Minority Report: Without recommendation. Signed by 1 member: Representative Timmons, Vice Chair.

Staff: Michael Hirsch (786-7195).

Background:

Eligibility for Deferred Prosecution.

A person charged with a misdemeanor or gross misdemeanor in district or municipal court may petition the court for a deferred prosecution, subject to certain conditions. For example, a petitioner is not eligible for more than one deferred prosecution for gross misdemeanor Driving Under the Influence or Physical Control of a Vehicle Under the Influence charges.

To qualify for a deferred prosecution, the petitioner must allege that a substance use disorder, mental health problem, or domestic violence behavior problem caused the petitioner to commit the charged offense and that treatment is necessary to prevent reoccurrence. An approved treatment provider, health center, or government agency must prepare a case history and risk assessment. The entity that prepares the case history and risk assessment is based on the petitioner's underlying problem. For example, a petitioner seeking a deferred prosecution related to criminal mistreatment must be evaluated by and have a plan developed and facilitated by the Department of Social and Health Services,

while a petitioner seeking a deferred prosecution for a substance use disorder services must have a plan prepared by a substance use disorder treatment program.

Requirements for Deferred Prosecution.

The court may refer the petitioner for a diagnostic investigation and evaluation to determine:

- whether the petitioner suffers from the problem described;
- whether the problem, if left untreated, has a probability of causing similar misconduct in the future;
- whether extensive and long-term treatment is required;
- whether effective treatment for the petitioner's problem is available; and
- whether the petitioner is amenable to treatment or willing to cooperate with child welfare services.

The entity conducting the evaluation must make a written report to the court stating its findings and recommendations. If the entity supports treatment, it must also recommend a treatment plan containing the type, nature, length, schedule, and cost of treatment. If the court approves the treatment plan and the petitioner agrees to comply with its terms and conditions, the court must accept the petitioner's request for a deferred prosecution.

A deferred prosecution based on alcoholism must be for a two-year period and requires:

- total abstinence from alcohol and all other nonprescribed, mind-altering drugs;
- participation in an intensive inpatient or outpatient program in a state-approved substance use disorder treatment program;
- participation in a minimum of two meetings per week of an alcoholism self-help recovery support group for the duration of the treatment program;
- participation in an alcoholism self-help recovery support group from the date of court approval of the plan to entry into intensive treatment;
- weekly outpatient counseling for a minimum of six months following the intensive phase of treatment;
- monthly outpatient contact for the remainder of the two-year deferred prosecution period;
- reservation of the decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment to the treating facility and the participant's physician;
- treatment by a state-approved substance use disorder treatment program; and
- petitioner's signature and agreement to the terms and conditions of the program.

As a condition of granting a deferred prosecution, the court may appoint a probation department or other appropriate person or agency to supervise the petitioner. The supervisor must:

- at least once every six months, request an abstract of the petitioner's driving record if the petitioner's charge relates to operation of a motor vehicle; and
- at least once every month, contact the petitioner or any agency to which the petitioner

has been directed for treatment.

The court will dismiss the charges pending against the petitioner three years after completion of the treatment plan, after proof is provided to the court that the petitioner successfully completed the two-year treatment plan. If a petitioner is convicted of a similar offense prior to successful completion of the deferred prosecution, the deferred prosecution will be rescinded and the court will enter judgment. If the petitioner violates the deferred prosecution requirements, the court may terminate the deferred prosecution.

Felony Offender Scores.

For most felony offenses, the Sentencing Reform Act provides a determinate sentencing system in which sentencing courts generally impose sentences within a standard range. The standard range for a person is determined by reference to a grid, which provides a base sentence according to the person's offender score and the seriousness level of the present offense. The offender score is a point total based on the person's prior dispositions and convictions. A felony DUI or PC conviction is included in the offender score.

Summary of Substitute Bill:

Eligibility for Deferred Prosecution.

A person who participates in a deferred prosecution for a first-time gross misdemeanor Driving Under the Influence (DUI) or Physical Control of a Vehicle Under the Influence (PC) charge may petition the court for a second deferred prosecution for a subsequent charge. A second deferred prosecution is only available for the person's next violation when the behavioral health agency's assessment concludes the person is eligible for treatment. In addition, the person must meet eligibility requirements, the court must make specific findings, and the person cannot have out-of-state convictions that would constitute a prior offense. A person who did not participate in a deferred prosecution for a first-time gross misdemeanor DUI or PC charge is only eligible to petition the court for one deferred prosecution.

A person may petition the court for a second deferred prosecution while still under the jurisdiction of the court for a first deferred prosecution; however, the court must revoke the first deferred prosecution. A person may not participate in two deferred prosecutions at the same time unless the separate offenses were committed within seven days of each other and the person petitions to consolidate the offenses into a single deferred prosecution.

A petition for deferred prosecution must include a case history and risk assessment. The entity preparing the case history and risk assessment is based on the petitioner's underlying problem. A substance use disorder or mental health co-occurring disorder requires assessment by a state-approved behavioral health agency. Domestic violence requires a state-certified domestic violence intervention treatment provider. Criminal mistreatment crimes require the Department of Children, Youth, and Families.

Requirements for Deferred Prosecution.

A program or department performing a diagnostic investigation and evaluation must determine whether the petitioner is either:

- amenable to treatment, demonstrated by completion of residential treatment and additional treatment based on the nature of the underlying problem; or
- willing to cooperate with child welfare services.

A deferred prosecution based on either a substance use disorder or a mental health co-occurring disorder must be for a two-year period and impose the following requirements:

- total abstinence from alcohol and all other nonprescribed, mind-altering drugs;
- periodic, random urinalysis or breath analysis;
- treatment within or approved by a state-approved behavioral health agency;
- weekly outpatient counseling for a minimum of six months following the intensive phase of treatment;
- monthly outpatient contact for the remainder of the two-year deferred prosecution period;
- decision whether to include the use of prescribed drugs, including disulfiram, as a condition of treatment, is made by the treating facility and the participant's physician; and
- petitioner's agreement to the program.

The petitioner's progress under the treatment plan developed by the agency and approved by the court must be provided to the court monthly.

A deferred prosecution based on substance use disorder must also impose the following requirements:

- completion of an intensive outpatient or residential inpatient treatment program, depending on the severity of the diagnosis; and
- participation in at least two meetings per week of a self-help recovery support group for the duration of the treatment program.

A deferred prosecution based on a mental health co-occurring disorder must also impose the following requirements:

- completion of either the substance use disorder requirements or an outpatient program; and
- completion of individual or group mental health services.

A deferred prosecution based on a mental health disorder where the conduct did not involve and was not caused by alcohol, drugs, or substance use, must include treatment recommended by a mental health provider.

As a condition of granting a deferred prosecution, the court may appoint a probation department or other appropriate person or agency to supervise the petitioner. The supervisor must:

- request an abstract of the petitioner's driving record at least once every three months, if the petitioner's charge relates to operation of a motor vehicle;
- contact the petitioner at least once a month until treatment is completed;
- review the petitioner's criminal history at least once every three months until the end of the deferral period; and
- report violations or noncompliance to the court within five business days or as soon as practicable.

Felony Offender Scores.

A deferred prosecution for a second or subsequent DUI or PC offense counts as one point on a defendant's offender score for.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on January 1, 2024.

Staff Summary of Public Testimony (Community Safety, Justice, & Reentry):

(In support) Encouraging and promoting treatment is a shared goal. Traffic fatalities are increasing. Driving under the influence is not a crime of addiction, although it plays a role in DUI crimes. Studies show that when a person completes a treatment program through deferred prosecution, there are fewer incidents of recidivism not only for DUIs but for all criminal offenses. It is important to incentivize and destigmatize treatment for people who are diagnosed with a substance use disorder for their first DUI crime. Treatment in lieu of prosecution improves public safety, decreases recidivism, and prioritizes prompt access to treatment. A second deferred prosecution removes the perverse incentive to postpone use of deferred prosecution for treatment and allows people who are challenged by addiction a second chance at treatment. Allowing the second deferred prosecution to count as a point in the offender score is a proper balance for when treatment fails at the first attempt. Deferred prosecution is supported by numerous organizations, and is a sound policy that will save lives.

(Opposed) None

(Other) It may be good to allow a second deferred prosecution, but only in the limited situation where a person has used it for their first DUI offense. Allowing a person to delay treatment is not a good public safety model. A first DUI conviction is not usually a first offense because charges are often pled down. The bill should be revised to include prior negligence or reckless endangerment that are originally charged as a DUI.

Staff Summary of Public Testimony (Transportation):

(In support) More needs to be done to decrease DUIs. People with multiple DUIs face escalating consequences. Deferred prosecution for DUI successfully gets people into treatment. The defense bar has been advising to save the one deferred prosecution a person gets and people are not getting treatment. Those with a substance use disorder can cause additional harm to themselves and others and need treatment. This bill will save lives and gets more people more treatment. The bill cleans up the deferred prosecution program and makes the roads safer.

(Opposed) There is a perverse incentive to not enter into treatment under a deferred prosecution until later offenses with higher charges. The State of Washington has requirements for treatment that are overly defined and prevents treatment providers from giving the best patient care. This bill adds additional requirements and includes unnecessary and harmful random screens and mandatory reassessments. Using a substance during the course of treatment is normal but prohibited under a deferred prosecution.

(Other) The second deferred prosecution should only be able to be used on the second offense. The bill has a gap that allows for banking a subsequent deferred prosecution. People should get treatment sooner. Drunk driving has real costs for victims and the state. Treatment helps even if required and even if a person is not going into treatment for the first time.

Persons Testifying (Community Safety, Justice, & Reentry): (In support) Representative Roger Goodman, prime sponsor; Julie Mitchell, Association of Alcoholism and Addiction Providers; Geoffrey Burg, Washington Defenders Association and Washington Association of Criminal Defense Lawyers; Amy Freedheim; and Linda Thompson, Washington Association for Substance Misuse and Violence Prevention.

(Other) James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Testifying (Transportation): (In support) Representative Roger Goodman, prime sponsor; Julie Mitchell; Elizabeth Gould; and Geoffrey Burg, Washington Association of Criminal Defense Lawyers and Washington Defender Association.

(Opposed) Josie Tracy.

(Other) Linda Thompson, Washington Association for Substance Misuse and Violence Prevention; Amy Freedheim, King County Prosecutors Office; and Taylor Gardner, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying (Community Safety, Justice, & Reentry): None.

Persons Signed In To Testify But Not Testifying (Transportation): None.