

## **Criminal, DWI and Traffic Law Update**

This CLE program was presented by Rusty Antel on February 13, 2002. Rusty's notes for the program follow:

### Changes in Missouri law related to alcohol related traffic offenses:

Section 302.302(9) and (10) provides for the assessment of points for convictions for driving with a blood alcohol content of .08% or more by weight – the point assessment remains the same with eight (8) points on a first conviction and twelve (12) points on a second or subsequent conviction.

Sections 302.302 (14), 302.540.1 and 577.023.7 modify the requirement for completion of SATOP as a requirement for license reinstatement: "...a program determined to be comparable by the Department..." is sufficient.

After a hearing, the court may modify or waive the assignment recommendation that the court determines is unwarranted based upon a review of the needs assessment, driving record, circumstances of offense and the likelihood of the person committing a like offense in the future, but the court cannot waive the assignment to an educational or rehabilitation program for a prior or persistent offender as defined in Section 577.023 RSMo or a person whose blood alcohol content at the time of the offense was .15% or more.

Section 302.505 and following sections change the blood alcohol content for the administrative suspension and revocation process to .08%.

Section 302.540.4 authorizes the Division of Drug and Alcohol Abuse within the Department of Mental Health to create a demonstration program to provide education or rehabilitation services to person determined by DDAA to be "serious or repeat offenders", which is defined as a prior or persistent offender under Section 577.023 RSMo or a person whose blood alcohol content at the time of the offense was .15% or more.

NOTE: Changes in provisions above under Section 302.302 RSMo are effective September 29, 2001.

Section 304.027 creates the Spinal Cord Injury Fund. Any person convicted of an intoxication related traffic offense as defined by Section 577.023 RSMo shall pay a \$25 judgment to this fund. (Effective August 28, 2001).

Section 577.012 changes the crime of driving with excessive blood alcohol content to operating a motor vehicle with a blood alcohol content of .08% or more. A first offense conviction is changed from a class C to a class B misdemeanor. (Effective September 29, 2001).

Section 577.021 pertaining to portable or preliminary breath tests is changed to allow these tests by any state, county or municipal law enforcement officer who has the power of arrest for violations of Sections 577.010 or 577.012 RSMo and who is certified pursuant to Chapter 590 RSMo. Currently, the law authorizes such tests by the state highway patrol.

The test is admissible to show probable cause for the arrest and is admissible as exculpatory evidence. It is not admissible as evidence of blood alcohol content.

The implied consent law does not apply to portable or preliminary breath tests (refusal to submit to such a test will not trigger the license revocation process for refusing to submit to a chemical test).

There is no requirement that the test result be recorded. Currently, the portable breath test is given by the highway patrol, the University of Missouri-Columbia Police Department and the Columbia Police Department. Current MSHP and MUPD policy does not require that the test result be recorded. Supreme Court Rule 25.03 re mandatory discovery requires that exculpatory evidence including evidence that mitigates the degree of the offense or the punishment shall be provided upon written request, but if the test result is not provided, how can defense counsel determine if the evidence is exculpatory. This is also important if the prosecutor has a policy to reduce some DWI charges to DWBAC if the breath test is below a certain threshold.

Section 577.020.6 RSMo requires that full information about any chemical test be provided to the defendant.

The PBT is not authorized to be given for persons under 21 years of age stopped for a traffic violation and suspected of driving with .02% blood alcohol content or greater, as Section 577.021 RSMo specifically addresses only person suspected of violating Sections 577.010 or 577.012 RSMo.

Can a PBT be given to a person arrested for violation a municipal or county ordinance, which prohibits driving while intoxicated or driving with excessive blood alcohol content?

Section 577.021 changes are effective August 28, 2001.

Section 577.023.4 RSMo changes the mandatory minimum punishments for prior and persistent offenders.

Prior offenders must serve a minimum of five (5) days imprisonment (currently 48 consecutive hours) as a condition of probation, unless they perform thirty (30) days of community service work.

Persistent offenders must serve a minimum of ten (10) days imprisonment (currently no shock detention requirement) or sixty (60) days of community service work.

Note that "days" is not defined. This provision is effective September 29, 2001.

Section 577.037.1 RSMo changes the prima facie level of intoxication from .10% to .08%. This is effective September 29, 2001.

Section 577.037.5 retains the dismissal provision for persons charged with driving while intoxicated in violation of state law or a county or municipal ordinance. The statute states that the charge shall be dismissed if the evidentiary breath, blood, saliva or urine test is less than .08% unless the court determines that the dismissal is unwarranted because of:

- the test is unreliable due to a lapse of time between the driving and the evidentiary test, or

- there is evidence that the person is under the influence of drugs or a controlled substances with or without alcohol, or
- there is substantial evidence of intoxication from physical observations of the defendant or admissions of the defendant.

While the statute does not specifically provide for a separate hearing, as a practical matter this will occur if requested by the defendant and probably must occur if a jury trial is requested. While this may not succeed, it will give the defendant a good chance to hear the major components of the government's evidence prior to trial.

Section 577.600 RSMo changes the provisions pertaining to ignition interlock devices. The requirement is discretionary with the court on a first intoxication related traffic offense and mandatory on a second or subsequent intoxication related traffic offense. The provision that makes the ignition interlock device applicable only to persons placed on probation has been removed. The new law requires that the court impose the ignition interlock device requirement for a minimum of one (1) month from the date of reinstatement of the person's drivers license, even though the court would not effectively be able to enforce this if the person is not on probation except as a new criminal offense which remains a class A misdemeanor.

If a court grants a limited driving privilege to a person convicted of a second or subsequent intoxication related traffic offense, the court shall require the use of an ignition interlock device on all vehicles operated by the person as a required condition of the limited driving privilege. However, this provision is not specifically applicable to limited driving privileges granted by DOR.

The undue hardship provisions in Section 577.602.1 RSMo are eliminated. This provision allowed the court to waive the installation of an ignition interlock device if it would be a financial hardship to the offender or if installation could not be done within 50 miles of the county seat of the offender's county of residence.

#### 2001 Statutory Changes - Criminal and Traffic Law:

Section 302.286 RSMo: A person who is found guilty of or pleads guilty to stealing motor fuel while operating a motor vehicle shall have his driver's license suspended by the court, beginning on the date of the court's order of conviction.

- 1st offense - 60 day suspension/hardship after 30 days
- 2nd offense - 90 day suspension/hardship after 60 days
- 3rd offense - 180 day suspension - hardship after 90 days

There is a \$25.00 reinstatement fee. No SR-22 insurance filing is required.

Section 304.580 RSMo: On a conviction or plea of guilty to speeding in violation of Section 304.009 RSMo or Section 304.010 RSMo, or passing in a "work zone" or "construction zone", the court shall assess a \$250.00 fine in addition to any other authorized fine if a worker is actually present in the work or construction zone. A sign is required which must state "\$250.00 fine for speeding or passing in this work zone."

Section 374.757 RSMo requires bail bond agents who intend to apprehend any person in this state to notify local law enforcement before attempting the apprehension. The bail bond agent is required to present a certified copy of the bond. This also provides to a "surety recovery agent" when entering a residence to apprehend a wanted person. A first offense is a class A misdemeanor and a second or subsequent offense is a class D felony.

Section 547.035 RSMo authorizes the filing of a post-conviction motion for DNA testing.

Section 610.105 RSMo changes the closed record provisions. Prior to the amendment of this section, the following dispositions were closed to the public:

- Suspended imposition of sentence after completion of probation.
- Dismissal.
- Acquittal.
- Nolle prosequi.

Under the new provision, the records are closed to the public, "...except that the court's judgment or order or the final action taken by the prosecuting attorney in such matters may be accessed."

#### Changes in Chapter 195 RSMo:

Gamma hydroxybutyric acid ("GHB") is added to the list of Schedule I controlled substances.

Ketamine is added to the list of Schedule III controlled substances.

The penalty for trafficking in ecstasy (3,4 methylenedioxymethamphetamine) is increased as follows:

- Distribution of 30 to less than 90 grams is a class A felony.
- Distribution of 90 grams or more is a class A felony without probation or parole.
- Possession of 30 to less than 90 grams is a class B felony.
- Possession of 90 to less than 450 grams is a class A felony.
- Possession of 450 grams or more is a class A felony without probation or parole.

Stealing or attempting to steal anhydrous ammonia or liquid nitrogen is a class C felony.

Theft of anhydrous ammonia in any amount by taking a tank truck or tank trailer is a class A felony.

Possession of anhydrous ammonia in an unapproved container is a class D felony.

#### Case Law Update:

*Dean v. Director of Revenue*, (Mo. App. WD 2001) holds that Section 577.054 RSMo authorizes expungement only for records in the criminal case including the arrest, plea and conviction. The records of the administrative proceedings under Chapter 302 RSMo are not subject to expungement. The following records can be expunged:

- FBI and NCIC criminal history records.
- MSHP criminal history records.
- Criminal history records maintained by the PA.
- Criminal records maintained by the court clerk and on casenet.

MSHP traffic arrest system records.  
DOR conviction records and point suspension records.

The administrative suspension records cannot be expunged under Section 577.054 RSMo.

*State v. Cullen*, (Mo. App. ED 2001) requires that proof of prior and persistent offender allegations must occur prior to submission of the case to the jury.

*State v. Stottlemeyer*, (Mo. App. WD 2001) holds that operating procedures pertaining to portable or preliminary breath test instruments do not need to be approved by the Department of Health.

*State v. Duncan*, (Mo. App. ED 2000) reversed a case where a portable breath test result was admitted in a jury trial over the defendant's objection and where the defendant had offered to stipulate that there was probable cause for the arrest.

*State v. Rowe*, (Mo. 2002 - #SC83880) reversed a conviction for driving while suspended, revoked or canceled. Rowe's driver's license in Iowa was canceled. He was arrested for driving in Missouri and charged with driving while suspended, revoked or canceled as a class D felony because of prior convictions for driving while suspended, revoked or canceled. Rowe contended that his license was not suspended, revoked or canceled under the laws of this state as required by Section 302.321 RSMo. The court concluded that the plain language of the statute was controlling and reversed the conviction. The court declined to rewrite the plain language of the statute despite the unlikelihood that the legislature intended to subject out of state drivers to suffer a lesser consequence than Missouri drivers. The defendant apparently conceded that he was guilty of driving without a license under Section 302.020 RSMo and practically invited the legislature to change the language of Section 302.321 RSMo.

*Clare v. Director of Revenue*, (Mo. App. ED 2002) reversed the trial court's judgment setting aside the 10 year denial of Clare's driving privileges. Out of a single incident, Clare was convicted of four counts of assault in the second degree involving a vehicular assault committed while he was driving while intoxicated. The Director notified Clare that his driving privileges were denied for 10 years for being convicted more than two time for offenses relating to driving while intoxicated. The traffic court commissioner sustained the Director's decision. Clare was granted a rehearing by a circuit court judge who set aside the 10 year denial. The Eastern District reversed the circuit court, holding that the plain language of Section 302.060(9) RSMo authorized a 10 year denial.

*Phillips v. Wilson*, (Mo. App. WD 2002) reversed the trial court's judgment reinstating Phillips' driving privileges. Phillips was arrested for driving while intoxicated. Apparently after being explained the implied consent law, the officer asked Phillips to submit to a breath test. Phillips responded that he would not take the breath test. Somewhat later, the officer asked Phillips if he was still refusing to take the test and Phillips said he would refuse and the said he would not refuse. The evidence is somewhat confusing as the case was tried on the alcohol influence report and related documents without any live testimony. The trial court found that Phillips did not refuse the breath test based upon ambiguities in the record indicating that Phillips attempted to revoke his initial refusal. The Western District reversed, holding that once a driver refuses a chemical test, the driver's request at a later to time to submit to the test has no bearing on the revocation of his driving privileges.

*Crabtree v. Director of Revenue*, (Mo. App. WD 2002) reversed the trial court's judgment reinstating Crabtree's driving privileges under the administrative suspension procedures in Section 302.505 RSMo. Crabtree was arrested for driving while intoxicated and taken to the Ray County Jail where he was asked to submit to a breath test. Crabtree asked to call an attorney. The deputy gave him a phone book. Crabtree called the only attorney he knew who unfortunately turned out to be the Ray County Prosecuting Attorney which Crabtree was aware of. The prosecutor advised Crabtree to take the test which Crabtree did, resulting in a breath test result of .221 percent. On trial de novo, the circuit court vacated the suspension and ordered the Director to reinstate Crabtree's driving privileges on the basis that Crabtree did not receive fair and unbiased advice under the implied consent law (Section 577.041 RSMo) before deciding to take the test. The Western District reversed and reinstated the suspension of Crabtree's driving privileges, holding that the provisions of the implied consent law allowing a driver to contact an attorney are triggered only where the driver refuses the chemical test. In a non-refusal case, contact with an attorney is not required for admission of the test results.

*Kyllo v. United States*, 121 S.Ct. 2038 (2001) held that thermal imaging was an unreasonable intrusion on the defendant's Fourth Amendment privacy rights. The exterior of Kyllo's residence was scanned with a thermal imager in an attempt to detect heat sources consistent with the growing of marihuana. The officers did not have a search warrant to use the thermal imager. Based upon the results of the thermal imaging, the officers then obtained a search warrant and discovered an indoor marihuana growing operation. The district court and the court of appeals upheld the warrant. The Supreme Court reversed in a 5-5 opinion authored by Justice Scalia. The majority opinion holds that when the government uses a device not in general public use to explore details of a home that previously would be unknowable without physical intrusion, the surveillance is a search and is presumptively unreasonable without a warrant.

*Atwater v. City of Lago Vista*, 121 S.Ct. 15636 (2001) holds that an officer may make a custodial arrest of a person without violating the Fourth Amendment where there is probable cause to believe that the defendant has committed in the officer's presence a minor misdemeanor violation punishable only by a fine. This was a 5-4 decision involving the custodial arrest of a driver for failure to wear a seat belt and failing to properly restrain a child passenger.

*Kinzenbaw v. Director of Revenue*, (Mo. 2001 – SC#83802) involves a ten year denial of Kinzenbaw's driving privileges because of three convictions relating to driving while intoxicated pursuant to Section 302.060 RSMo. The driver had a Missouri conviction for driving with excessive blood alcohol content, a Missouri conviction for driving while intoxicated and an Iowa conviction for driving while intoxicated. Neither party presented any evidence and the trial court entered judgment for Kinzenbaw as the Director had failed to meet its burden of proof. The Supreme Court reversed and remanded. In the future, the Supreme Court set the following procedural guidelines pertaining to the burden of proof and the burden of producing evidence. Initially, the driver bears the burden of producing evidence that he is entitled to a license. Once the driver has produced evidence on this issue, the burden of producing evidence shifts to the Director to put on evidence to show that the driver is not entitled to a license. Normally, this will involve offering the certified records in the Director's files pursuant to Section 302.312 RSMo. The burden for the Director to produce evidence does not shift the burden of persuasion which remains with the driver. After the Director has introduced its records, the driver has the burden of showing that the facts established by the certified records are not true (e.g. that he was not the person convicted or the offense was not

in fact driving while intoxicated or driving with excessive blood alcohol content) or that the grounds for the Director's action are unlawful, unconstitutional or otherwise insufficient.