

## CHAPTER 15

### PRIOR CONVICTIONS / ENHANCEMENTS

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### 15.1 GENERALLY

Utah provides that DUI offenses become more serious with each consecutive offense. Prosecutors should carefully screen each case with an eye for any potential enhancement. City prosecutors should, when appropriate, refer any offense which qualifies as either a Class A Misdemeanor or Felony to the appropriate District or County Attorney's office.

### 15.2 STATUTES

#### 15.2.1 OFFENSE CLASSIFICATION ENHANCEMENT

The statutes which relate to the offense classification enhancement of repeat DUI offenses are as follows:

41-6a-503. Penalties for driving under the influence violations.

\* \* \*

(2) A person convicted of a violation of Section 41-6a-502 is guilty of a third degree felony if:

(b) the conviction under Section 41-6a-502 is within ten years of two or more prior convictions as defined in Subsection 41-6a-501(2); or

(c) the conviction under Section 41-6a-502 is at any time after a conviction of:

(i) automobile homicide under Section 76-5-207 that is committed after July 1, 2001;

(ii) a felony violation of Section 41-6a-502 or a statute previously in effect in this state that would constitute a violation of Section 41-6a-502 that is committed after July 1, 2001; or

(iii) any conviction described in Subsection (2)(c)(i) or (ii) which judgment of conviction is reduced under Section 76-3-402.

### **15.2.2 PUNISHMENT ENHANCEMENTS**

In addition the provisions which enhance the offense classification of repeat DUI offenses, the legislature has also provided that certain sentencing and punishment enhancements are required for repeat offenders. The specific statutes are as follows:

41-6a-505. Sentencing requirements for driving under the influence of alcohol, drugs, or a combination of both violations.

\* \* \*

(2) If a person is convicted under Section 41-6a-502 within ten years of a prior conviction as defined in Subsection 41-6a-501(2):

(a) the court shall:

(i) (A) impose a jail sentence of not less than 240 consecutive hours;

(B) require the person to work in a compensatory-service work program for not less than 240 hours; or

(C) require the person to participate in home confinement through the use of electronic monitoring in accordance with Section 41-6a-506;

(ii) order the person to participate in a screening;

(iii) order the person to participate in an assessment, if it is found appropriate by a screening under Subsection (2)(a)(ii);

(iv) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (2)(b);

(v) impose a fine of not less than \$800; and

(vi) order probation for the person in accordance with Section 41-6a-507; and

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

(3) Under Subsection 41-6a-503(2), if the court suspends the execution of a prison sentence and places the defendant on probation:

(a) the court shall impose:

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

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

(iii) supervised probation; and

(iv) an order requiring the person to obtain a screening and assessment and substance abuse treatment at a substance abuse treatment program providing intensive care or inpatient treatment and long-term closely supervised follow-through after treatment for not less than 240 hours; and

(b) the court may require the person to participate in home confinement through the use of electronic monitoring in accordance with Section 41-6a-506.

(4) (a) The requirements of Subsections (1)(a), (2)(a), and (3)(a) may not be suspended.

(b) Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(5) If a person is convicted of a violation of Section 41-6a-502 and there is admissible evidence that the person had a blood alcohol level of .16 or higher, the court shall order the following, or describe on record why the order or orders are not appropriate:

(a) treatment as described under Subsection (1)(b), (2)(b), or (3)(a)(iv); and

(b) one or both of the following:

(i) the installation of an ignition interlock system as a condition of probation for the person in accordance with Section 41-6a-518; or

(ii) the imposition of home confinement through the use of electronic monitoring in accordance with Section 41-6a-506.

### 15.3 PROVING THE PRIOR CONVICTION

Although it is not uncommon for a Defendant to stipulate to the fact that he or she has a prior conviction, a prosecutor must keep in mind that, absent a defense stipulation, the fact of a prior conviction must be proven beyond a reasonable doubt during trial on a felony DUI. If the case at bar is a second offense, the prior conviction is not an element of the offense, but rather a sentencing enhancement, and the burden of proof for the prior would be clear and convincing evidence. It is recommended that the prosecutor present this to the court by way of a motion *in limine* to determine the parameters of presenting evidence of the prior. Many courts will not allow the presentation of prior evidence before a jury and will either bifurcate the trial on that issue or even take judicial notice of the conviction. *It is important to know the court's ruling on this BEFORE the beginning of trial.*

In order to prove a prior conviction, the prosecutor must prove three essential elements:

1. The fact of the prior conviction,
2. That the prior conviction falls within the time period for

- enhancement, and
3. Identity of the defendant.

Thanks to Rule 902 (4) Ut.R.Evid., a certified copy of the prior conviction will suffice to prove elements 1 and 2. The prosecutor must be certain to have these available for trial and to provide them as discovery. In ***State v. Anderson***, 797 P.2d 1114, 1117 (Utah Ct. App. 1990), the Court of Appeals held that “[a] written, clear and definite judgment signed by the trial court is sufficient proof of a prior conviction.”

One potential concern that may arise depending on your court’s interpretation of the statute is that, although it doesn’t apply to the DUI enhancement statute, ***State v. Powasnik***, 918 P.2d 146 (Utah Ct. App. 1996), the Court of Appeals held that the drug penalty enhancement statute adds an extra element to drug offenses coming w/in the statute, that must be proved beyond a reasonable doubt to the same trier of fact who decides predicate offenses. The Utah courts have not expressly held the same for the DUI enhancement statutes, but they may at some point apply the same reasoning.

Proving identity (again, assuming it is disputed) can be accomplished through booking photos, dates of birth, and the defendant’s own statements (such as acknowledging his or her identity at arraignment).

### 15.3.1 CHALLENGES TO THE PRIOR CONVICTION

A recent phenomenon which is becoming more and more prevalent is for a defendant to challenge the validity of the prior conviction pursuant to *State vs. Ferguson*, 111 P.3d 820 (Utah Ct. App. 2005). In *Ferguson*, the court held that when the State is enhancing a charge based on a prior conviction, that previous conviction is presumed valid unless the defendant testifies, or offers other evidence, that he did not knowingly and intelligently waive his right to counsel. Then, the burden shifts to the State to establish the validity of the waiver. The facts of the case, for background information, were:

Julia Jepson obtained a protective order against defendant Ferguson, prohibiting Ferguson from going near, contacting, or

harassing her. After calling and threatening Jepson several times, Ferguson plead guilty to violating the protective order, and was sentenced to one year in jail. The sentence was suspended, and Ferguson was put on probation. Ferguson was not represented by counsel during these proceedings. Six days after these proceedings, Ferguson appeared with a rifle on a roof behind Jepson's place of employment. The State charged Ferguson with violating a protective order and sought to enhance that charge from a class A misdemeanor to a third degree felony based on Ferguson's prior conviction for the same charge. The district court held that the State could not enhance the protective order charge on the basis of a prior conviction obtained in violation of a defendant's right to counsel. The Utah Court of Appeals affirmed this decision, but reversed the district court's holding that the State bore the burden of establishing the constitutional validity of the uncounseled conviction. In reviewing the case, the Utah Supreme Court affirmed the court of appeals' holding that a previous uncounseled conviction cannot be used to enhance a subsequent criminal charge "unless the defendant knowingly and intelligently waived his right to counsel." The Court further held that "In determining whether a defendant did so, a previous conviction is presumed valid unless the defendant can rebut that presumption by offering evidence that he did not validly waive his right to counsel. This burden is minimal, however, and can be satisfied with the defendant's own testimony. The burden then shifts to the State to establish the validity of the waiver." The case was remanded to determine whether Ferguson's waiver was made "knowingly and intelligently."

In order to effectively pre-empt this type of challenge, prosecutors should obtain a certified copy, not just of the order of conviction, but also any plea forms, court notes, or any other documentation which shows that the defendant was previously advised of his/her right to counsel and knowingly waived or exercised that right.

In order to avoid this problem in future case, prosecutors must ensure that all defendants are adequately advised of their rights and that there is a written record of the waiver before a plea is accepted by a court.

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