2002

State of Utah, Plaintiff/Appelle, v. Steven Norton, Defendant/Appellant : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20020708-CA
v.	:	
STEVEN NORTON,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION ENTERED ON A CONDITIONAL PLEA TO A CHARGE OF DRIVING WHILE INTOXICATED, A THIRD DEGREE FELONY UPON ENHANCEMENT WITH PRIORS, IN VIOLATION OF UTAH CODE ANN. § 41-6-44 (SUPP. 2001), THE HONORABLE DONALD J. EYRE, PRESIDING

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NO ORAL ARGUMENT OR PUBLISHED OPINION REQUESTED

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction entered on a conditional plea to the charge of driving while intoxicated, a third degree felony upon enhancement with priors, in violation of Utah Code Ann. § 41-6-44 (Supp. 2001) (R. 1, 75-79) (statute attached in **Add. A**). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2002).

STATEMENT OF ISSUE PRESENTED ON APPEAL AND STANDARD OF APPELLATE REVIEW

The sole issue on appeal is whether the trial court correctly applied the 2001 amendment to the driving while intoxicated [DUI] statute, effective April 30, 2001, to

defendant's November 23, 2001, DUI violation, rendering defendant liable for a third degree felony instead of a class B misdemeanor.[1]

"We review for correctness a trial court's statutory interpretation, according it no particular deference." *State v. Barrick*, 2002 UT App 120, ¶ 4, 46 P.3d 770.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutory provision is relevant to the issue on appeal:

Utah Code Ann. § 41-6-44 (Supp. 2001) (in Add. A).

STATEMENT OF THE CASE

On November 23, 2001 defendant was arrested for driving under the influence of alcohol [DUI] (R. 3). The information charged violation of Utah Code Ann. § 41-6-44 as a third degree felony in lieu of a class B misdemeanor because of prior convictions (R. 5). Though not part of the record, an order was apparently entered by the court denying defendant's motion to dismiss the enhancement, which motion is also not in the record, on January 3, 2002.[2] Defendant twice absconded and was ultimately apprehended on June 13, 2002 (R. 53, Presentence Report at 3). He was then arraigned and submitted a statement in support of his guilty plea and a certificate of counsel on July 17, 2002 (R.

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[1]This same issue is currently before this Court in the cases of *State v. Soto*, Case No. 20020328-CA, and *State v. Marshall*, Case No. 20020829-CA. These cases were consolidated for oral argument, were argued on June 19, 2003, and are under advisement with a panel of this Court.

[2]At the time of this filing, the record contains no written order denying defendant's motion to dismiss. The only record of such an order is an extra-record addendum to defendant's brief. Br. of Aplt. at addendum.

34-44). Defendant's guilty plea was conditional pursuant to *State v. Sery* and reserved to defendant the right to appeal the "ten-year and six-year enhancement argument" (R. 39).

STATEMENT OF FACTS

Defendant was arrested on November 23, 2001 for driving while under the influence of alcohol [DUI] in violation of Utah Code Ann. § 41-6-44 (R. 5). His charge was filed as a felony DUI because of two previous DUI convictions during the ten years previous to November 23, 2001 (R. 5). The first of those convictions was ostensibly entered on July 28, 1992 from the Heber City Justice Court. Br. of Aplt. at addendum. The second conviction was ostensibly entered on April 4, 1996, from the Summit County Justice Court. *Id.*

SUMMARY OF ARGUMENT

This Court cannot reach the merits of defendant's appeal because the record is inadequate. Defendant has failed to include the parties' arguments, and the trial court's findings of fact, conclusions of law, or ruling in support of his claim. The record does not even support his claim of when his two prior convictions occurred. The inadequate record requires that this Court presume the regularity of the proceedings below and the correctness of the trial court's disposition of the matter.

If this Court does reach the merits, the unambiguous plain language of the 2001 amendment to the DUI statute permits the use of the prior convictions in this case to enhance defendant's misdemeanor to a felony. The legislature's amendments to the statute in 2001 demonstrate that the lawmakers did not accidentally omit a specific date or

otherwise mean something other than that the ten-year look-back period extended back ten years from the effective date of the amendment. Further, the 2001 amendment does not apply retroactively to defendant's prior convictions, but applies to punish his post-amendment violation, which occurred seven months after the April 30, 2001 effective date of the amendment. Hence, defendant had constitutionally sufficient notice from which he could have conformed his actions to the law and avoided application of the amendment to his conduct. Moreover, the look-back period is *not* a statute of limitations, but is more like a recidivist or habitual offender statute. Hence, the limitations case upon which defendant relies is not controlling.

ARGUMENT

THIS COURT CANNOT REVIEW DEFENDANT'S CLAIM BECAUSE THE RECORD IS INADEQUATE; ALTERNATIVELY, THE LANGUAGE OF THE AMENDED STATUTE IS PLAIN AND UNAMBIGUOUS AND SUPPORTS DEFENDANT'S ENHANCED PENALTY

Defendant contends that the use of his prior DUI convictions to enhance his current conviction is not only contrary to the legislative intent behind the 2001 amendment to the statute, but is a violation of his rights under the statute as it existed at the time of his prior convictions. Br. of Aplt. at 3-6. He argues that the trial court misinterpreted the statute in light of *State v. Lusk*, 2001 UT 102, 37 P.3d 1103, and that a proper reading of the statute cannot deprive him of the right he acquired under the 1992 version of the statute that his 1992 conviction "could never be used against him" after 1998. *Id.*

A. This Court Should Presume The Accuracy Of The Trial Court's Ruling Where The Record Is Incomplete And Does Not Permit A Review Of Defendant's Claim

Defendant claims that the trial court's enhancement of his charge based on two prior DUI convictions was improper because the law at the time of those convictions was such that they were no longer available for enhancement use at the time of the 2001 amendment to the DUI statute. Br. of Aplt. at 3-6. His entire argument is based on the existence of his prior convictions and the language of the enhancement statute as it existed at the time of those convictions. *Id.* However, defendant has failed to carry his burden of providing adequate record support for his claim because the record is devoid of evidence of these facts.

There is no support in the record for the dates of defendant's two prior convictions, although he admits they exist (R. 43; Br. of Aplt. at 2-3). The presentence investigation report notes prior DUI offenses which roughly correspond to the conviction dates defendant argues, but does not provide any support for the actual date of conviction (R. 53, Presentence Report at 4). There are no written memoranda, no transcripts of oral argument or discussions on defendant's motion to dismiss the enhancement, and no findings of fact, conclusions of law, or order by the trial court. There is no express mention in the record of defendant's motion except an undated minute entry with minimal detail noting argument about a six- and ten-year period and a ruling that the amendment "is not unconstitutional" and the mention in defendant's plea affidavit that he was

reserving the right to appeal the "10 yr & 6 yr [sic] enhancements arguement [sic]" he had "presented to [the trial] court" (R. 34, 45). The only information offered by defendant to directly support his claims concerning his prior convictions and the relevant law at the time are contained in the document appended to defendant's brief. However, that document is not part of the record before this Court.

Without the details surrounding defendant's prior convictions, this Court cannot evaluate defendant's argument. Without the trial court's order on defendant's alleged motion, this Court cannot evaluate the trial court's analysis of the arguments. Therefore defendant has failed to carry his burden of providing adequate record support for his claim. In the absence of such record support, this Court must presume the correctness of the trial court's apparent denial of defendant's motion. *See State v. Pritchett*, 2003 UT 24, ¶ 14, 69 P.3d 1278 ("[Defendant] has failed to preserve a record on appeal that would allow this court to evaluate the actions of the trial court, and we therefore presume the regularity of the proceedings."); *State v. Eloge*, 762 P.2d 1, 2 (Utah 1988) ("Absent a record, this Court presumes regularity in the proceedings below").[3]

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[3]The State also moves to strike defendant's addendum pursuant to Utah R. App. P. 23, because it contains a document that is not included in the record of this case. The record on appeal may not be supplemented "by simply including the omitted material in the party's addendum." *State v. Pliego*, 1999 UT 8, ¶ 7, 974 P.2d 279 (citation omitted) (two alterations added, rest in original) (citing Utah R. App. P. 11(h)).

B. On The Merits, The Plain Language Of The Statute Supports Enhancement Of Defendant's Third Violation

Defendant represents that at the time of both prior convictions, the "look-back" period within which the prior violations must have occurred in order to be used for enhancement purposes was six years under Utah Code Ann. § 41-6-44 (1990) (Notes, References, and Annotations). Br. of Aplt. at 2. Using that version of the statute, defendant argues that the availability of his 1992 conviction for enhancement purposes expired in 1998 and that the conviction could not be resurrected to be used thereafter to enhance future crimes. *Id.* at 3, 5-6.

Effective April 30, 2001, the legislature changed the "look back" period to ten years. Utah Code Ann. § 41-6-44 (Supp. 2001). This is the version of the statute that existed at the time of defendant's most recent DUI violation and which defendant claims was erroneously applied to him to resurrect his prior two DUI convictions for enhancement purposes.

Defendant recognizes that the purpose of this Court should be to reveal the "true intent and purpose of the Legislature" in statutory interpretation. Br. of Aplt. at 4. *See State v. McKinnon*, 2002 UT App. 214, ¶ 6, 51 P.3d 729. However, that intent is "evidenced by the plain language [of the statute], in light of the purpose the statute was meant to achieve. [The court] need look beyond the plain language only if [it] find[s] some ambiguity." *State v. Norton*, 2003 UT App. 88, ¶ 13, 67 P.3d 1050 (quoting *State v. Lusk*, 2001 UT 102, ¶ 19, 37 P.3d 1103 (quotations and citation omitted)).

Defendant argues that the plain language of the statute is "silent" concerning convictions that were older than six years at the time the ten-year look-back period became effective. Br. of Aplt. at 4. That silence is an ambiguity that permits defendant to interpret the 2001 amendment in a manner contrary to the plain language of the amendment. He argues, essentially, that all convictions that were entered before April 30,1995—and, hence, were more than six years old at the time of the 2001 amendment—expired and were unavailable for enhancement use when the ten-year period was imposed. He equates these "look-back" periods with statutes of limitations and argues that once they expire, the convictions cannot be resurrected for future use against the defendants. *Id.* at 3-5. Consequently, he claims, the DUI statute must necessarily be interpreted as meaning that the ten-year look-back period referenced in the amendment was really six years when the amendment became effective, because anything prior to that had expired and was unavailable for enhancement use. His interpretation necessarily requires that one year would be added to the original six-year look-back period each year the amendment remains effective until April 30, 2005, when the six-year period would be fully extended to ten years.

However, defendant's statute of limitations analysis is inapplicable here as the plain language of the statute does *not* provide for partial application of the look-back period until April 30, 2005. In this case the plain language of the statute in existence at the time of the latest DUI violation before the trial court in this case provided that a DUI violation is "a third degree felony if it is: (i) a third or subsequent conviction under this section

within ten years of two or more prior convictions . . . ." Utah Code Ann. § 41-6-44(6)(a). Also in subsection (6), the statute provides that a DUI would be a third degree felony:

> (ii) at any time after a conviction of:
> (A) automobile homicide under Section 76-5-207 that is committed after July 1, 2001; or
> (B) a felony violation under this section that is committed after July 1, 2001.

Id. at (6)(a)(ii) (A-B). These dates, both within subsection (6) and included as part of the 2001 amendment at issue, show that the legislature was aware that it could insert specific dates and that it intentionally left out any such date regarding application of the ten-year period. Had the legislature intended the ten-year period to reach back to anything other than ten full years, it would have included a specific date in the statute as it did for subsections (6)(a)(ii)(A) and (B). The plain language therefore places no limitation on the application of the ten-year "look-back" period, meaning it reaches back to any DUI conviction entered after April 30, 1991 and within ten years of the most recent violation of the statute. Hence, defendant's most recent conviction was properly enhanced with his prior convictions.

C. Defendant's Claim Fails Because The DUI Amendment Does Not Apply Retroactively

Defendant contends that "a legislative enactment which alters the substantive law . . . [should] not be read to operate retrospectively." Br. of Aplt. at 5. However, the DUI amendment does not apply "retrospectively" to defendant's case because it does not punish defendant for his past conduct. Retroactive application is applying a recent law to a crime committed before the law was passed. *See State v. Burgess*, 870 P.2d 276, 280

(1994). Defendant was arrested and charged seven months *after* the amendment became effective. The amendment applied prospectively because defendant's most recent violation had the benefit of seven months worth of "fair warning" that his prior convictions would be used against him in punishing the repetitive nature of his third conviction. *See Weaver v. Graham*, 450 U.S. 24, 29 (1981) (holding that principle of ex post facto prohibition is to "assure that legislative acts give fair warning of their effect"); *see also Botkin v. Commonwealth*, 890 S.W.2d 292, 294 (Ky. 1994) (holding that the "principle of ex post facto prohibition is one of *fair warning*" (emphasis in original)). Pursuant to the seven-month-old enhancement language, the State properly charged defendant with a third degree felony instead of a class B misdemeanor. *See* Utah Code Ann. § 41-6-44(6)(a)(i) (attached at Add. A).

D. Defendant's Statute Of Limitations Argument Does Not Apply To Invalidate His Enhancement

The defendant claims that "the Statute of Limitations had run on this 1992 conviction and for all intents and purposes this conviction could never be used against him." Br. of Aplt. at 3. However, he improperly equates the challenged enhancement amendment with a statute of limitations amendment, relying on *State v. Lusk*, 2001 UT 102, 37 P.3d 1103. Br. of Aplt. at 4-6. *Lusk* involved application of a statute of limitations which had been amended *subsequent* to defendant's commission of the crime sought to be prosecuted. 2001 UT 102, at ¶¶ 25-26. The Utah Supreme Court took the position that "a statutory amendment enlarging a statute of limitations will extend the

limitations period applicable to a *crime already committed* only if the amendment becomes effective before the previously applicable statute of limitations has run, thereby barring prosecution of the crime." *Id.* at ¶ 26 (emphasis added). In *Lusk*, because the four-year limitations period which existed at the time of the offense had run before the statute was amended to provide for a longer period, the amendment could not resurrect the State's ability to prosecute Lusk for the crime. *Id.* In other words, *Lusk* dealt with retroactive application of a statute of limitations to a crime which had *already been committed*, the effect of which would have been to revive an extinguished cause of action.

In contrast, this case involves application of a statutory amendment which occurred *prior* to commission of the charged offense. Enhancements imposed based on defendant's repetitive criminal conduct "do[] not inflict additional or further punishment for the prior convictions or impose a new punishment therefor." *Zeimer v. Turner*, 381 P.2d 721, 723 (Utah 1963) (habitual criminal enhancement); *see also State v. Bishop*, 753 P.2d 439, 488 (Utah 1988) (sentence enhancement for repetitive violation of sexual abuse of a child statute). Instead, such enhancements are imposed only upon a final, multiple conviction and serve to "make more severe the punishment for the last or subsequent offense which might be imposed because of the previous convictions." *Zeimer*, 381 P.2d at 723; *see also Bishop*, 753 P.2d at 488. This is consonant with United States Supreme Court rulings. *See Gryger v. Burke*, 334 U.S. 728, 732 (holding that the statute enhancing a defendant's sentence because he was a repeat offender does not violate ex post facto laws but amounts to "a stiffened penalty for the latest crime, which is considered to be an aggravated offense

because [it is] a repetitive one."), *reh'g denied*, 335 U.S. 837 (1948); *see also Monge v. California*, 524 U.S. 721, 728 (1998) (an enhanced sentence imposed on a persistent offender is to be viewed as a stiffened penalty for the most recent offense, which is an aggravated one because it is repetitive). Clearly, defendant is not being punished again for his prior offenses, but is being more severely punished for *this* current offense because it is repetitive and, hence, more reprehensible or more deserving of more serious punishment.

That the amendment applies only to punish the post-amendment offense comports with a number of state court decisions in other jurisdictions involving an ex post facto issue in a repetitive DUI situation[4]. The consensus is that such an amendment is not intended to punish a defendant for his past offenses and does not criminalize conduct committed prior to the amendment's enactment. *See State v. Yellowmexican*, 688 P.2d 1097, 1099 (Ariz. App. 1984) (the statute amounts to an "enhanced punishment statute which did not increase the penalty for the prior convictions, but imposed punishment based upon the defendant's third DUI conviction"), *opinion approved of*, 688 P.2d 983 (Ariz. 1984); *Roberts v. State*, 494 A.2d 156, 159 (Del. Supr. 1985) (enhancement provision increases punishment for the second offense only, not the original offense which

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[4]Defendant makes no constitutional ex post facto argument on appeal, and the record does not reflect any such argument below. An appellate court "'will not engage in constructing arguments out of whole cloth on behalf of defendants . . .'" *State v. Arquelles*, 2003 UT 1, ¶ 125, 63 P.3d 731, *reh'g denied* (Jan 16, 2003) (quoting *State v. Lafferty*, 749 P.2d 1239, 1247 n. 5 (Utah 1988). However, should this Court choose to reach the issue, the State would request supplemental briefing in order to have full argument before the Court.

provides the basis for the enhancement); *Botkin v. Commonwealth*, 890 S.W.2d 292, 294 (Ky. 1994) (where the statute provides fair warning *before* the offender commits the offense that if he does so, he will receive an enhanced punishment because of his status as a previous offender, the ex post facto principle is not implicated; rather, the offender is being punished for a crime committed after the effective date of the statute, not before). *See also State v. Hansen*, 605 N.W.2d 461, 464 (Neb. 2000) (such a statute "permits an inquiry whether [defendant] has previously [been convicted], and in fixing the penalty does not punish him for his previous offenses . . . but for his persistence in crime") (additional quotation omitted); *State v. Jones*, 543 S.E.2d 541, 546 (S.C. 2001) (no ex post facto violation occurs where the offense which triggers recidivist features of sentencing provisions occurs after the effective date of the sentencing amendment). Consequently, application of the statute does not violate constitutional ex post facto provisions, and defendant's claim fails.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the trial court's order dismissing the felony charge against defendant and remand the matter for further proceedings.

NO ORAL ARGUMENT OR PUBLISHED OPINION REQUESTED

The State requests that this matter *not* be set for oral argument and that no published opinion issue. This case presents an issue that is squarely before this Court in two earlier cases, and the publication of decisions in those cases will sufficiently inform

trial courts, counsel, and the public as to the law argued herein. This case adds nothing to this area of the law.

RESPECTFULLY SUBMITTED this 24th day of June, 2003.

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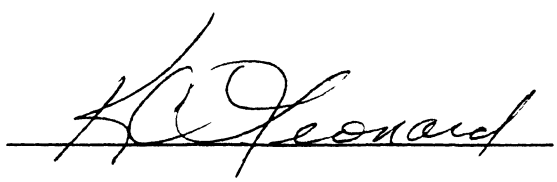
MAILING CERTIFICATE

I hereby certify that two true and accurate copies of the foregoing Brief of Appellant were mailed by first-class mail, postage-prepaid, to DANA M. FACEMYER, attorney for defendant/appellee, 3610 N. University Ave., Ste 325-375, Jamestown Courtyard, Cartier Bldg., Provo, UT 84604, Telephone (801) 235-9400, this 24th day of June, 2003.



Addendum A

UTAH CODE ANNOTATED

2001 Supplement

REPLACEMENT VOLUME 5A

1998 EDITION

Place in Pocket of Corresponding Bound Volume.

ARTICLE 5

DRIVING WHILE INTOXICATED AND RECKLESS DRIVING

41-6-44. Driving under the influence of alcohol, drugs, or with specified or unsafe blood alcohol concentration — Measurement of blood or breath alcohol — Criminal punishment — Arrest without warrant — Penalties — Suspension or revocation of license.

(1) As used in this section:

(a) "educational series" means an educational series obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(b) "prior conviction" means any conviction for a violation of:

(i) this section;

(ii) alcohol-related reckless driving under Subsections (9) and (10);

(iii) local ordinances similar to this section or alcohol-related reckless driving adopted in compliance with Section 41-6-43;

(iv) automobile homicide under Section 76-5-207; or

(v) statutes or ordinances in effect in any other state, the United States, or any district, possession, or territory of the United States which would constitute a violation of this section or alcohol-related reckless driving if committed in this state, including punishments administered under 10 U.S.C. Sec. 815;

(c) "screening and assessment" means a substance abuse addiction and dependency screening and assessment obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(d) "serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death;

(e) "substance abuse treatment" means treatment obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(f) "substance abuse treatment program" means a state licensed substance abuse program;

(g) a violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6-43; and

(h) the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(2) (a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

within two hours of the alleged operation of [illegible]
that the person has a blood or breath alcohol concentration of .08 grams or greater; or

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(c) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) (a) A person convicted the first or second time of a violation of Subsection (2) is guilty of a:

(i) class B misdemeanor; or

(ii) class A misdemeanor if the person:

(A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner;

(B) had a passenger under 16 years of age in the vehicle at the time of the offense; or

(C) was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense.

(b) A person convicted of a violation of Subsection (2) is guilty of a third degree felony if the person has also inflicted serious bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(4) (a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 24 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening and assessment;

(ii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (4)(d); and

(iii) impose a fine of not less than $700.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e) (i) Except as provided in Subsection (4)(e)(ii), the court may order probation for the person in accordance with Subsection (14).

(ii) If there is admissible evidence that the person had a blood alcohol level of 16 or higher, the court shall order probation for the person in accordance with Subsection (14)

(5) (a) If a person is convicted under Subsection (2) within ten years of a prior conviction under this section, the court shall as part of any sentence

(i) work in a compensatory-service work program for not less tha 240 hours; or

(ii) participate in home confinement through the use of electron monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work progra or home confinement, the court shall:

(i) order the person to participate in a screening and assessmen

(ii) order the person to participate in an educational series if th court does not order substance abuse treatment as described und Subsection (5)(d); and

(iii) impose a fine of not less than $800.

(d) The court may order the person to obtain substance abuse treatme if the substance abuse treatment program determines that substan abuse treatment is appropriate.

(e) The court shall order probation for the person in accordance wi Subsection (14).

(6) (a) A conviction for a violation of Subsection (2) is a third degree felo if it is committed:

(i) within ten years of two or more prior convictions under th section; or

(ii) at any time after a conviction of:

(A) automobile homicide under Section 76-5-207 that is cor mitted after July 1, 2001; or

(B) a felony violation under this section that is committed aft July 1, 2001.

(b) Under Subsection (3)(b) or (6)(a), if the court suspends the executi of a prison sentence and places the defendant on probation the court sha impose:

(i) a fine of not less than $1,500; and

(ii) a mandatory jail sentence of not less than 1,500 hours.

(c) For Subsection (6)(a) or (b), the court shall impose an order requiri the person to obtain a screening and assessment and substance abu treatment at a substance abuse treatment program providing intensi care or inpatient treatment and long-term closely supervised follo through after treatment for not less than 240 hours.

(d) In addition to the penalties required under Subsection (6)(b), t court may require the person to participate in home confinement throu the use of electronic monitoring in accordance with Subsection (13).

(7) The mandatory portion of any sentence required under this section m not be suspended and the convicted person is not eligible for parole probation until any sentence imposed under this section has been serve Probation or parole resulting from a conviction for a violation under th section may not be terminated.

(8) (a) (i) The provisions in Subsections (4), (5), and (6) that require sentencing court to order a convicted person to: participate in screening and assessment; and an educational series; obtain, in t discretion of the court, substance abuse treatment; obtain, mandat rily, substance abuse treatment; or do a combination of those thing apply to a conviction for a violation of Section 41-6-44.6 or 41-6- under Subsection (9).

(ii) The court shall render the same order regarding screening a

Section 41-6-44.6 or 41-6-45 under Subsection (9), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), and (6).

(b) If a person fails to complete all court ordered screening and ıssessment, educational series, and substance abuse treatment, or fails to ıay all fines and fees, including fees for restitution and treatment costs, he court shall notify the Driver License Division of a failure to comply. Jpon receiving the notification, the division shall suspend the person's lriving privilege in accordance with Subsections 53-3-221(2) and (3).

(a) (i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45, of an ordinance enacted under Section 41-6-43, or of Section 41-6-44.6 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

(b) The court shall advise the defendant before accepting the plea ffered under this Subsection (9)(b) of the consequences of a violation of ection 41-6-44.6 or of Section 41-6-45.

(c) The court shall notify the Driver License Division of each conviction f Section 41-6-44.6 or 41-6-45 entered under this Subsection (9).

) A peace officer may, without a warrant, arrest a person for a violation s section when the officer has probable cause to believe the violation has red, although not in his presence, and if the officer has probable cause to ve that the violation was committed by the person.

) (a) The Driver License Division shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (2);

(ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (2) if the violation is committed within a period of ten years from the date of the prior violation; and

(iii) suspend or revoke the license of a person as ordered by the court under Subsection (12).

(b) The Driver License Division shall subtract from any suspension or evocation period the number of days for which a license was previously uspended under Section 53-3-223 or 53-3-231, if the previous suspension vas based on the same occurrence upon which the record of conviction is ıased.

) (a) In addition to any other penalties provided in this section, a court nay order the operator's license of a person who is convicted of a violation f Subsection (2) to be suspended or revoked for an additional period of 90 lays, 180 days, one year, or two years to remove from the highways those ersons who have shown they are safety hazards.

(b) If the court suspends or revokes the person's license under this ubsection (12)(b), the court shall prepare and send to the Driver License ivision an order to suspend or revoke that person's driving privileges for specified period of time.

) (a) If the court orders a person to participate in home confinement forcement units, or contract provider of the defendant's whereabouts.

(b) The electronic monitoring device shall be used under conditions which require:

(i) the person to wear an electronic monitoring device at all times;

(ii) that a device be placed in the home or other specified location of the person, so that the person's compliance with the court's order may be monitored; and

(iii) the person to pay the costs of the electronic monitoring.

(c) The court shall order the appropriate entity described in Subsection (13)(e) to place an electronic monitoring device on the person and install electronic monitoring equipment in the residence of the person or other specified location.

(d) The court may:

(i) require the person's electronic home monitoring device to include a substance abuse testing instrument;

(ii) restrict the amount of alcohol the person may consume during the time the person is subject to home confinement;

(iii) set specific time and location conditions that allow the person to attend school educational classes, or employment and to travel directly between those activities and the person's home; and

(iv) waive all or part of the costs associated with home confinement if the person is determined to be indigent by the court.

(e) The electronic monitoring described in this section may either be administered directly by the appropriate corrections agency, probation monitoring agency, or by contract with a private provider.

(f) The electronic monitoring provider shall cover the costs of waivers by the court under Subsection (13)(c)(iv).

(14) (a) If supervised probation is ordered under Section 41-6-44.6 or Subsection (4)(e) or (5)(e):

(i) the court shall specify the period of the probation;

(ii) the person shall pay all of the costs of the probation; and

(iii) the court may order any other conditions of the probation.

(b) The court shall provide the probation described in this section by contract with a probation monitoring agency or a private probation provider.

(c) The probation provider described in Subsection (14)(b) shall monitor the person's compliance with all conditions of the person's sentence, conditions of probation, and court orders received under this article and shall notify the court of any failure to comply with or complete that sentence or those conditions or orders.

(d) (i) The court may waive all or part of the costs associated with probation if the person is determined to be indigent by the court.

(ii) The probation provider described in Subsection (14)(b) shall cover the costs of waivers by the court under Subsection (14)(d)(i).

(15) If a person is convicted of a violation of Subsection (2) and there is admissible evidence that the person had a blood alcohol level of .16 or higher, then if the court does not order:

(a) treatment as described under Subsection (4)(d), (5)(d), or (6)(b)(iii), then the court shall enter the reasons on the record; and

(b) the following penalties, the court shall enter the reasons on the record:

(i) the installation of an ignition interlock system as a condition of

(ii) the imposition of home confinement through the use of electronic monitoring in accordance with Subsection (13).

History: L. 1941, ch. 52, § 34; C. 1943, 57-7-111; L. 1949, ch. 65, § 1; 1957, ch. 75, § 1; 1967, ch. 88, § 2; 1969, ch. 107, § 2; 1977, ch. 268, § 3; 1979, ch. 243, § 1; 1981, ch. 63, § 2; 1982, ch. 46, § 1; 1983, ch. 99, § 13; 1983, ch. 103, § 1; 1983, ch. 183, § 33; 1985, ch. 46, § 1; 1986, ch. 122, § 1; 1986, ch. 178, § 29; 1987, ch. 138, § 37; 1987 (1st S.S.), ch. 8, § 2; 1988, ch. 17, § 1; 1990, ch. 183, § 16; 1990, ch. 299, § 1; 1991, ch. 147, § 1; 1993, ch. 168, § 1; 1993, ch. 193, § 1; 1993, ch. 234, § 32; 1994, ch. 159, § 1; 1994, ch. 263, § 1; 1996, ch. 71, § 1; 1996, ch. 220, § 1; 1996, ch. 223, § 2; 1997, ch. 68, § 1; 1998, ch. 13, § 46; 1998, ch. 94, § 1; 1998, ch. 168, § 1; 1999, ch. 33, § 1; 1999, ch. 226, § 1; 1999, ch. 258, § 1; 2000, ch. 333, § 1; 2000, ch. 334, § 1; 2001, ch. 64, § 1; 2001, ch. 289, § 1; 2001, ch. 309, § 1; 2001, ch. 355, § 1.