

2009 HOUSE TRANSPORTATION

HB 1287

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1287

House Transportation Committee

Check here for Conference Committee

Hearing Date: 01/22/09

Recorder Job Number: 7564

Committee Clerk Signature

Janette Cook

Minutes:

Chairman Ruby opened the hearing on HB 1287.

Cherie Clark, Assistant State's Attorney in Cass County provided written testimony to support HB 1287. See attachment #1. She explained the loophole that had developed in the prosecution and subsequent suspension of licenses conducted by the Department of Transportation.

Representative Delmore: Does it need to say a specific blood alcohol level? Does it matter where you are over .08 does it?

Cherie Clark: The issue is being confused. We are not asking for a certain BAC (blood alcohol level) level. The law as it was changed again in 2005 and tweaked in 2007, only relates license suspension time to .08 or greater. Prior to 2005 and 2007 the law indicated that you would be suspended for 91 days for a violation of 39-08-01 or an equivalent ordinance. Refer to Attachments #2 and #3. When you look at the law today, you have the word "and". If you turn to 7a, it indicates 91 days if the operator records show that the person has not violated 39-08-01 or equivalent ordinance within the five proceeding years. Then the "and" that comes after that, **AND** the violation is at least eight one hundredths of one percent by weight.

The concern is the misplacement of that "and". In the bill we are picking out all the "ands" on 1a,d,and e.

Chairman Ruby: I remember when we were changing that. There was some opposition because people thought that we were making the change to capture Federal dollars, rather than because that was a safer level than .10. I am wondering if the "and" wasn't included purposely, so if it was .08, that under that violation, unless it was a higher level, it didn't result in the same suspension.

Cherie Clark: I think that it went down to .08 in 2005. The conviction would have been for a .08 as well.

Representative Weisz looked up the code for clarification.

Chairman Ruby: I don't think that this was intended. Do we understand this?

Representative Griffin: I have seen this firsthand. Let's say someone was stopped and blew a .2. They are charged with driving under the influence, or you can be charged with .08 or above within two hours of driving. For some reason when they are going through the administrative phase, they don't lose their license. Either the officer didn't show, or maybe they won the hearing. What they are doing is say that they will plead guilty to the DUI, but I will only admit that I was under the influence. I won't admit that I was over .08, because they didn't lose their license initially, and they aren't pleading guilty to over .08, even though they are .2. They don't lose their license, ever. It was probably just an over site at the time.

Cherie Clark: I can tell you that this happen a lot, if the defendant doesn't say the exact words, they don't lose their license.

Lad Erickson, McLean County State's Attorney: There is an important point that I need to make. When this issue came up, everyone assumed the law is the way the bill is. Then this issue got raised, and things changed. Here is the biggest problem for the executive branch. I

have the internal e-mails, that were not meant to be private and were forwarded to me and others. I will share them with you. When this came up the clerk's office had to designate the alcohol level on the criminal judgment. That was sent to DOT, and they will suspend. Some clerks decided that they were not going to do that. So, what we have right now, if this bill doesn't pass, if you get a DUI in Burleigh County you won't be suspended. If you get a DUI with the same facts in McLean County, you will. You will have completely different treatment depending upon the clerk. The clerks have discussed this in e-mails with the DOT. If there is a blood alcohol level above .08 within two hours, the way they read the current law, then they will suspend as long as the clerk designates it on the judgment. The DOT on this e-mail list shows that six or so courts are doing it, and others aren't doing it. That is not a good system to have that treatment different depending upon the county. There is another point I want to articulate. Potentially, the worse the DUI is the better break under current law because the blood alcohol level on .08 has to occur within two hours. In DUI car crashes the first priority is stabilization of the people. The officers go to the hospital, and the person has to be treated. Then the test will miss the two hour window. The test doesn't show above .08 within two hours, therefore, there is no suspension despite the fact that the DUI had a greater "thing" out on the road. I am asking the committee to get this fixed because it creates all these inequities for the same offense.

Representative Delmore: It almost sound like more of a judiciary problem rather than an executive branch problem. Is there a reason that the courts themselves can't communicate with the clerks and make this a standard procedure rather than needing a bill?

Lad Erikson: When the Attorney General's Office and the DOT met, this is the way they interpreted it: you will need .08 on the judgment for this to work. This is what we are living with. That was in an e-mail that we received. One discrepancy (in an e-mail) says: "A driver's

license gets suspended if there is a BAC or not, if no hearing was requested. Not correct. A meeting with the Attorney General's Office revised that for the driver's license. Basically, if there was no implied consent violation suspension on the record with the establishment of the BAC and the conviction comes in with no BAC, the DL cannot be suspended, whether or not they request to have a hearing. DOT has submitted legislation for 2009, hopefully to resolve this loophole, but until then our legal division and the Attorney General's Office have decided this." Then the DOT did not put in the bill, so the State's Attorney felt that it was important to bring it before the committee.

Chairman Ruby asked if there were additional questions, or if anyone else was there to speak in favor of HB 1287.

Linda Butts, Director of Driver Services at DOT: We do support this legislation. It is a tool that we need.

Chairman Ruby asked if there was anyone to speak in opposition of HB 1287.

There was no opposition for HB 1287.

The hearing was closed on HB 1287.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1287

House Transportation Committee

Check here for Conference Committee

Hearing Date: 01/22/09 PM

Recorder Job Number: 7616

Committee Clerk Signature

Jeanette Cook

Minutes:

Chairman Ruby asked the committee's wishes on HB 1287.

Representative Gruchalla moved a **Do Pass** on HB 1287.

Representative Griffin seconded the motion.

A roll call vote was taken. **Aye 14 Nay 0 Absent 0**

Representative Gruchalla will carry the HB 1287.

Date: 1-22-09

Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1287

House TRANSPORTATION Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do pass Don't Pass Amended

Motion Made By Gruchalla Seconded By Griffin

Representatives	Yes	No	Representatives	Yes	No
Representative Ruby - Chairman	✓		Representative Delmore	✓	
Rep. Weiler - Vice Chairman	✓		Representative Griffin	✓	
Representative Frantsvog	✓		Representative Gruchalla	✓	
Representative Heller	✓		Representative Potter	✓	
Representative R. Kelsch	✓		Representative Schmidt	✓	
Representative Sukut	✓		Representative Thorpe	✓	
Representative Vigesaa	✓				
Representative Weisz	✓				

Total Yes 14 No 0

Absent 0

Bill Carrier Gruchalla

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
January 22, 2009 5:57 p.m.

Module No: HR-13-0780
Carrier: Gruchalla
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1287: Transportation Committee (Rep. Ruby, Chairman) recommends DO PASS
(14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1287 was placed on the
Eleventh order on the calendar.

2009 SENATE TRANSPORTATION

HB 1287

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1287

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: February 27, 2009

Recorder Job Number: 9857

Committee Clerk Signature

Jody Hauge

Minutes:

Senator Lee opened the hearing on HB 1287 relating to the suspension of drivers' licenses.

Ladd Erickson, McLean County State's Attorney testified in support of HB1287. This bill is a correction to make the law exactly what everyone thought it was. If the law is left as it is, you have different clerks of court handling DUI's in different ways. The law is failing to do what the intent of the law implies. He submitted two e-mails that explained the problem. Attachment #1

Senator Fiebiger On page 2, section e is new, can you explain what that is for?

Erickson I believe it addresses the stuff that is deleted right above it but I will defer the question to Aaron Birst.

Senator Nething If it is .20 is there a difference in the suspension period?

Erickson Not on the criminal side but there is on the administrative side. There is a length difference.

Senator Nething Is administrative law functioning o-k?

Erickson I can't give a good answer to that.

Senator Potter What is the point in section c and how does it relate to section b.

Erickson In section c it shows a prior conviction and the language on the BAC is sometime not record by clerks and this is a big loop hole.

Representative DeKrey was present in support of HB 1287.

Aaron Birst, NDACo testified in support of HB 1287. I am speaking today on behalf of our member group of States Attorneys. As the states attorneys were reviewing their legislative goals this year this was determined to be one of the problems prosecutors were running into. People were being treated differently. Some people who were getting DUI's were convicted of DUI's and not getting their license suspended while others coming in at initial appearance and pleaded guilty were getting suspended. The attorneys felt that was not equal treatment. He presented the committee with written testimony from Cherie Clark, Assistant State's Attorney in Cass County. #2 This was the testimony that Cherie gave to the House Transportation committee. The extent of this loophole has been significant. According to numbers provided by the Department of Transportation, since October of 2008, 185 convictions have been received in which the Department of Transportation could not take any license suspension action.

Discussion followed on sections a, b, c, & d.

Senator Potter Is there a higher penalty if you refuse to take a blood test?

Aaron If you refuse the blood test you will get a mandatory 1 year. (26:00) Explains how the loophole works. Under ND law you can on the roadside refuse the test and you would then get the higher suspension penalty however ND law allows you to come in and cure that by pleading guilty and you could say, that night I didn't know what I was doing and I refused the blood test. I don't want to lose my license for one year, it's my first offense, I would like to plead guilty in criminal court and the Department of Transportation can only take my license for 91 days. The problem was there is no BAC listed and the Department of Transportation said we can't suspend them because there is no BAC here.

Senator Fiebiger had a question on how they were going to correct the administrative side of the problem were people weren't writing in the numbers.

Aaron Good question. It could still be a problem but I think that could be corrected by training. Right now the Department of Transportation can't do anything without BAC conviction.

Discussion followed about when section c kicks in.

Ladd Erickson asked the committee to consider an emergency clause if they pass the bill.

No Opposing testimony

Closed the Hearing on HB 1287.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1287

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: March 5, 2009

Recorder Job Number: 10238

Committee Clerk Signature

Jody Hauge

Minutes:

Committee work on HB 1287

Senator Lee opened committee work on HB 1287 relating to the suspension of drivers' licenses. He asked **Senator Fiebiger** what he found out after visiting with some defense attorneys.

Senator Fiebiger said he did have some discussion and he is comfortable with the bill.

Senator Fiebiger moved a Do Pass on HB 1287.

Senator Nething seconded.

Senator Lee asked for some clarity on the bill.

Senator Fiebiger said that they weren't putting in the BAC and that was opening up a loophole. This bill should close that loophole.

Roll call vote: 5-0-1

Senator Fiebiger will carry the bill. (5:00) Forgot to turn recorder off.

REPORT OF STANDING COMMITTEE (410)
March 5, 2009 1:19 p.m.

Module No: SR-38-4126
Carrier: Fleblger
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1287: Transportation Committee (Sen. G. Lee, Chairman) recommends DO PASS
(5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1287 was placed on the
Fourteenth order on the calendar.

2009 TESTIMONY

HB 1287

Same given
to Senate.

Testimony to the
HOUSE TRANSPORTATION
Prepared January 22, 2009 by Cherie Clark, Cass County Assistant State's Attorney

CONCERNING HOUSE BILL 1287

Chairman Ruby and members of the Committee, my name is Cherie Clark and I am an Assistant State's Attorney in Cass County. I am the team leader in the division of the office which handles DUI cases and I also personally handle such cases. Previous to working in North Dakota, I was a prosecutor in Minnesota.

This fall it was brought to the attention of prosecutors throughout the State that a significant loophole had developed in the prosecution and subsequent suspension of licenses conducted by the Department of Transportation (DOT).

As this committee is aware, in North Dakota one can commit the crime of DUI as found in NDCC 39-08-01 in 4 different ways. Those four ways are if you drive with blood alcohol content (BAC) of over .08, if you drive under the influence of intoxicating liquor, if you drive under the influence of drugs and if you drive under the combined influence of alcohol and drugs.

Previous to the 2007 session, if you were convicted of DUI under any of the options your license would be suspended for the appropriate time. However, in 2007 in an attempt by the legislature to actually increase the time of suspension based on higher BAC's the law was changed only to reference BAC numbers.

This change has caused a significant loophole through which convicted offenders have either intentionally or inadvertently been able to exploit. First off, any conviction for DUI based on drug use will result in no license suspension despite the fact the drug impaired offender posed just as great a menace on the road as a driver with a BAC over .08. Another defect is under North Dakota law a person suspected of driving under the influence has a right to refuse testing. If the offender refuses testing their license will be suspended for a longer period. However, the offender also has the right to cure the refusal by pleading guilty to a DUI. In refusal cases, there is obviously no BAC result so when they plead to the DUI the DOT can no longer suspend the offender.

On cases where a BAC is recorded, the administrative license suspension process ordinarily would allow the DOT to take suspension action if the hearing officer found the offender to have violated the law. However, since this loophole was exposed, defendants have been attempting to take advantage of this by requesting officers not appear for administrative hearings on the condition they will be pleading guilty to DUI. To officers and prosecutors who were not aware of this loophole they would agree and the defendant would indeed plead guilty to DUI but would not plead to a certain BAC amount or the clerk of court would not reflect the BAC in the judgment which again would prohibit the DOT from taking license suspension action.

HB 1287

1-22-09

The extent of this loophole has been significant. According to numbers provided by the DOT, since October of 2008, 185 convictions have been received in which the DOT could not take any license suspension action. Prosecutors and law enforcement officers have relied on the DOT license suspension process to hold those accountable for putting all of the motoring public at risk and under the current law a number of offenders are being allowed to not face the full consequences of their actions.

For the following reasons I ask that you support House Bill 1287 which continues to hold higher BAC offender responsible but also ensures others convicted of driving under the influence are also held accountable.

Thank you.

Attachment #3

HB 1287

DISPOSITION OF TRAFFIC OFFENSES

39-06.1-10

1-22-09

2 points

a person has been
equivalent ordinance,
portunity for hearing
rator's license to the
director the written
f an appropriate li-
he offender does not
program or that the
ed program and has
ctor shall send notice
he provisions of this

st recent violation of
he offender has pre-
valent ordinance, at
driving privileges to
co. acted addiction
a on treatment
dr. related offense
f treatment.

ncludes an order or
an operator's license,
with any suspension
a person for violating
ending the person's
which license suspen-
under chapter 39-20

ed twenty days after
nsee at the licensee's
active delivery under
enty-two hours after

e recorded against an
the operator has ever

had an operator's license issued in this state, and the licensing authority shall maintain records on all violators regardless of whether they are licensed. Upon the assignment of twelve or more points, any unlicensed operator must be deemed to be driving under suspension if the operator has never had an operator's license or if the operator has failed to renew the operator's license.

7. The period of suspension imposed for a violation of section 39-08-01 or equivalent ordinance is:
 - a. Ninety-one days if the operator's record shows the person has not violated section 39-08-01 or equivalent ordinance within the five years preceding the last violation.
 - b. Three hundred sixty-five days if the operator's record shows the person has once violated section 39-08-01 or equivalent ordinance within the five years preceding the last violation.
 - c. Two years if the operator's record shows the person has at least twice violated section 39-08-01 or equivalent ordinance within the five years preceding the last violation.

Source: S.L. 1973, ch. 301, § 10; 1975, ch. 339, § 14; 1975, ch. 340, § 1; 1975, ch. 341, § 3; 1977, ch. 353, § 1; 1977, ch. 354, §§ 2, 3; 1977, ch. 355, § 2; 1979, ch. 187, § 78; 1979, ch. 418, § 3; 1979, ch. 420, § 1; 1981, ch. 91, § 27; 1981, ch. 385, § 5; 1981, ch. 389, § 4; 1981, ch. 391, § 2; 1981, ch. 392, § 2; 1983, ch. 415, §§ 15, 16; 1983, ch. 432, § 2; 1985, ch. 429, § 5; 1985, ch. 430, §§ 2, 4; 1985, ch. 434, §§ 1, 2; 1985, ch. 436, § 1; 1987, ch. 460, § 3; 1987, ch. 461, § 2; 1987, ch. 463, §§ 3, 4; 1987, ch. 464, § 2; 1987, ch. 465, § 2; 1987, ch. 466, § 2; 1987, ch. 467, §§ 1, 2; 1987, ch. 468, § 1; 1989, ch. 463, §§ 3, 4; 1991, ch. 414, §§ 2 to 4; 1991, ch. 416, § 2; 1991, ch. 417, § 1; 1993, ch. 375, § 7; 1993, ch. 386, § 1; 1995, ch. 377, § 1; 1997, ch. 337, § 2.

Effective Date.

The 1997 amendment to this section by section 2 of chapter 337, S.L. 1997 became effective August 1, 1997.

Cross-References.

Licensing addiction treatment programs, see ch. 23-17.1.

Penalty for driving while license suspended or revoked, see §§ 39-06-42, 39-06-43.

Prior offenses under § 39-08-01 restricted to those after July 1, 1981, see § 39-08-01.1.

Constitutionality.

Subdivision 3.1 a, imposing additional requirements for reinstatement of a driver's license when suspension is for driving under the influence of intoxicating liquor, is clear and unambiguous and is not unconstitutionally vague. State v. Bettenhausen, 460 N.W.2d 394 (N.D. 1990).

Assignment of Points.

The number of points assigned to licensee's driving record should be in accordance with the statute in effect at the time of commission of the offense rather than the statute in effect at the time of sentence. State v. Goodbird, 344 N.W.2d 483 (N.D. 1984).

Trial court does not have authority to assign points to licensee's driving record upon conviction; court's responsibility is to report the conviction to the highway commissioner who, upon receipt of the report of the conviction, has the duty to enter the proper number of points on the licensee's driving record. State v. Goodbird, 344 N.W.2d 483 (N.D. 1984).

Challenge to Evaluation.

Individual who did not request an administrative hearing to challenge the validity of his evaluation, nor seek another evaluation, was in no position to challenge either the division's reliance on the evaluation by his addiction counselor or the division's reliance on his failure to file another evaluation by an addiction counselor that would satisfy the statutory requirement. State v. Bettenhausen, 460 N.W.2d 394 (N.D. 1990).

Constructive Delivery of Suspension Order.

An affidavit of mailing stating that an order of suspension was mailed to a licensee on a certain date was sufficient to establish constructive delivery of the order forty-eight hours after the stated date without further proof that the licensee received the order. State v. Hagstrom, 274 N.W.2d 197 (N.D. 1979).

#1

Ladd Erickson

From: "Ladd Erickson" <lerrickson@state.nd.us>
To: <bohnzo@yahoo.com>
Sent: Monday, October 27, 2008 2:39 PM
Subject: Fw: BAC's

----- Original Message -----

From: Ladd Erickson
To: Mike Hoffman
Sent: Monday, October 27, 2008 2:35 PM
Subject: Fw: BAC's

----- Original Message -----

From: Bailey, Cathy
To: lerrickson@nd.gov
Sent: Thursday, October 16, 2008 9:13 AM
Subject: FW: BAC's

From: Walker, Peggy
Sent: Wednesday, October 15, 2008 4:41 PM
To: Bailey, Cathy
Subject: FW: BAC's
Importance: High

From: Rothmann, Patricia A. [mailto:prothman@nd.gov]
Sent: Wednesday, May 07, 2008 9:11 AM
To: Walker, Peggy
Cc: Simenson, Deb
Subject: RE: BAC's
Importance: High

Hi Peggy,

I'm not sure how the clerks get the BAC but we definitely get convictions in with the BAC listed. Several I know of are, Mandan Municipal, Cass District, Fargo Municipal, Ramsey District, and LaMoure District courts.

By law, if a driver is convicted, DOT still has to afford them an opportunity for an administrative hearing on the conviction. The driver may or may not have been suspended on the Implied Consent (Report and Notice). Sometimes the officer doesn't send it in or it's not filled out properly, so DOT cannot take action. Sometimes the Implied Consent is *dismissed*. In those cases if the BAC **is on the conviction, DOT can suspend**. If no BAC on the conviction and no Implied Consent suspension, the conviction can only be put on as *history* and possibly used as enhancement purposes later.

Ready

If DOT receives a Report and Notice and suspension action *has been taken on the BAC listed on the Report and Notice*, should the conviction come in with no BAC, DOT can suspend. At this point, the conviction doesn't add any additional time to the suspension but just adds the requirement for an SR22 filing and an evaluation.

Read

The one discrepancy from Trooper Rost is "DL can suspend whether there is a BAC or not if no hearing is requested." Not correct. A meeting with the Attorney General's office two weeks ago revised that for DL. Basically, if there is no Implied Consent violation/suspension on record with an established BAC and the conviction comes in with no BAC, DL cannot take suspension action, whether or not they request a hearing or have an attorney. DOT has submitted legislation for 2009 to hopefully resolve the 'loop hole' but until then, this is what our Legal Div. and the AG's office have decided.

Crazy, huh? ☹

If you have any further questions, just let me know.

Thanks - Patti

Patricia Rothmann
Manager - Driver Improvement Services

Buckle Up! Every trip - Every time.

From: Walker, Peggy [mailto:PWalker@ndcourts.gov]
Sent: Wednesday, May 07, 2008 8:46 AM
To: Rothmann, Patricia A.
Cc: Simenson, Deb
Subject: BAC's

Hi Patty,

I have another question to follow up on the blood alcohol issue Deb and I discussed with you. Yesterday Trooper Jeremy Rost called our office. He was asking if we realized we should be putting the BAC on the UCIS screen. He was not aware that we don't get the BAC results. I am not sure how other clerk's get this information. But if we did get the BAC we would have no problem entering it.

In talking with Trooper Rost, he told me that after a court conviction goes to your office, the defendant is allowed one more hearing to make sure that all the paperwork is properly done. If it is and there is a BAC result showing, then D/L can suspend the license. If not proper, or no BAC, then D/L can't suspend. He also said if no hearing is requested, then D/L can suspend whether there is a BAC or not.

We were not aware of this. Is this correct? Is this a hearing requested out of your office? His opinion was that the hearings were only being requested when they have an attorney that is aware of this.

Any ideas?

Thanks,

Peggy