

## **Changes to the Laws Regarding Intoxication Offenses**

For well over two decades, there have been a number of substantial changes to the laws regarding intoxication-related offenses. Many of these changes have added increased responsibilities to community supervision and corrections departments. Moreover since these legislative initiatives resulted in amendments to scattered portions of the law dealing with intoxication-related offenses, community supervision officers have had great difficulty in interpreting these various provisions in a consistent and harmonious manner. Consequently, officers responsible for monitoring conditions of community supervision imposed on probationers convicted of an intoxication-related offense face a perplexing task in deciphering this area of the law. Hopefully this paper will better enable officers to perform their duties in supervising persons convicted of intoxication-related offenses. However, I do not profess to totally comprehend this area of the law myself and this paper only reflects my personal understanding of the law.

### **Overview of Intoxication Offenses**

Even though the Legislature began making substantial changes to intoxication laws beginning in the mid-1980's, it was not until 1993 that the Legislature re-codified the statutes dealing with intoxication offenses. As part of the Seventy-Third Legislature's efforts to revise and update the penal laws of this state, the legislature made several changes to the laws addressing crimes committed while under the influence of alcohol or drugs. The first significant change was to collect the various scattered provisions dealing with this matter and to create a separate chapter in the penal code for all these laws.<sup>1</sup> Under S.B. No. 1067, effective September 1, 1994, these various intoxication offenses were re-codified under Chapter 49 of the Penal Code. Consequently offenses involving public intoxication; driving, flying, or boating while intoxicated; consumption or possession of an alcoholic beverage in a motor vehicle; intoxication assault; and intoxication manslaughter which are committed on or after September 1, 1994 will be governed by Chapter 49 of the Texas Penal Code. See S.B. No. 1067, enacted in Acts 1993, Seventy-Third Leg., Ch. 900, Section 1.01, pp. 3699-3701.<sup>2</sup>

A second significant change made by the Legislature in 1993 regarding intoxication offenses involved the range of punishment for certain of these crimes. Thus the offenses of driving, flying, and boating while intoxicated were classified as a Class B misdemeanor with a minimum term of confinement of seventy-two hours and a maximum term not to exceed 180 days, a fine not to exceed \$1,500, or both.<sup>3</sup> In addition S.B. No. 1067 created a new criminal offense of intoxication assault. This new offense provided that if a person, by accident or mistake, while operating an aircraft, watercraft, or motor vehicle in a public place caused serious bodily injury to another by reason of intoxication, then the person committed a third degree felony offense. See V.T.C.A., Penal Code, Section 49.07. Also, S.B. No. 1067 redesignated the offense of involuntary manslaughter by reason of intoxication as intoxication manslaughter and reclassified it as a second degree felony. See V.T.C.A., Penal Code, Section 49.08.

---

<sup>1</sup> Previous to the inclusion of intoxication-related criminal offenses in the Penal Code, these offenses were found at V.A.C.S. Article 67011-1.

<sup>2</sup> In 1999 the Seventy-sixth Legislature added a Section 49.065 to the Penal Code creating the offense of assembling or operating an amusement ride while intoxicated. This new provision became effective beginning on January 1, 2000.

<sup>3</sup> V.T.C.A., Penal Code, Section 49.04(c) provides that if it is shown in the trial of an offense for driving while intoxicated that at the time of the offense the person driving or operating the motor vehicle had an open container of alcohol in the person's immediate possession, then the offense is a Class B misdemeanor with a minimum term of confinement of six days.

Finally, S.B. No. 1067 added a section to Chapter 49 of the Penal Code in order to increase the range of punishment for subsequent commissions of certain intoxication offenses. V.T.C.A., Penal Code, Section 49.09(a) provided that if it were shown in trial of an offense for driving, flying and boating while intoxicated that the person had previously been convicted one time for one of the above-specified offenses, then the offense became a Class A misdemeanor, with a minimum term of confinement of fifteen days. In addition, Penal Code, Section 49.09(b) provided that if it were shown in trial of an offense for driving, flying or boating while intoxicated that the person had previously been convicted two times of any of the above-specified offenses, then the offense was a felony of the third degree. This section also provided that any of these offenses was a final conviction, regardless of whether the sentence for the conviction was imposed or probated.<sup>4</sup> In addition any final conviction, regardless of when it was obtained, can now be used to enhance a subsequent conviction for an offense arising under Chapter 49 of the Penal Code.<sup>5</sup>

Over the years there have been a number of other changes to the intoxication laws in this State. In 1983 under S. B. 1, the Sixty-Eighth Legislature enacted a provision providing that a person charged with an intoxication offense was no longer eligible for deferred adjudication community supervision. This measure became effective on or after January 1, 1984.<sup>6</sup> In 1999 under S. B. 114, the Seventy-Sixth Legislature changed the definition of “intoxication” by lowering the level of alcohol concentration from 0.10 or more to 0.08 or more. Finally, in 2003 the Seventy-Eighth Legislature created a new intoxication offense of operating a motor vehicle in a public place while intoxicated and while the vehicle is being occupied by a passenger who is younger than 15 years of age. Moreover the Legislature classified this new offense as a state jail felony. See Penal Code, Section 49.045.<sup>7</sup>

## **CONDITIONS OF COMMUNITY SUPERVISION**

### **A. Confinement as a Condition of Community Supervision.**

Most of the conditions of community supervision related specifically to DWI offenses are found in Article 42.12, Section 13 of the Code of Criminal Procedure. The first condition found in this section

---

<sup>4</sup> In 1993 at the time the intoxication statutes were re-codified under Chapter 49 of the Penal Code, Penal Code, Section 49.09(c) stated that a conviction could not be used for enhancement purposes if: (1) the conviction was a final conviction and was for an offense committed more than ten years before the offense for which the person is being tried was committed; and (2) the person has not been convicted of an offense for driving, flying, or boating while intoxicated or any offense related to driving or operating a motor vehicle while intoxicated committed within ten years before the date on which the offense for which the person being tried was committed. Nevertheless in 2005 H. B. 51 repealed this provision of Chapter 49 of the Penal Code.

<sup>5</sup> Hence, regardless of how long ago the conviction was had, if a defendant had served a sentence for an intoxication related offense or had been granted community supervision on or after January 1, 1984, the individual had a final conviction and this conviction could be used for enhancement purposes.

<sup>6</sup> Nevertheless despite this prohibition, it is my opinion that a person charged with an intoxication offense is still eligible for a pre-trial diversion program.

<sup>7</sup> When creating this new offense, the Legislature overlooked the prohibition against granting a person charged with an intoxication offense deferred adjudication under Article 42.12, Section 5 (d), Code of Criminal Procedure. Thus a person charged with the offense of driving while intoxicated with a child passenger was eligible for deferred adjudication. Nevertheless in 2007 the Eightieth Legislature rectified this matter. Under H. B. 2115, Subdivision (1) of Subsection (d) of Article 42.12, Section 5, supra, was amended to now provide that a judge could grant deferred adjudication unless the defendant was charged with an offense under Sections 49.04 – 49.08 of the Penal Code. Moreover this change became effective for all new offenses committed on or after September 1, 2007.

deals with the imposition of jail time as a condition of community supervision. Subsection (a) of Section 13 states that a judge granting community supervision to a defendant convicted of an offense under Chapter 49, Penal Code, shall require as a condition of community supervision that the defendant submit to:

(1) not less than 72 hours of continuous confinement in county jail if the defendant was punished for a second time DWI conviction;<sup>8</sup>

(2) not less than five days of confinement in county jail if the defendant was punished for a second time DWI conviction and the previous offense was committed within five years of the new offense;

(3) not less than 10 days of confinement in county jail if the defendant was punished for a felony DWI conviction; or

(4) not less than 30 days of confinement in county jail if the defendant was convicted for intoxication assault.

In addition subsection (b) of this section provides that a judge granting community supervision to a defendant convicted of an intoxication manslaughter offense shall require as a condition of community supervision that the defendant submit to a period of confinement of not less than 120 days. It should be noted that in 1993 when these offenses were recodified under Chapter 49 of the Penal Code, the Legislature deleted any reference that a defendant convicted of manslaughter by reason of intoxication and who was granted community supervision had to be confined in a penal institution for the prescribed period of not less than 120 days as a condition of community supervision. Now Article 42.12, Section 13(b), supra, merely states that a judge who grants community supervision to a defendant convicted of intoxication manslaughter must require as a condition of community supervision that the defendant submit to a period of confinement of not less than 120 days. By deleting the phrase “penal institution” it now appears that a judge can require a probationer convicted of intoxication manslaughter to submit to the mandatory period of confinement in a community corrections facility or county jail as well as any other penal facility.

#### B. DWI Educational Program

Article 42.12, Section 13(h) of the Code of Criminal Procedure provides that if a person is convicted of a driving while intoxicated offense and is placed on community supervision, the judge shall require, as a condition of his community supervision, that the defendant attend and successfully complete before the 181<sup>st</sup> day after the day community supervision is granted an educational program designed to rehabilitate persons who have driven while intoxicated. Upon showing of good cause in a written motion by the defendant, the judge may waive the educational program requirement or may grant an extension of time to successfully complete the program provided that the extension may not be for longer than one year after the beginning date of the person’s community supervision. This program must be jointly approved by the Texas Commission on Alcohol and Drug Abuse (now the Division for Mental Health and Substance Abuse Services of the Texas Department of State Health Services), the Department of Public Safety, the Traffic Safety Section of the Texas Department of Transportation, and the community justice assistance division of the Texas Department of Criminal

---

<sup>8</sup> In 2005 the Seventy-ninth Legislature enacted H. B. 157, which amended Article 42.12, Section 13 (a), Code of Criminal Procedure to provide that a judge granting community supervision to a defendant convicted of an offense under Chapter 49, Penal Code, must require as a condition of community supervision that the defendant submit to not less than 72 *hours of continuous* (emphasis added) confinement in county jail if the defendant was convicted under Section 49.09 (a). Prior to this change this provision only stated that a defendant needed to be confined in a county jail for three days. In addition, this change became applicable only to the terms of community supervision for an offense under Chapter 49, supra, that was committed on or after September 1, 2005.

Justice. In determining good cause, the judge may consider but is not limited to the defendant's school and work schedule, the defendant's health, the distance that the defendant must travel to attend an educational program, and the fact that the defendant resides out of state, has no valid driver's license, or does not have access to transportation. A finding of good cause for the waiver must be set out in the judgment.

It is the responsibility of the court clerk to notify the Texas Department of Public Safety concerning whether the defendant is required to attend an educational program, whether the court waived the educational program requirement, or whether the court granted the defendant an extension of time to complete the program. If the person successfully completes the educational program, then the person's instructor must give notice to DPS for inclusion in the person's driving record and also to the community supervision and corrections department. Moreover it is the responsibility of the CSCD to notify the court clerk that the defendant successfully completed the educational program. If the DPS does not receive notice that a defendant required to complete an educational program has successfully done so within the prescribed period, DPS shall revoke the defendant's driver's license, permit, or privilege or prohibit the defendant from obtaining a license or permit. Nevertheless, DPS may not move to revoke or suspend the driver's license of a defendant under this provision if a jury recommends community supervision for the defendant and also recommends that the defendant's driver's license not be suspended.

#### C. Repeat Offender DWI Education Program

Article 42.12, Section 13(j) of the Code of Criminal Procedure provides that if a defendant is convicted of an enhanced DWI offense and is granted community supervision, the trial judge must order the defendant to participate in a repeat offender DWI education program as a condition of community supervision. This provision also specifies that the educational program for repeat offenders must be approved by TCADA (now the Division for Mental Health and Substance Abuse Services of the Texas Department of State Health Services). Moreover this provision further states upon showing of good cause in a written motion by the defendant, the judge may waive the educational program requirement. In addition, a finding of good cause must be set out in the judgment. Good cause contains the same factors as those a court can consider in waiving an educational program under Section 13 (h). However, unlike Section 13 (h), Section 13(j) does not contain a provision that the repeat education program must be completed within a specified time.

Section 13(j) provides that if a defendant is required to attend a repeat offender DWI education program, then it is the responsibility of the court clerk to notify DPS of this fact. Moreover, if the person successfully completes the educational program, then the person's instructor must give notice to DPS for inclusion in the person's driving record and also to the community supervision and corrections department. The CSCD in turn must notify the court clerk of the fact that the defendant successfully completed the educational program for repeat offenders. Finally this provision states that if DPS does not receive notice that a defendant required to complete an educational program for repeat offenders has successfully done so within the period required by the judge, then DPS shall revoke the defendant's driver's license, permit, or privilege or prohibit the defendant from obtaining a license or permit.

Nevertheless despite the language in Section 13 (j) that infers that an offender's DWI license will only be revoked if the person fails to complete the repeat educational program within the period specified by the court, other portions of Section 13, indicate that a defendant's license must be suspended for a specified period of time. Article 42.12, Section 13, Subsection (k), supra, provides that if the judge permits or requires a defendant convicted of a subsequent driving while intoxicated offense to attend an educational program as a condition of community supervision, or waives the required attendance for such a program, and the defendant has previously been required to attend such a program, or the required attendance at the program had been waived, the judge nevertheless must order the suspension of the driver's license, permit, or operating privilege for the following periods:

- 1) not less than 90 or more than 365 days, if the defendant is convicted of any non-enhanced intoxication-related criminal offense;
- 2) not less than 180 days or more than two years if the defendant is convicted of any subsequent misdemeanor or felony DWI related criminal offense; or
- 3) not less than one year or more than two years, if the person is convicted of a second or subsequent intoxication related offense and the previous offense was committed within five years of the date on which the most recent preceding offense was committed.

In addition, Article 42.12, Section 13, Subsection (l) of the Code of Criminal Procedure, which was enacted by the Seventy- First Legislature in 1989 under H.B. No. 2335, is a separate provision dealing with the suspension of the driver's license of a defendant convicted of a second DWI offense and who is required to participate in a DWI education program as a condition of community supervision. This provision provides that if the Department of Public Safety receives notice that a defendant has been required or permitted to attend a subsequent education program under one of the subsections in Section (13), DPS shall suspend the defendant's driver's license, permit or operating privilege, or shall issue an order prohibiting the defendant from obtaining a license or permit for a period of 365 days. This mandatory suspension applies even though the previous required attendance had been waived and the judge had not ordered a period of suspension.

In reviewing the various suspension periods contained in subsections (j), (k), and (l) for repeat DWI offenders, it is apparent that these various provisions conflict with one another. Subsection (j) implies that a defendant's driver's license can only be suspended if he fails to successfully complete the repeat offender education program. However, subsections (k) and (l) clearly indicate that the driver's license of a person convicted of a subsequent DWI offense must be suspended, regardless of whether the person is ordered or permitted to attend a repeat offender education program. Unfortunately even these two sections contradict each other. Subsection (k) specifies three separate suspension periods while Subsection (l) contains a flat suspension period of 365 days for all intoxication-related criminal offenses. Moreover subsection (k) contains a contradiction within itself. While this subsection deals with persons convicted of subsequent DWI offenses, one of the suspension periods deals with persons convicted of first time intoxication-related offenses.

As with other provisions found in Article 42.12, Section 13, supra, it is difficult, if not impossible, to harmonize the various suspension periods relating to repeat offender DWI education programs. It is my opinion that notwithstanding the language contained in subsections (k) and (l), if a court orders a defendant to participate in a repeat offender DWI education program, then the Department of Public Safety may not suspend the driver's license of a person who successfully completes the course.

Transportation Code, Section 521.344 (d) states that DPS may not, during the period of probation, revoke the driver's license, permit, or resident or nonresident privilege to operate a motor vehicle of a person if the person is required under Section 13(h) or (j), Article 42.12, Code of Criminal Procedure, to successfully attend and complete an educational program designed to rehabilitate persons who have driven while intoxicated. The one exception to this rule is that if a person is convicted of an enhanced intoxication offense and the previous intoxication offense was committed within five years of the date on which the most recent proceeding offense was committed, then DPS must revoke the individual's driver's license. This provision was amended in 1993 when the legislature included subsection (j) of Article 42.12, Section 13, supra, within the ambit of this statute. See Acts 1993, Seventy-Third Leg., Ch. 796, Section 11, p. 3163. Subsections (k) and (l) of Article 42.12, Section 13, supra, were first enacted in 1989 under H.B. No. 2335. See Actions 1989, Seventy-First Leg., Ch. 785, Section 4.17, p. 3508. Considering that subsection (k) and (l) contradict one another and both contradict subsection (j) and Section 521.344 (d), Transportation Code (formerly Revised Civil Statutes, Article 6687b, Section 24(g)(1)), was substantively amended after the enactment of subsection (k) and (l), it would appear that Article 6687b, Section 24(g)(1) would prevail over the language found in Section 521.344 (d), supra.

D. Use of Deep-Lung Breath Analysis Mechanism as a Condition of Community Supervision.

In 1993 the Legislature added a subsection (i) to Article 42.12, Section 13, Code of Criminal Procedure, dealing with the use of a deep lung breath analysis mechanism on a vehicle as a condition of community supervision. In its present form, this subsection authorizes a court to have a defendant convicted of certain intoxication offenses install on his vehicle, as a condition of community supervision, a device that uses a deep-lung breath analysis mechanism to make impractical the operation of the motor vehicle if ethyl alcohol is detected on the breath of the operator. This subsection (i) further provides that if the person is convicted of an enhanced DWI or a subsequent offense of intoxication manslaughter or intoxication assault<sup>9</sup> the court must require as a condition of community supervision that the defendant have the device installed on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant and that not operate any vehicle unless the vehicle is equipped with such a device. Finally, in 2005 the Legislature enacted H. B. 51 to provide that if it is shown on the trial of an intoxication offense that an analysis of a specimen of the person's blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed, then upon conviction, the defendant must install such a device.<sup>10</sup>

---

<sup>9</sup> Note: This subsection specifies that a previous conviction may not be used for purposes of restricting a person to the operation of a motor vehicle equipped with an interlock ignition device under this subsection if:

- (1) the previous conviction was a final conviction under Section 49.04, 49.045, 49.05, 49.06, 49.07, or 49.08, Penal Code, and was for an offense committed more than 10 years before the instant offense for which the person was convicted and placed on community supervision; and
- (2) the person has not been convicted of an offense under Section 49.04, 49.045, 49.05, 49.06, 49.07, or 49.08 of that code, committed within 10 years before the date on which the instant offense for which the person was convicted and placed on community supervision.

<sup>10</sup> Note: Art. 17.441, Code of Criminal Procedure also authorizes a magistrate to require a defendant, as a condition of bond, to install a deep lung breath analysis device on his motor vehicle. Subsection (a) of this provision states that except as provided by Subsection (b), a magistrate shall require on release that a defendant charged with a subsequent offense under Sections 49.04-49.06, Penal Code, or an offense under Section 49.07 or 49.08 of that code:

This subsection (i) indicates that the imposition of this particular condition is not contingent on the fact that a defendant was convicted of an enhanced DWI offense or a subsequent conviction of intoxication assault or intoxication manslaughter. Instead this subsection provides that before placing a person convicted of one of these offenses on community supervision, the court must determine from criminal history record information maintained by the Department of Public Safety whether the person has one or more previous convictions under Sections 49.04 – 49.08, Penal Code. If the court determines that the person has had one or more such previous convictions, the court must require as a condition of community supervision that the defendant have that device installed on the motor vehicle most regularly driven by the defendant and that the defendant not operate a motor vehicle unless the vehicle is equipped with the device described in this subsection.

This subsection (i) further specifies that the court must require the defendant to obtain the device before the 30<sup>th</sup> day after the date of conviction at his own cost unless the court finds that to do so would not be in the best interest of justice and enters its finding on the record. Moreover, the court must require the defendant to provide evidence within the 30<sup>th</sup> day period that the device has been installed. The court must also order the device to remain installed on that vehicle for a period of not less than 50 percent of the supervision period. If the court determines that the offender is unable to pay for the device, the court may impose a reasonable payment schedule not to exceed twice the period of the court's order. (Presumably this period also cannot exceed the term of probation). Finally this subsection (i) provides that if a person is required to operate a motor vehicle in the course and scope of the person's employment and if the vehicle is owned by the employer, the person may operate that vehicle without installation of an approved ignition interlock device if the employer has been notified of that driving privilege restriction and if proof of that notification is with the vehicle. This employment exemption does not apply, however, if the business entity that owns the vehicle is owned or controlled by the person whose driving privilege has been restricted. See Acts 1993, Seventy-Third., Ch. 662, Section 1, p. 2459.

## **ALCOHOL OR DRUG ABUSE ASSESSMENTS AND EVALUATIONS**

There are several provisions in the law which mandate that a person be assessed or evaluated for alcohol or drug abuse under certain situations. Article 42.12, Section 13 of the Code of Criminal Procedure contains several subsections which address this matter. Section 13(a)(2) provides that a judge granting community supervision to a defendant convicted of an intoxication-related criminal offense shall require as a condition of community supervision that the defendant submit to an evaluation by a supervision officer or by a person, program, or facility approved by the Texas Commission on Alcohol and Drug Abuse for the purpose of having the facility prescribe and carry out a course of conduct necessary for the rehabilitation of the defendant's drug or alcohol dependence condition.

- 
- (1) have installed on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant, a device that uses a deep-lung breath analysis mechanism to make impractical the operation of a motor vehicle if ethyl alcohol is detected in the breath of the operator; and
  - (2) not operate any motor vehicle unless the vehicle is equipped with that device.

Subsection(b) of this provision also provides that the magistrate may not require the installation of the device if the magistrate finds that to require the device would not be in the best interest of justice. It has been my position that a magistrate could require a community supervision and corrections department to monitor this particular condition of bond.

Section 13(f) provides that if a judge grants community supervision to a defendant convicted of a first time intoxication-related criminal offense and if before receiving community supervision the defendant has not submitted to an evaluation under Article 42.12, Section 9 of the Code of Criminal Procedure, the judge shall require the defendant to submit to the evaluation as a condition of community supervision.<sup>11</sup> Moreover if the evaluation indicates to the judge that the defendant is in need of treatment for drug or alcohol dependency, the judge shall require the defendant to submit to that treatment as a condition of community supervision in a program or facility approved or licensed by the Texas Commission on Alcohol and Drug Abuse or in a program or facility that complies with standards established by the community justice assistance division, after consultation by the division with the TCADA.

Finally Section 13(d) provides that if a judge requires as a condition of community supervision that the defendant participate in a prescribed course of conduct necessary for the rehabilitation of the defendant's drug or alcohol dependence condition, the judge shall require that the defendant pay for all or part of the cost of such rehabilitation based on the defendant's ability to pay. In addition, this provision allows the judge, at his discretion, to credit such cost paid by the defendant against the fine assessed. Moreover, in making a determination of a defendant's ability to pay the cost of rehabilitation, the judge shall consider whether the defendant has insurance coverage that will pay for rehabilitation.

In addition to Article 42.12, Section 13, supra, Article 42.12, Section 9 of the Code (dealing with pre- and postsentence investigation reports) also addresses alcohol and drug abuse evaluations. Section 9 (h) provides that on a determination by the judge that alcohol or drug abuse may have contributed to the commission of the offense, the judge shall direct a supervision officer approved by the community supervision and corrections department or the judge (sic) or a person, program or other agency approved by the Texas Commission on Alcohol and Drug Abuse, to conduct an evaluation to determine the appropriateness of, and a course of conduct necessary for, alcohol or drug rehabilitation for a defendant and to report that evaluation to the judge. This provision requires that an evaluation be made:

- 1) after arrest and before conviction, if requested by the defendant;
- 2) after conviction and before sentencing, if the judge assesses punishment in the case;
- 3) after sentencing and before the entry of a final judgment, if the jury assesses punishment in the case; or
- 4) after community supervision is granted, if the evaluation is required as a condition of community supervision under Article 42.12, Section 13, Code of Criminal Procedure.

As indicated in the language found in both Article 42.12, Sections 9 and 13, these two sections are mutually dependent upon one another. Section 9 contemplates that an alcohol or drug evaluation

---

<sup>11</sup> Article 102.018 (b), Code of Criminal Procedure, provides that on conviction of an offense relating to the driving or operating of a motor vehicle punishable under Section 49.04(b), Penal Code, the court shall impose as a cost of court on the defendant an amount that is equal to the cost of an evaluation of the defendant performed under Section 13(a), Article 42.12, of this code. Costs imposed under this subsection are in addition to other court costs and are due whether or not the defendant is granted probation in the case, except that if the court determines that the defendant is indigent and unable to pay the cost, the court may waive the imposition of the cost.

should be done in accordance with Section 13 if the defendant is granted community supervision. Section 13 contemplates that an alcohol or drug evaluation should be done only if one has not already been done in accordance with Section 9. Moreover, as with so many of the provisions dealing with intoxication-related criminal offenses, each of these two sections in Article 42.12 contain ambiguities and internal contradictions within each provision. Even though the provision in Section 9(h) regarding alcohol and drug abuse evaluations is included in the section dealing with the preparation of pre- and postsentence investigation reports, nowhere in this section does it require that alcohol and drug abuse evaluations be made a part of a pre- or postsentence investigation report. Indeed, a literal following of the procedures established in Section 9(h) would require that an alcohol and drug abuse evaluation be conducted, in several circumstances, after a pre- or postsentence investigation report had been ordinarily prepared. This subsection requires that a judge order an evaluation be conducted upon a determination that alcohol or drug abuse may have contributed to the commission of the offense. One may assume that this determination can only be made (1) in a pretrial hearing upon motions made by either party or upon the court's own motion, (2) in a pre- (or now post-sentence) investigation report, in which case the judge will ordinarily not be aware of the contents of the presentence report until after a defendant is found guilty or the contents of a postsentence report until after the defendant is sentenced, or (3) in the trial upon the merits at either the guilt/innocence stage or the punishment stage of the trial. Consequently the period in which an evaluation should be made in accordance with Section 9(h) does not always conform to the moment at which the determination is actually made during the trial process.

Section 9(h) requires that the evaluation be made at a time prescribed in accordance with four given situations. In the first situation, an evaluation must be made after arrest and before conviction; i.e., prior to a determination of guilt, if requested by the defendant. Under this situation it would appear that a defendant must raise the matter prior to trial and either allow the judge to inspect any presentence investigation report as permitted under Article 42.12, Section 9(c)(2) of the Code of Criminal Procedure or request that the judge conduct a pretrial hearing on the matter. Under the second situation, an evaluation must be made after conviction and before sentencing,<sup>12</sup> if the judge assesses punishment in the case. Presumably this second situation refers to the period after which a finding of guilt has been made but prior to which punishment has been determined. Under this situation it would appear that a judge must make a determination that alcohol or drug abuse may have contributed to the offense through the inspection of a presentence investigation report (if a presentence report must be prepared) or at the guilt/innocence stage of the trial and then order that an evaluation be conducted prior to an assessment of the punishment. Thus if no evidence were raised in either the presentence report or during the guilt/innocence stage of the trial concerning whether alcohol or drug abuse may have contributed to the commission of the crime, then a judge need not order an evaluation be made. In the third situation an evaluation must be made after sentencing and before the entry of a final judgment, if the jury assesses punishment. The only logical reading of this portion of Section 9(h) would require that the evaluation be made after punishment has been assessed by the jury and before the judge sentences a defendant (or signs a written judgment). In any event, a determination that alcohol or drug abuse may have contributed to the commission of the crime would have to be made at either the guilt/innocence or punishment stage of the trial since no presentence

---

<sup>12</sup> The word sentencing as used in the context of this portion of the section is a misnomer. Sentencing does not mean the punishment event of a trial but refers to the part of the judgment, or order revoking a suspension of the imposition of a sentence, that orders that the punishment be carried into execution in the manner prescribed by law. See Article 42.02, Code of Criminal Procedure. Consequently the sentencing event occurs after punishment is assessed and imposed and a judgment is rendered.

report would be prepared under these circumstances. See Article 42.12, Section 9(g)(1), Code of Criminal Procedure. Finally, under the fourth situation, an evaluation must be made after community supervision is granted to a defendant convicted of an intoxication-related criminal offense. This fourth situation conflicts with the second situation, in which the judge assesses punishment but probably does not conflict with the third situation, in which the jury assesses punishment. If a jury assesses a hard-time sentence, then the evaluation must be made prior to sentencing. If the jury recommends community supervision, then the evaluation may be made after the court places the defendant on community supervision. This final situation does not apply to a defendant placed on community supervision for a non-intoxication related offense. Under that circumstance, the period under which an evaluation must be made is controlled by one of the first three situation in Section 9(h).<sup>13</sup>

As previously noted Article 42.12, Section 13, supra, contains two separate provisions addressing alcohol and drug abuse evaluations for intoxication related offenses. Subsection (a)(2) is applicable to all intoxication-related criminal offenses in which the court grants community supervision to a defendant. Subsection (f) is applicable only to first time intoxication-related criminal offenses in which the court grants community supervision to a defendant. Under subsection (a)(2) either a supervision officer or a person, program, or facility approved by the TCADA may conduct the evaluation. Subsection (f) does not specify who is supposed to conduct the evaluation. Nevertheless one may assume that whoever is expected to conduct an evaluation under subsection (f) must be licensed or approved by the TCADA. In addition Subsection (a)(2) contemplates that the alcohol or drug abuse evaluation should be conducted for the purpose of placing the defendant in a treatment facility approved by the TCADA. Subsection (f) states that the court may order the defendant to submit to treatment in any program or facility that is either approved or licensed by the TCADA or that complies with the standards established by the community justice assistance division. Even though these two subsections appear to be inconsistent, it is my opinion that the court can order any defendant determined to have a substance abuse problem and placed on community supervision to submit to treatment in any program or facility either licensed or approved by the TCADA or which meets the standards of the community justice assistance division or to submit to counseling or treatment by any person licensed or approved by the TCADA.<sup>14</sup>

## **JAIL TIME FOR INTOXICATION-RELATED CONVICTIONS**

As indicated before, Article 42.12, Section 13(a), of the Code of Criminal Procedure, requires probationers convicted of certain intoxication-related criminal offenses to serve a period of confinement as a condition of community supervision. Ordinarily this period must be served in jail and cannot be served in an alternate method. Moreover, a court can no longer allow a defendant convicted of any misdemeanor offense in which confinement is imposed as a condition of community

---

<sup>13</sup> Article 42.12, Section 11(a)(15), Code of Criminal Procedure, contains a separate provision which authorizes a court to require a probationer, as a condition of community supervision, to attend counseling sessions for substance abusers or participate in substance abuse treatment services in a program or facility approved or licensed by the Texas Commission on Alcohol and Drug Abuse. Presumably, this condition is applicable to persons convicted of non-intoxication-related offenses who have an alcohol or drug abuse problem.

<sup>14</sup> Government Code, Section 509.003 (c) , states that a facility or program operating under the standards is not required to be licensed or otherwise approved by any other state or local agency. The Attorney General has opined that a community correction facility directly operated by a CSCD and offering substance abuse treatment is exempt from licensure by the TCADA if it operates under standards validly adopted by the CJAD. See Attorney General Opinion No. JM-1131 dated December 29, 1989.

supervision to serve the period in a community corrections facility rather than in a county jail. See Article 42.12, Section 12, Code of Criminal Procedure. Moreover, effective for all intoxication-related offenses committed on or after September 1, 1994, a court cannot permit a defendant to serve all or part of a sentence of confinement or period of confinement required as a condition of community supervision by performing community service rather than being confined in county jail. See Article 42.036(a), Code of Criminal Procedure. Nevertheless the law still allows a trial judge, whenever jail time has been awarded for any criminal offense, including an intoxication-related offense, to permit the defendant to serve the sentence or period of confinement as a condition of community supervision intermittently during his off-work hours or on weekends.<sup>15</sup> See Article 42.033(a), Code of Criminal Procedure. In addition the law still allows a trial judge to require a defendant to serve all or a part of any sentence of confinement in county jail by submitting to electronic monitoring rather than being confined in the county jail or serve the sentence under house arrest during the person's off-work hours. See Article 42.035(a) and (b), Code of Criminal Procedure. It appears that the options under Article 42.035(a) and (b), *supra*, are available only to a defendant sentenced to jail and that a defendant confined in jail as a condition of community supervision cannot serve his period of confinement under house arrest or by electronic monitoring.

In 1993 under S.B. No. 1067 the Legislature amended Article 42.032 of the Code of Criminal Procedure so that a sheriff could no longer grant commutation of time for good conduct, industry, and obedience for periods of confinement served as conditions of community supervision. As such an individual serving a period of time in a county jail as a condition of community supervision must serve out the full period as straight time. See *Ex parte Cruthirds*, 712 S.W. 2d 749 (Tex. Cr. App. - 1986). In addition under S.B. No. 1067, the Legislature amended Article 42.03, Section 2(a) of the Code of Criminal Procedure, to provide that in all criminal cases, the judge of the court in which the defendant was convicted shall give the defendant credit on his sentence for the time that the defendant has spent in jail in said cause, other than confinement served as a condition of community supervision, from the time of his arrest and confinement until his sentence by the trial court. Finally, S.B. No. 1067 amended Article 42.12, Section 23(b) of the Code of Criminal Procedure by deleting a provision which allowed a defendant whose probation was revoked and who was sentenced to prison to receive credit for the time he spent in actual confinement as a condition of probation under Sections 12 and 13 of Article 42.12 of the Code of Criminal Procedure. Consequently, for offenses which occur on or after September 1, 1993, not only does a defendant confined in jail as a condition of community supervision not get credit for any period of confinement served while awaiting trial but if he is later revoked and sentenced to prison, he does not get credit for any period that he was confined in jail as a condition of community supervision.

Nevertheless in 1993 the Legislature retained Article 42.12, Section 13(e) of the Code which provided that confinement imposed [for an intoxication offense] must be treated as a condition of community supervision and in the event of a sentence of confinement upon the revocation of community supervision, the term of imprisonment served thereunder had to be credited toward service of such subsequent confinement. The Legislature only addressed this anomaly in 1995 when it amended this subsection to provide that even though confinement imposed under Section 13 should be treated as a condition of community supervision, in the event that the probated sentenced was later revoked, the term of confinement could not be credited toward service of the subsequent confinement.

---

<sup>15</sup> See, however, H. B. 51, enacted by the Seventy-Ninth Legislature in 2005.

Thus as of now, persons convicted of an intoxication offense no longer get credit on any subsequent sentence for the time they spent in jail as a condition of community supervision.

### **TERM OF COMMUNITY SUPERVISION FOR A DEFENDANT CONVICTED OF AN INTOXICATION OFFENSE**

In 1993, the Seventy-Third Legislature made certain changes regarding the duration of the term of community supervision. Prior to September 1, 1993 the law provided that in a misdemeanor case, the period of probation had to be for a period of time not to exceed the maximum confinement applicable to the offense or two years, whichever period was greater. Since no misdemeanor offense was punishable for a period greater than one year, the effect of this provision was to require that all misdemeanor probation be for a period of two years. See Article 42.12, Section 3, Code of Criminal Procedure [1992 Ed.]. Under S.B. No. 1067, the legislature amended this provision to provide that the maximum period of community supervision in a misdemeanor case was now two years with no specified minimum period of community supervision. The effect of this change was to allow a trial judge to place a misdemeanant probationer on community supervision for as little a period of time as one day. See Article 42.12, Section 3(b), Code of Criminal Procedure.<sup>16</sup> While this change was also applicable to all misdemeanor intoxication offenses occurring on or after September 1, 1993, it is assumed that a trial judge cannot specify a period of community supervision which is less than any minimum term of confinement required to be imposed as a condition of community supervision on a probationer convicted of an intoxication offense.

The Seventy-Third Legislature also made a change in the law which now prevents defendants convicted of certain offenses, including many intoxication offenses, and placed on community supervision from receiving an early discharge. Previously a defendant convicted of a driving while intoxicated offense or involuntary manslaughter by reason of intoxication could petition the court to reduce or terminate the period of probation at any time after the defendant had satisfactorily completed one-third of the original probationary period or two years of probation, whichever was the lesser. See Article 42.12, Section 23, Code of Criminal Procedure [1992 Ed.]. S.B. No. 1067 reenacted this provision in Article 42.12, Section 20(a) of the Code of Criminal Procedure as part of its efforts to revise the law affecting probationary matters. However in its revised version, the Legislature created a subsection (b) to provide that Section 20 does not apply to a defendant convicted of certain intoxication offenses or a defendant convicted of an offense punishable as a state jail felony. As such a person placed on community supervision for certain intoxication offenses committed on or after September 1, 1993 or a state jail felony offense cannot be discharged from community supervision until he has served the full term imposed by the court.

Nevertheless it is uncertain whether this change prohibiting the early discharge of persons placed on community supervision for certain intoxication-related offenses is applicable to enhanced convictions or only to first time convictions. Article 42.12, Section 20(b), *supra*, specifically states that Section 20 does not apply to a defendant convicted of an offense under Sections 49.04 - 49.08, Penal Code. Sections 49.04 - 49.08, *supra*, however, only deal with first time convictions for various intoxication-related offenses. Section 49.09, Penal Code, which addresses enhanced intoxication-related offenses, is not mentioned in Article 42.12, Section 20(b), *supra*. One could argue that since the primary

---

<sup>16</sup> These changes apply only for offenses which occurred on or after September 1, 1993. See Acts 1993, Seventy-Third Leg., Ch. 900, Section 5.09 and 5.10, pp. 3763-3764.

conviction under Section 49.09, supra, must be a conviction under either Sections 49.04, 49.05, or 49.06, Penal Code, Article 42.12, Section 20(b), supra, is applicable to any enhanced driving while intoxicated conviction. However, one could also argue that a literal reading of Article 42.12, Section 20(b), supra, excludes a conviction obtained under Section 49.09, Penal Code, from the prohibition against early termination. Since Section 49.09(a), Penal Code, states that an offense is a Class A misdemeanor if it is shown on the trial of an offense under Section 49.04, 49.05, or 49.06, supra, that the person has previously been convicted one time of a DWI offense and since Section 49.09(b), Penal Code, states that an offense is a third degree felony if it is shown on the trial of an offense under Section 49.04, 49.05, or 49.06, supra, that the person has previously been convicted two times of a DWI offense, one could contend that an enhanced conviction constitutes a separate criminal offense which falls outside the scope of Article 42.12, Section 20(a), supra. Hence a person convicted of a Class A misdemeanor DWI offense or a third degree felony DWI offense and placed on community supervision would still be eligible for early termination. This matter has yet to be finally resolved by the courts.<sup>17</sup>

## **SUSPENSION OF DRIVER'S LICENSE**

An individual may risk the suspension or denial of issuance of his driver's license under three circumstances:

- (1) upon refusal to give a blood or breath specimen after requested by a law enforcement officer;
- (2) when a breath or blood specimen indicates a state of legal intoxication, even though no criminal charges may have been filed; and
- (3) upon conviction for an intoxication-related offense.

As with much of the law dealing with intoxication offenses, the statutes controlling the suspension of drivers' licenses can only be described as Byzantine and often appear to be confusing or contradictory. This discussion of the suspension laws merely reflects my personal understanding of the statutes; the Department of Public Safety may have a different interpretation of these laws and apply different policies regarding the suspension of drivers' licenses. Transportation Code, Section 724.011 (a) states that if a person is arrested for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle in a public place, or a watercraft, while intoxicated, the person is deemed to have consented, subject to this chapter, to submit to the taking of one or more specimen's of the person's breath or blood for analysis to determined the alcohol concentration or the presence in the person's body of a controlled substance, drug, dangerous drug, or other substance. While a person cannot be forced to give a sample,<sup>18</sup> if he refuses, his license will be

---

<sup>17</sup> Since Article 42.12, Section 20(a), Code of Criminal Procedure, also authorizes the trial judge, upon discharging the defendant from community supervision, to set aside the verdict or permit the defendant to withdraw his plea and dismiss the accusation against the defendant, one could, based on this same rationale, argue that a defendant placed on community supervision for a Class A misdemeanor DWI offense or a third degree felony DWI offense is still entitled to have the conviction set aside and have his civil rights restored.

<sup>18</sup> Nevertheless Subsection (b) to Section 724.012, Transportation Code, states that a peace officer shall require the taking of a specimen of the person's breath or blood if:

- (1) the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft;
- (2) the person was the operator of a motor vehicle or a watercraft involved in an accident that the officer reasonably believes occurred as a result of the offense;
- (3) at the time of the arrest the officer reasonably believes that as a direct result of the accident:
  - (A) any individual has died or will die; or

automatically suspended for a period of 90 days if the person is 21 years of age or older, or 120 days if the person is younger than 21 years of age, said period of suspension or denial to begin on the 40<sup>th</sup> day after the date on which the person receives notice of suspension or denial or is considered to have received notice of suspension or denial. See Transportation Code, Section 724.035 (c).

In addition Transportation Code, Section 524.022 (a) states that if a person gives a specimen to a peace officer and an analysis of the specimen shows that the person had an alcohol concentration of a level of at least 0.08, the person's license will be suspended for 90 days if the person's driving record shows no alcohol-related or drug-related enforcement contact<sup>19</sup> during the 10 years preceding the date of the person's arrest; or one year if the person's driving record shows one or more alcohol-related or drug-related enforcement contacts during the 10 years preceding the date of the person's arrest.<sup>20</sup> Nevertheless, Transportation Code, Section 524.015 (b) states that a suspension may not be imposed under this chapter on a person who is acquitted of a criminal charge under Section 49.04, 49.07, or 49.08, Penal Code, or Section 106.041, Alcoholic Beverage Code, arising from the occurrence that was the basis for the suspension. Moreover, this subsection states that if a suspension was imposed before the acquittal, the department shall rescind the suspension and shall remove any reference to the suspension from the person's computerized driving record.

Transportation Code, Section 724.032 (a) provides that if a person refuses to submit to the taking of a specimen, whether expressly or because of an intentional failure of the person to give the specimen, the peace officer shall:

- (1) serve notice of license suspension or denial on the person;
- (2) take possession of any license issued by this state and held by the person arrested;

- 
- (B) an individual other than the person has suffered serious bodily injury; and
  - (4) the person refuses the officer's request to submit to the taking of a specimen voluntarily.

<sup>19</sup> Transportation Code, Section 524.001 (3) defines an "alcohol-related or drug-related enforcement contact" to mean a driver's license suspension, disqualification, or prohibition order under the laws of this state or another state resulting from:

- (A) a conviction of an offense prohibiting the operation of a motor vehicle while:
  - (i) intoxicated;
  - (ii) under the influence of alcohol; or
  - (iii) under the influence of a controlled substance;
- (B) a refusal to submit to the taking of a breath or blood specimen following an arrest for an offense prohibiting the operation of a motor vehicle while:
  - (i) intoxicated;
  - (ii) under the influence of alcohol; or
  - (iii) under the influence of a controlled substance; or
- (C) an analysis of a breath or blood specimen showing an alcohol concentration of a level specified by Section 49.01, Penal Code, following an arrest for an offense prohibiting the operation of a motor vehicle while intoxicated.

<sup>20</sup> Note: The period of suspension for a minor is:

- (1) 60 days if the minor has not been previously convicted of an offense under Section 106.041, Alcoholic Beverage Code (Driving while under the Influence of Alcohol by a Minor), or Section 49.04, Penal Code, or an offense under Section 49.07 or 49.08, Penal Code, involving the operation of a motor vehicle;
- (2) 120 days if the minor has been previously convicted once of an offense listed by Subdivision (1); or
- (3) 180 days if the minor has been previously convicted twice or more of an offense listed by Subdivision (1).

- (3) issue a temporary driving permit to the person unless department records show or the officer otherwise determines that the person does not hold a license to operate a motor vehicle in this state; and
- (4) make a written report of the refusal to the director of the department.

Nevertheless a person is entitled to contest the determination of DPS to suspend the individual's driver's license. A hearing must be held not earlier than the 11th day after the date the person is notified of the determination to suspend the license and the hearing must be held by an administrative law judge employed by the State Office of Administrative Hearings. See Transportation Code, Section 724.041. See also, Transportation Code, Section 524.033 (a). The issues at a hearing are whether:

- (1) reasonable suspicion or probable cause existed to stop or arrest the person;
- (2) probable cause existed to believe that the person was:
  - (A) operating a motor vehicle in a public place while intoxicated; or
  - (B) operating a watercraft powered with an engine having a manufacturer's rating of 50 horsepower or above while intoxicated;
- (3) the person was placed under arrest by the officer and was requested to submit to the taking of a specimen; and
- (4) the person refused to submit to the taking of a specimen on request of the officer.

In addition to the provision found in Transportation Code, Chapter 724, regarding the procedure for conducting a hearing to suspend or deny the issuance of a driver's license of a person who refuses to give a specimen, Transportation Code, Chapter 524 also specifies a procedure for conducting administrative hearings to suspend or prohibit the issuance of a driver's license upon a determination that the person who gave a specimen had an alcohol concentration of a level of at least 0.08. Section 524.011 (b), Transportation Code, provides that if an analysis of the specimen shows that the person had an alcohol concentration of a level which exceeds the legal limit, a peace officer shall:

- (1) serve or, if a specimen is taken and the analysis of the specimen is not returned to the arresting officer before the person is admitted to bail, released from custody, delivered as provided by Title 3, Family Code, or committed to jail, attempt to serve notice of driver's license suspension by delivering the notice to the arrested person;
- (2) take possession of any driver's license issued by this state and held by the person arrested;
- (3) issue a temporary driving permit to the person unless department records show or the officer otherwise determines that the person does not hold a driver's license to operate a motor vehicle in this state; and
- (4) send to the department not later than the fifth business day after the date of the arrest:
  - (A) a copy of the driver's license suspension notice;
  - (B) any driver's license taken by the officer under this subsection;
  - (C) a copy of any temporary driving permit issued under this subsection; and
  - (D) a sworn report of information relevant to the arrest.

Moreover, Section 524.012 (a), Transportation Code, states that upon receipt of the report issued under Section 524.011, supra, if the officer did not serve a notice of suspension of driver's license at the time the results of the analysis of a breath or blood specimen were obtained, the department shall determine from the information in the report whether to suspend the person's driver's license. Furthermore, Subsection (b) of this section specifies DPS must suspend the person's driver's license if the department determines that:

(1) the person had an alcohol concentration of a level of 0.08 or more while operating a motor vehicle in a public place; or

(2) the person is a minor and had any detectable amount of alcohol in the minor's system while operating a motor vehicle in a public place.

As with the suspension periods mandated under Chapter 724, supra, Section 524.021 (a) specifies that the driver's license suspension takes effect on the 40th day after the date the person:

(1) receives a notice of suspension under Section 524.011; or

(2) is presumed to have received notice of suspension under Section 524.013.

Section 524.031, Transportation Code states that if, not later than the 15th day after the date on which the person receives notice of suspension or is presumed to have received notice, DPS receives at its headquarters in Austin, in writing, including a facsimile transmission, or by another manner prescribed by the department, a request that a hearing be held, a hearing shall be held as provided by this subchapter. In addition, as with hearings conducted for the suspension or denial of a driver's license under Chapter 724, supra, a hearing under this subchapter must be heard by an administrative law judge employed by the State Office of Administrative Hearings. See Section 524.033, Transportation Code. Moreover, a request for a hearing stays suspension of a person's driver's license until the date of the final decision of the administrative law judge. See Section 524.032 (d), Transportation Code. Finally, a person whose driver's license suspension is sustained may still appeal this decision by filing a petition not later than the 30th day after the date the administrative law judge's decision is final. See Section 524.041 (a), Transportation Code.

In addition to the above referred statutes dealing with various circumstances in which a person operating a motor vehicle on a public road may have his driver's license suspended, the law also mandates, under certain circumstances, the suspension of a person's driver's license upon the conviction of various criminal offenses. Section 521.341, Transportation Code, provides that the license of any person shall be automatically suspended upon final conviction of:

(1) criminally negligent homicide as the result of the operation of a motor vehicle;

(2) evading arrest or detention if a motor vehicle was used in the commission of the offense;

(3) driving while under the intoxication of alcohol and intoxication manslaughter;

(4) intoxication assault if a motor vehicle was used in the commission of the offense;

(5) an offense punishable as a felony under the motor vehicle laws of this state; and

(6) certain other offenses of the motor vehicle statutes.

Moreover, Section 521.342, Transportation Code provides that the license of any person who was younger than 21 years of age at the time of the offense, other than a misdemeanor punishable by fine only, shall be automatically suspended on conviction of:

(1) driving while under the intoxication of alcohol or intoxication assault committed as a result of the introduction of alcohol into the body;

(2) an offense under the Alcoholic Beverage Code involving the manufacture, delivery, possession, transportation, or use of an alcoholic beverage;

(3) a misdemeanor offense under the controlled substances act that does not require the automatic suspension of the license of the person;

(4) an offense involving the manufacture, delivery, possession, transportation, or use of a dangerous drug; or

- (5) an offense involving the manufacture, delivery, possession, transportation , or use of a volatile chemical.

Ordinarily, the suspension for any of the above-listed offenses shall for both adults and minors in the first instance be for a period of twelve (12) months and shall for a subsequent offense be for a period of eighteen months. See Section 521.343, supra. However if a person is convicted of a driving while intoxicated offense or intoxication assault, the suspension of the person's license shall begin not earlier on the date of conviction and not more than thirty (30) days after the date of conviction, as determined by the court, and be for a period determined by the court according to the following schedule:

- (A) not less than 90 days or more than one year, if the person is punished for a first time DWI conviction or intoxication assault except that if the person's license is suspended for a second or subsequent intoxication assault offense committed within five years of the date on which the most recent preceding offense was committed, the suspension continues for a period of one year;
- (B) not less than 180 days or more than two years, if the person is punished for a subsequent DWI conviction; or
- (C) not less than one year or more than two years, if the person is punished for a subsequent DWI conviction and committed an intoxication offense conviction within the preceding five years of the commission of the new offense.

Nevertheless Section 521.344 (d), supra, specifies that during a period of probation DPS may not revoke the person's license if the person is required to successfully complete a DWI education program or a repeat program unless the person was punished for a subsequent DWI conviction and had had a previous intoxication conviction within the last five years. However this provision does not apply if the defendant is a minor.<sup>21</sup> Finally DPS may not revoke the license of a person:

- (1) for whom the jury has recommended that the license not be revoked; or
- (2) who is placed under community supervision under and is required as a condition of community supervision to not operate a motor vehicle unless the vehicle is equipped with a deep lung breath analysis device, unless the person was punished for a subsequent DWI conviction and had had a previous intoxication conviction within the last five years.

Lastly, Transportation Code, Section 521.371 et seq. provides for the suspension of the driver's license of a person convicted of a drug-related offense. Section 521.372(a) states that the driver's license of a person shall be automatically suspended on final conviction (including an adjudication under juvenile proceedings) of an offense under the Controlled Substance Act, a drug offense, or a felony under Chapter 481, Health and Safety Code, that is not a drug offense. In addition, Subsection (b) of this section states that DPS may not issue a driver's license to a person convicted of one of the above-specified offenses who, on the date of the conviction, did not hold a driver's license. Thus it

---

<sup>21</sup> Transportation Code, Section 521.342 (b), states that the department shall suspend for one year the license of a person who is under 21 years of age and is convicted of an offense under Section 49.04, 49.07, or 49.08, Penal Code, regardless of whether the person is required to attend an educational program under Section 13(h), Article 42.12, Code of Criminal Procedure, that is designed to rehabilitate persons who have operated motor vehicles while intoxicated, unless the person is placed under community supervision under that article and is required as a condition of the community supervision to not operate a motor vehicle unless the vehicle is equipped with the device described by Section 13(i) of that article.

appears that this provision would be inapplicable if a defendant were granted deferred adjudication for one of these offenses.

Ordinarily the period of suspension under this section is 180 days after the date of final conviction, and the period of license denial is for the 180 days after the date a person applies to DPS for reinstatement or issuance of a driver's license. Nevertheless the period of suspension or prohibition shall continue for an indefinite period if the person does not attend and successfully complete an educational program, approved by the Texas Commission on Alcohol and Drug Abuse, designed to educate persons on the dangers of drug abuse. See Section 521.374 If DPS receives notification from the clerk of the court in which the person was convicted that the person has successfully completed an educational program and the initial mandated period of suspension or prohibition has been fulfilled, DPS, on payment of the applicable fee, shall reinstate the person's license or issue a license if the person otherwise qualifies. See Transportation Code, Section 521.377 (a). Finally, a person whose license is suspended under this provision is still eligible to receive an occupational license. See Section 521.377 (b), *supra*.<sup>22</sup>

## **CONCLUSION**

As can readily be gathered from this paper, there are numerous and scattered laws directed toward punishing and rehabilitating persons convicted of intoxication-related criminal offenses. Moreover, a tremendous responsibility is placed on supervision officers to ensure that these laws are properly executed. While one may initially be overwhelmed by the complexity and scope of these laws, one can maintain a better grasp of these various measures by separating them into their fundamental elements. Then one can more easily proceed to apply the correct law to a specific situation. Nevertheless one should constantly be aware that there may be times when one cannot be certain as to which is the proper law to apply.

Revised February 13, 2008

---

<sup>22</sup> This provision applies both to offenders who are granted community supervision and those who are sentenced to prison.