



RESOLUTION

URGING THE STATE LEGISLATURE TO STRENGTHEN STATE DRUNK DRIVING STATUTES.

WHEREAS, driving while intoxicated continues to be a serious problem in Hawaii as evidenced by the six thousand arrests made on average each year for driving under the influence (DUI); and

WHEREAS, in 2010, Hawaii had the tenth highest percentage of alcohol-related traffic fatalities in the nation as measured and ranked by the National Highway Traffic Safety Administration (NHTSA); and

WHEREAS, while the minimum illegal blood alcohol content (BAC) specified in Hawaii Revised Statutes is .08 grams, as little as .02 grams BAC has been medically determined to impair a driver's fitness resulting in a reduced ability to track moving targets and declined overall coordination; and

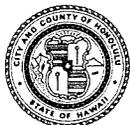
WHEREAS, the latest study conducted by the NHTSA concluded that the minimum illegal BAC in the United States of .08 is higher than levels established by most comparable economic and demographic foreign countries; and

WHEREAS, while enforcement of existing laws governing alcohol-impaired driving have had an impact on alcohol-related traffic fatalities, this action alone may not be sufficient to bring about substantial improvements; and

WHEREAS, German DUI law is recognized internationally as exacting stiff penalties through the enactment of a tiered BAC system where the minimum illegal BAC tier is .03 grams, followed by .05 grams and finally .11 grams; and

WHEREAS, Germany's tiered illegal BAC levels are used, in combination with the driver's apparent fitness to drive and whether the driver caused an accident while driving intoxicated, to trigger corresponding penalty tiers that include the addition of points to a driver's record, fines, imprisonment and possible withdrawal of the driving license; and

WHEREAS, lowering the minimum BAC threshold accompanied by a cumulative points system where each traffic infraction carries an assigned points number on a driver's record would strengthen existing DUI state statutes, reduce the number of drunk drivers on Hawaii's roads and decrease Hawaii's overall number of alcohol-related traffic fatalities; now, therefore,



RESOLUTION

BE IT RESOLVED by the Council of the City and County of Honolulu that the State Legislature is urged to strengthen existing State statutes governing drunk driving by lowering the minimum illegal BAC level to .03 grams and creating tiered illegal BAC levels with a commensurately tiered penalty structure as enacted by Germany; and

BE IT FINALLY RESOLVED that copies of this Resolution be transmitted to the President of the Hawaii Senate, the Speaker of the House of Representatives, and the Governor.

INTRODUCED BY:

TOM BERG

DATE OF INTRODUCTION:

APR 10 2012

Honolulu, Hawaii

Councilmembers

PART IV. PROHIBITED CONDUCT

Revision Note

Sections 291E-61 to 291E-65 renumbered pursuant to §23G-15(1).

§291E-61 Operating a vehicle under the influence of an intoxicant. (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:

- (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;
- (2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
- (3) With .08 or more grams of alcohol per two hundred ten liters of breath; or
- (4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

(b) A person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced without possibility of probation or suspension of sentence as follows:

- (1) For the first offense, or any offense not preceded within a five-year period by a conviction for an offense under this section or section 291E-4(a):
 - (A) A fourteen-hour minimum substance abuse rehabilitation program, including education and counseling, or other comparable program deemed appropriate by the court;
 - (B) One-year revocation of license and privilege to operate a vehicle during the revocation period and installation during the revocation period of an ignition interlock device on any vehicle operated by the person;
 - (C) Any one or more of the following:
 - (i) Seventy-two hours of community service work;
 - (ii) Not less than forty-eight hours and not more than five days of imprisonment; or
 - (iii) A fine of not less than \$150 but not more than \$1,000;
 - (D) A surcharge of \$25 to be deposited into the neurotrauma special fund; and
 - (E) A surcharge, if the court so orders, of up to \$25 to be deposited into the trauma system special fund;

- (2) For an offense that occurs within five years of a prior conviction for an offense under this section or section 291E-4(a):
 - (A) Revocation for not less than eighteen months nor more than two years of license and privilege to operate a vehicle during the revocation period and installation during the revocation period of an ignition interlock device on any vehicle operated by the person;
 - (B) Either one of the following:
 - (i) Not less than two hundred forty hours of community service work; or
 - (ii) Not less than five days but not more than thirty days of imprisonment, of which at least forty-eight hours shall be served consecutively;
 - (C) A fine of not less than \$500 but not more than \$1,500;
 - (D) A surcharge of \$25 to be deposited into the neurotrauma special fund; and
 - (E) A surcharge of up to \$50 if the court so orders, to be deposited into the trauma system special fund;
- (3) For an offense that occurs within five years of two prior convictions for offenses under this section or section 291E-4(a):
 - (A) A fine of not less than \$500 but not more than \$2,500;
 - (B) Revocation for two years of license and privilege to operate a vehicle during the revocation period and installation during the revocation period of an ignition interlock device on any vehicle operated by the person;
 - (C) Not less than ten days but not more than thirty days imprisonment, of which at least forty-eight hours shall be served consecutively;
 - (D) A surcharge of \$25 to be deposited into the neurotrauma special fund; and
 - (E) A surcharge of up to \$50 if the court so orders, to be deposited into the trauma system special fund;
- (4) In addition to a sentence imposed under paragraphs (1) through (3), any person eighteen years of age or older who is convicted under this section and who operated a vehicle with a passenger, in or on the vehicle, who was younger than fifteen years of age, shall be sentenced to an additional mandatory fine of \$500 and

an additional mandatory term of imprisonment of forty-eight hours; provided that the total term of imprisonment for a person convicted under this paragraph shall not exceed the maximum term of imprisonment provided in paragraph (1), (2), or (3), as applicable. Notwithstanding paragraphs (1) and (2), the revocation period for a person sentenced under this paragraph shall be not less than two years; and

- (5) If the person demonstrates to the court that the person:
 - (A) Does not own or have the use of a vehicle in which the person can install an ignition interlock device during the revocation period; or
 - (B) Is otherwise unable to drive during the revocation period,

the person shall be absolutely prohibited from driving during the period of applicable revocation provided in paragraphs (1) to (4); provided that the court shall not issue an ignition interlock permit pursuant to subsection (i) and the person shall be subject to the penalties provided by section 291E-62 if the person drives during the applicable revocation period.

(c) Notwithstanding any other law to the contrary, the court shall not issue an ignition interlock permit to:

- (1) A defendant whose license is expired, suspended, or revoked as a result of action other than the instant offense;
- (2) A defendant who does not hold a valid license at the time of the instant offense; or
- (3) A defendant who holds either a category 4 license under section 286-102(b) or a commercial driver's license under section 286-239(b), unless the ignition interlock permit is restricted to a category 1, 2, or 3 license under section 286-102(b).

(d) Except as provided in subsection (c), the court may issue a separate permit authorizing a defendant to operate a vehicle owned by the defendant's employer during the period of revocation without installation of an ignition interlock device if the defendant is gainfully employed in a position that requires driving and the defendant will be discharged if prohibited from driving a vehicle not equipped with an ignition interlock device.

(e) A request made pursuant to subsection (d) shall be accompanied by:

- (1) A sworn statement from the defendant containing facts establishing that the defendant currently is employed in a position that requires driving and that the

defendant will be discharged if prohibited from driving a vehicle not equipped with an ignition interlock device; and

- (2) A sworn statement from the defendant's employer establishing that the employer will, in fact, discharge the defendant if the defendant is prohibited from driving a vehicle not equipped with an ignition interlock device and identifying the specific vehicle and hours of the day, not to exceed twelve hours per day, the defendant will drive for purposes of employment.

(f) A permit issued pursuant to subsection (d) shall include restrictions allowing the defendant to drive:

- (1) Only during specified hours of employment, not to exceed twelve hours per day, and only for activities solely within the scope of the employment;
 - (2) Only the vehicle specified; and
 - (3) Only if the permit is kept in the defendant's possession while operating the employer's vehicle.
- (g) Notwithstanding any other law to the contrary, any:
- (1) Conviction under this section, section 291E-4(a), or section 291E-61.5;
 - (2) Conviction in any other state or federal jurisdiction for an offense that is comparable to operating or being in physical control of a vehicle while having either an unlawful alcohol concentration or an unlawful drug content in the blood or urine or while under the influence of an intoxicant or habitually operating a vehicle under the influence of an intoxicant; or
 - (3) Adjudication of a minor for a law violation that, if committed by an adult, would constitute a violation of this section or an offense under section 291E-4(a), or section 291E-61.5,

shall be considered a prior conviction for the purposes of imposing sentence under this section. Any judgment on a verdict or a finding of guilty, a plea of guilty or nolo contendere, or an adjudication, in the case of a minor, that at the time of the offense has not been expunged by pardon, reversed, or set aside shall be deemed a prior conviction under this section. No license and privilege revocation shall be imposed pursuant to this section if the person's license and privilege to operate a vehicle has previously been administratively revoked pursuant to part III for the same act; provided that, if the administrative revocation is subsequently reversed, the person's license and privilege to operate a vehicle shall be revoked as provided in this section. There shall be no requirement for the

installation of an ignition interlock device pursuant to this section if the requirement has previously been imposed pursuant to part III for the same act; provided that, if the requirement is subsequently reversed, a requirement for the installation of an ignition interlock device shall be imposed as provided in this section.

(h) Whenever a court sentences a person pursuant to subsection (b), it also shall require that the offender be referred to the driver's education program for an assessment, by a certified substance abuse counselor, of the offender's substance abuse or dependence and the need for appropriate treatment. The counselor shall submit a report with recommendations to the court. The court shall require the offender to obtain appropriate treatment if the counselor's assessment establishes the offender's substance abuse or dependence. All costs for assessment and treatment shall be borne by the offender.

(i) Upon proof that the defendant has:

- (1) Installed an ignition interlock device in any vehicle the defendant operates pursuant to subsection (b); and
- (2) Obtained motor vehicle insurance or self-insurance that complies with the requirements under either section 431:10C-104 or section 431:10C-105,

the court shall issue an ignition interlock permit that will allow the defendant to drive a vehicle equipped with an ignition interlock device during the revocation period.

(j) Notwithstanding any other law to the contrary, whenever a court revokes a person's driver's license pursuant to this section, the examiner of drivers shall not grant to the person a new driver's license until the expiration of the period of revocation determined by the court. After the period of revocation is completed, the person may apply for and the examiner of drivers may grant to the person a new driver's license.

(k) Any person sentenced under this section may be ordered to reimburse the county for the cost of any blood or urine tests conducted pursuant to section 291E-11. The court shall order the person to make restitution in a lump sum, or in a series of prorated installments, to the police department or other agency incurring the expense of the blood or urine test. Except as provided in section 291E-5, installation and maintenance of the ignition interlock device required by subsection (b) shall be at the defendant's own expense.

(l) As used in this section, the term "examiner of drivers" has the same meaning as provided in section 286-2. [L 2000, c 189, pt of §23; am L 2001, c 157, §25; am L 2002, c 160, §11; am L 2003, c 71, §3; am L 2004, c 90, §12; am L 2005, c 33,

§1 and c 194, §1; am L 2006, c 201, §7; am L 2007, c 198, §4; am L 2008, c 171, §§8, 16, 20 and c 231, §17; am L 2009, c 11, §17 and c 45, §§1, 2 as superseded by c 88, §§6, 13, 17(2); am L 2010, c 166, §19]

Case Notes

As to the description of the offense, this section, which relates to operating a vehicle under the influence of an intoxicant, substantially reenacted §291-4.4, which pertained to the offense of habitually driving under the influence of intoxicating liquor or drugs. 106 H. 480, 107 P.3d 409.

Where indictment charged defendant under §291-4.4, the statute that was in effect at the time of defendant's arrest, there was no ex post facto problem. 106 H. 480, 107 P.3d 409.

Where the five-year time period omitted from the oral charge was a critical part of the subsection (b)(2) attendant circumstance, especially in light of defendant's several prior DUI convictions, the oral charge was defective and defendant's oral motion to dismiss should have been granted. 112 H. 269 (App.), 145 P.3d 812.

Because a prior conviction, as described in subsection (b)(2) (2003), is an elemental attendant circumstance, intrinsic to the offense of operating a vehicle under the influence of an intoxicant, it was necessary that defendant's prior conviction be alleged in the charging instrument and proven at trial as preconditions to defendant's present conviction of operating a vehicle under the influence of an intoxicant for the second time within five years, in violation of subsections (a) and (b)(2) (2003). 114 H. 227, 160 P.3d 703.

Considerations of due process continue to require that the aggravating factors set forth in subsection (b) - all of which remain "attendant circumstances that are intrinsic to and 'enmeshed' in the hierarchy of offenses that this section as a whole describes" - be alleged in the charging instrument and proven beyond a reasonable doubt at trial. 114 H. 227, 160 P.3d 703.

The 2003 amendment to this section transformed subsection (b)(1) to (3) into status offenses. 114 H. 227, 160 P.3d 703.

Where complaint charging defendant with a violation of this section was silent with respect to the attendant circumstance of any prior conviction, complaint was insufficient as a matter of law in charging a violation of subsections (a) and (b)(2) (2003). 114 H. 227, 160 P.3d 703.

Although prosecution's oral charge failed to adequately set forth the essential elements of the offense described by subsections (a) and (b)(2) (2004), absent the phrase "for your

second offense", the prosecution's oral charge set forth the essential elements of the included offense described by subsections (a) and (b)(1) (2004); thus, as record contained sufficient evidence that defendant committed the offense of operating a vehicle under the influence of an intoxicant under subsections (a) and (b)(1) (2004), case remanded for entry of judgment and resentencing under subsections (a) and (b)(1) (2004). 114 H. 411, 163 P.3d 1148.

Where prosecution failed to present sufficient foundational evidence for either the REA blood alcohol chemical testing procedure or the Abbott AxSYM testing instrument used to perform defendant's blood alcohol test, prosecution failed to prove beyond a reasonable doubt as required under this section that defendant was operating a vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood; appeals court thus erred in affirming district court's admission into evidence of defendant's test results without a proper foundation. 121 H. 274, 218 P.3d 762.

Although the oral charge tracked the language of this section, where the charge failed to allege that defendant was driving defendant's vehicle upon a public way, street, road, or highway at the time of the offense, the charge was deficient, as the term "operate" as defined in §291E-1 did not comport with its commonly understood definition, required the conduct to take place "upon a public way, street, road, or highway", and was neither "unmistakable" nor "readily comprehensible to persons of common understanding". 121 H. 383, 219 P.3d 1170.

Section 291E-1 establishes an attendant circumstance of the offense of operating a vehicle under the influence of an intoxicant (OVUII), i.e., that the defendant's conduct occur "upon a public way, street, road, or highway"; the definition of "operate" in §291E-1 refers generally to the conduct of "operating" a vehicle under the influence as described in the title of this section, whether the conduct consists of driving the vehicle or otherwise assuming actual physical control of it; thus, the operation of a vehicle on a public way, street, road, or highway is an attendant circumstance of the offense of OVUII and therefore an element of the offense. 121 H. 383, 219 P.3d 1170.