

Traffic Safety Standard

Providing relevant information to Montana's prosecutors, law enforcement and judges

SPECIAL ISSUE

SUMMER 2011

In this issue:

SB 42 1

SB 15 2

HB 106 2

HB 12 3

HB 69 3

SB 319 3

SB 423 4

Montana's Recent DUI Legislation

The 2011 legislative session marked significant changes in Montana DUI and traffic law. Many important DUI bills passed, including the search warrant to obtain blood bill, the aggravated DUI bill, 24/7 sobriety program, and increased penalties for DUI per se offenders. Also passed was a bill to reinstate the primary child safety seat law. The purpose of this newsletter is to outline each of these bills, provide quick links to the bills in their entirety, and discuss issues pertaining to each bill.

Senate Bill 42: An act . . . clarifying that search warrants may be issued for blood samples if the offender has a prior refusal or conviction or pending offense. . . Effective April 28, 2011. <http://data.opi.mt.gov/bills/2011/billpdf/SB0042.pdf>

Outline:

- law enforcement may apply for a search warrant to obtain blood after the arrested person refuses to provide a breath sample (for the Intoxylizer[®]) or a blood sample when
- the suspect has been convicted of or has a pending offense of a prior DUI, DUI per se, negligent homicide, vehicular homicide while under the influence, or negligent vehicular assault in Montana or another state (similar offense), or
- the suspect has previously refused to provide a breath sample (for the preliminary alcohol screening test (PAST) or Intoxylizer[®]) or a blood sample during the course of a DUI investigation in Montana or another state (substantially similar statute).

This bill is designed to close the loophole that allowed a person suspected of DUI to refuse to provide a blood or breath test when probable cause of DUI existed. Knowing the breath alcohol content (BrAC), blood alcohol content (BAC), or other impairing drugs in the suspects' systems is important for two reasons: 1. Judges use the information to tailor sentencing according to individual's needs, and 2. the information is helpful to prosecutors and triers of fact in determining what actually happened in each case.

Law enforcement is still prohibited from pursuing a warrant if the suspect has no previous DUI conviction and has never refused to provide a sample.¹ The bill did not eliminate the Implied Consent law. Rather, it modified the language to allow for a more traditional criminal investigation in the circumstances outlined above. Now a judge who has proper jurisdiction² will review the warrant application and verify probable cause is present. A warrant may then be issued and blood may be obtained. Due to the varying populations and resources throughout Montana, each county will have a different process by which they obtain the warrant and the sample.

The bill also defines blood or breath as "evidence" under Montana's warrant laws. This should clarify confusion arising from the court's rationale in *State v Saale*, 2009 MT 95.



Montana's Traffic Safety Resource Prosecutor (TSRP) position is funded by the Montana Department of Transportation as part of a comprehensive effort to reduce the number and severity of traffic crashes, injuries, and fatalities on Montana highways.

In *Saale* the Montana Supreme Court stated, “blood alcohol content is not evidence until it exists in a state capable of analysis” in DUI cases.³

Senate Bill 15: An act establishing the offense of aggravated driving under the influence; providing penalties . . . Effective April 28, 2011. <http://data.opi.mt.gov/bills/2011/billpdf/SB0015.pdf>

Outline:

- A person commits the offense of aggravated DUI if they have committed either DUI or DUI per se and one of the following factors also exists:
 - the person’s BAC was greater than or equal to 0.16,
 - during the commission of the offense, the person was under ignition interlock restriction,
 - during the commission of the offense, the person’s driver’s license was suspended or revoked as a result of an Implied Consent refusal or as a result of a DUI conviction,
 - the person’s driver’s license was suspended or revoked within ten years of the offense as a result of an Implied Consent refusal, or
 - the person has either a conviction or pending charge of DUI, DUI per se, vehicular homicide under the influence, or negligent vehicular assault within
 - three years if only one offense, or
 - seven years if more than one offense
- Penalties include
 - a term of imprisonment of not more than 1 year, part of which may be suspended, except for the mandatory minimum sentences set forth in MCA 61-8-714,
 - \$1,000.00 fine, and
 - mandatory participation in DUI Court if available
 - participation in 24/7 program if available in the jurisdiction and imposed by the court.

This bill addresses “hard core” offenders⁴ and impaired driving recidivists. Testimony presented to the Legislature indicated Montana’s statutory scheme inadequately dealt with these offenders. This new crime helps the State and the Judiciary identify those in greatest need of intervention and provides judges with some leeway to sentence accordingly.

House Bill 106: An act establishing the 24/7 program. . . Effective July 1, 2011. <http://data.opi.mt.gov/bills/2011/billpdf/HB0106.pdf>

Outline:

- DOJ will coordinate with counties that choose to establish the 24/7 Program.
- DOJ will write Administrative Rules regarding the 24/7 Program.
- 24/7 Program may be used for second or subsequent offense DUI offenders. First-time DUI offenders may not be sentenced to 24/7.
- 24/7 program can be used as a condition of bond or pretrial release, as a condition of sentence or probation, or as a condition of parole.
- 24/7 Program requires the participant to submit to alcohol and/or drug testing twice daily (about twelve hours apart) including weekends and holidays, or to continuous transdermal alcohol monitoring.
- offenders who test positive for drugs or alcohol may be found in (criminal) contempt of court.

Montana’s 24/7 Program is modeled after South Dakota’s very successful program of the same name.⁵ The Program is unique in that it focuses on the substance abuse and/ or addiction aspect of the offender’s criminal behavior, rather than addressing the driving aspect of a DUI. The Program allows offenders to remain in

the community as long as they are alcohol and drug free. To ensure they are alcohol and drug free, they submit to testing every day.

Counties may participate in the Program on a voluntary basis. Lewis and Clark County initiated a pilot 24/7 Program in 2010, and found it very beneficial. If counties choose to implement the Program, the DOJ will help coordinate the program and provide technical assistance. Contact Siri Smillie at ssmillie@mt.gov for more information.

House Bill 12 and House Bill 69: An act revising penalties for alcohol-related driving offenses by extending the possible jail time for certain misdemeanor offenses . . . and an act encouraging DUI court participation; revising penalties for driving under the influence of alcohol or drugs; allowing DUI courts to suspend all or a portion of imprisonment sentences; defining a DUI court . . . *Effective April 20, 2011.* <http://data.opi.mt.gov/bills/2011/billpdf/HB0012.pdf> <http://data.opi.mt.gov/bills/2011/billpdf/HB0069.pdf>

Outline:

- maximum jail time for DUI per se is revised as follows:
 - 1st offense – maximum 6 months in jail,
 - 2nd offense – maximum 1 year in jail, and
 - 3rd offense – maximum 1 year in jail.

Prior to the effective date of these bills, DUI per se offenders were subject to minimal jail time; First offenders could only spend ten days maximum in jail. Courts were typically allowed to have jurisdiction over these offenders for that same time period. This made it impossible for DUI Courts and other programs to effectively monitor and change the behavior of many offenders. These bills allow for DUI per se violations to be treated more similarly to DUI violations by extending the maximum jail time.⁶ With the extended jurisdiction, DUI Courts will have more time to monitor offenders and ensure their dangerous driving behaviors have changed.⁷ As the title of House Bill 69 indicates, other provisions were also included to assist DUI court in facilitating participation.



Senate Bill 319: An act revising child safety restraint standards; waiving the fine for violation of the restraint requirement under certain conditions; eliminating the secondary enforcement restriction for certain restraint violations . . . *Effective July 1, 2011.* <http://data.opi.mt.gov/bills/2011/billpdf/SB0319.pdf>

Outline:

- a law enforcement officer may stop a vehicle if a person in the vehicle who is under 6 years of age and weighs less than 60 pounds is not properly restrained in an appropriate child safety seat.
- the fine must be waived if
 - the violator shows proof of the acquisition of proper restraint within seven days, and
 - the violator has not had a previous dismissal of a child safety restraint violation

Prior to the effective date of this bill, law enforcement was not allowed to stop a vehicle for a violation of the child restraint law unless a separate violation was observed. This bill allows officers to stop when observing a violation if the child is six years old or younger.⁸ Officers are still prohibited from stopping vehicles for a violation of other seat belt laws unless another violation is observed.

Please visit www.buckleup.mt.gov for more information and resources about proper child safety seat fit

and. use, including a list of certified child passenger safety technicians and inspection stations that can provide guidance regarding seat selection and installation.

Senate Bill 423: An act establishing the Montanan Marijuana Act and revising laws relating to the use of marijuana Effective in its entirety July 1, 2011

<http://data.opi.mt.gov/bills/2011/billpdf/SB0423.pdf>.

On June 30, 2011 Judge Reynolds of Helena blocked some of the provisions of SB 423. The temporary injunction of certain sections of the bill will stand until the court has a hearing and decides whether to issue a permanent injunction. For a good discussion regarding that decision, go to http://helenair.com/news/article_bf323816-a371-11e0-947c-001cc4c03286.html#ixzz1RpFdRSLq.

¹DUI (first offense) remains the only crime in Montana which allows a suspect to withhold evidence when law enforcement has probable cause of the crime.

²A companion bill, Senate Bill 40, providing for a 24 hour magistrate to sign DUI warrants did not pass.

³*Id.* at ¶ 11 (citing *State v Peplow*, 2001 MT 253, ¶ 25).

⁴Hard core offenders are considered the most dangerous of DUI offenders. *The Century Council* defines “hard core” offenders as those who habitually drive at or above a 0.15 BAC. *Hard Core Drunk Driving Prosecutorial Guide*, p.4 (available at <http://www.centurycouncil.org>). Drivers with a BAC level of .08 or higher in fatal crashes were eight times more likely to have a prior conviction for driving while impaired than were drivers with no alcohol (source: <http://www.nhtsa.gov/staticfiles/ncsa/pdf/2010/811385.pdf>).

⁵*The South Dakota 24/7 Sobriety Project: A Summary Report*, Attorney General Larry Long, Attorney General of South Dakota, Stephen K. Talpins, Chief Executive Officer, National Partnership on Alcohol Misuse and Crime, Robert L. DuPont, M.D., President, Institute for Behavior and Health, Inc. <http://apps.sd.gov/atg/dui247/index.htm>

⁶*The American Medical Association* recommends the “per se” limit be set at 0.05 BAC. *American Medical Association*, H-30.973 Encouraging State Action to Prevent Drunk Driving (available at http://www.ama-assn.org/resources/doc/alcohol/underage_drnkndrive.pdf).

⁷*The Ten Guiding Principles to DWI Courts*, (available at http://www.mdt.mt.gov/safety/docs/courts/guiding_principles.pdf).

⁸Enforcement of seat belt laws has been shown to increase use of seat belts and prevent death in vehicle crashes. Public Health Law Research, <http://publichealthlawresearch.org/public-health-topics/injury-prevention/motor-vehicle-injuries/evidence-brief/primary-enforcement-saf> (2011).

Montana TSRP

Erin T. Inman, PLLC

11 Friendship Lane, Ste 101

Montana City, Montana 59634

Phone: 406-449-1255

FAX: 406-449-2188

Email: erin@inmantraining.com

Website: <http://www.mdt.mt.gov/tsrp/>

MDT attempts to provide accommodations for any known disability that may interfere with a person participating in any service, program, or activity of the Department. Alternative accessible formats of this information will be provided upon request. For further information call (406) 444-3423, TTY (800) 335-7592, or the Montana Relay at 711.