

1995

West Valley City vs. Jamie Hunsaker : Brief of Appellee

Utah Court of Appeals

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J. Richard Catten.

Tom Jones.

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,

Plaintiff/Appellee,

v.

JAMIE HUNSAKER,

Defendant/Appellant.

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Case No. 950471-CA

Priority 2

BRIEF OF THE APPELLEE

Appeal from the Third Circuit Court, West Valley Department,
in and for Salt Lake County, State of Utah,
The Honorable Edward A. Watson

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UT OF APPEALS

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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to Section 78-2a-3(2)(f), Utah Code Annotated.

STATEMENT OF THE ISSUES

ISSUE 1: WAS SUFFICIENT EVIDENCE PRODUCED AT TRIAL TO SUPPORT THE DEFENDANT JAMIE DANIEL HUNSAKER'S A CONVICTION OF ONE COUNT OF DRIVING UNDER THE INFLUENCE OF ALCOHOL?

When reviewing the findings of a trial judge sitting without a jury, this appellate court will overturn a guilty verdict only if it is clearly erroneous. *State v. Taylor*, 818 P.2d 1030 (Utah 1991). Also, the Utah Supreme Court has stated that "When challenging the findings of fact of the trial court on appeal, the appellant must show that the findings of fact were clearly erroneous. In order to show clear error, the appellant must marshal all of the evidence in support of the trial court's findings of fact, and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack." *State v. Moosman*, 794 P.2d 474 (Utah 1990).

ISSUE 2: WHETHER THE ARRESTING OFFICER HAD REASONABLE SUSPICION OF CRIMINAL ACTIVITY ON THE PART OF HUNSAKER AND THE INDIVIDUALS ACCOMPANYING HIM, THEREBY ALLOWING THE OFFICER TO DETAIN HUNSAKER FOR INVESTIGATIVE PURPOSES?

A trial court's determination of reasonable suspicion is a determination of law and is reviewed nondeferentially for correctness. However, the reasonable suspicion standard is one that conveys a measure of discretion to the trial judge when applying that standard to a given set of facts. *State v. Pena*, 869 P.2d 932 (Utah 1994).

ISSUE 3: DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO APPROVE A PROPOSED PLEA AGREEMENT BETWEEN THE PARTIES?

Rule 11(h)(2), Utah Rules of Criminal Procedure provides that proposed plea agreements are subject to the approval of the trial court. The trial courts decision to approve or reject a plea agreement should be reviewed on an abuse of discretion standard.

DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, AND RULES

CONSTITUTIONAL PROVISIONS

Utah R. Crim P. Rule 11 See Addendum, Page 1

STATUTES

Utah Code Ann. § 41-6-44 See Addendum, Page 2

STATEMENT OF THE CASE

NATURE OF THE CASE

This case involves a prosecution and conviction for the violation of Section 41-6-44, Utah Code Annotated, Driving Under the Influence of Alcohol, in the Third Circuit Court, West Valley Department, Salt Lake County, State of Utah.

COURSE OF THE PROCEEDINGS

Prosecution in this case was commenced with the arrest of Jamie Daniel Hunsaker on December 4, 1994. The pretrial conference was held on January 27, 1995, and a bench trial before the Honorable Edward A. Watson, was conducted on June 7, 1995.

DISPOSITION IN TRIAL COURT

At trial, Hunsaker was convicted of the class B misdemeanor Driving Under the Influence of Alcohol. On July 26, 1995, Hunsaker was sentenced to serve 90 days in jail (80 days were suspended) and was charged fines and assessments totaling \$1,387.50. Hunsaker was also placed on probation for 12 months with a provision that an additional five days of jail would be suspended upon successful completion of probation. A Notice of Appeal in this case was filed on July 26, 1995.

STATEMENT OF FACTS

1. On December 4, 1994, at approximately 1:20 am, West Valley Police Officer Pearce was patrolling the parking lot of the Westerner Bar in West Valley City. This was a regular part of Pearce's patrol and upon entering the parking lot he made contact with a security person from the bar. (Tr. 10-11, 17-18).

2. Approximately 15 minutes after arriving at the Westerner parking lot, the security person with whom Pearce had previously spoken approached him. The security person pointed out a group of individuals crossing the parking lot and informed Pearce that they were intoxicated and had been fighting or trying to pick fights in the bar. (Tr. 12-14). Pearce observed the individuals enter a vehicle, with Hunsaker at the wheel, and begin to back up. Pearce activated his grill lights and pulled in behind the vehicle to block its path. (Tr. 14).

3. West Valley Officer Newbold arrived on the scene and made contact with Hunsaker. Newbold observed Hunsaker as swaying or unstable on his feet and detected the odor of alcohol on his breath. (Tr. 27-29).

4. Newbold informed Hunsaker that he suspected Hunsaker of driving while intoxicated and asked Hunsaker to perform field sobriety tests. (Tr. 29-30).

5. Newbold administered a gaze nystagmus test and a one leg stand and count. Newbold found all indicators of the gaze nystagmus test indicated that Hunsaker had consumed alcohol. Also, Hunsaker was unable to complete the one leg stand test. (Tr. 30-38).

6. Hunsaker stopped the one leg stand test in the middle of the test and stated to Newbold that "I can't do it, I've had too much, just arrest me." (Tr. 38).

7. Newbold administered a Intoxilyzer chemical test to Hunsaker. The results of that test were excluded by the trial court. (Tr. 39-67).

8. Hunsaker testified at trial that he had not been in an altercation in the bar and that he had only two beers during the evening. (Tr. 92-94). Hunsaker also testified that he had been instructed to perform the one leg stand test with his arms straight out. (Tr. 102-117-118).

9. April Hunsaker testified that upon picking Hunsaker up at the police station following his arrest, he told her that there had been an altercation in the bar. (Tr. 132-133).

10. Newbold testified that he always instructed persons performing a one leg stand test to put their arms at their side, and that Hunsaker performed the test in that manner. (Tr. 135-137).

SUMMARY OF THE ARGUMENT

POINT I: **THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON THE CHARGE OF DRIVING UNDER THE INFLUENCE OF ALCOHOL.**

The witnesses at trial provided the trial court with sufficient evidence to prove each element of the crime of driving under the influence of alcohol. The trial court relied on this evidence and upon the lack of credibility it found in the testimony of the defendant in reaching its verdict. These facts and inferences were articulated by the trial court in the findings of fact it made concurrent with its verdict. Hunsaker failed to marshal these facts in arguing insufficiency of the evidence.

POINT II: **WEST VALLEY CITY POLICE OFFICERS HAD REASONABLE SUSPICION TO DETAIN AND QUESTION HUNSAKER PRIOR TO HIS ARREST.**

The trial court, based on the totality of the circumstances surrounding the vehicle stop and detention of Hunsaker, found that Officer Pearce had reasonable suspicion to suspect that Hunsaker may be involved in criminal activity. The reasonable suspicion was raised by communication to Officer Pearce directly from a security person at the Westerner bar that the defendant may have been involved in an altercation inside the bar. The Court found that

the security person was well known to Officer Pearce, that Officer Pearce knew the security person to be in radio contact with other security personnel inside the bar and that the suspects were directly pointed out to Officer Pearce by the security personnel.

POINT III: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SETTLE THIS CASE BY APPROVING A PLEA BARGAIN AGREEMENT.

Whether or not to accept or reject a proposed plea agreement is within the sound discretion of the trial court. Hunsaker has presented this court with no basis for determining that the trial court in this case abused its discretion in refusing to approve a proposed plea agreement.

DETAIL OF THE ARGUMENT

POINT I: THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS SUFFICIENT TO SUSTAIN A GUILTY VERDICT ON THE CHARGE OF DRIVING UNDER THE INFLUENCE OF ALCOHOL.

A challenge to the sufficiency of the evidence in a criminal case is governed by a clear and unambiguous standard. The Utah Supreme Court has articulated that standard as follows:

When reviewing the findings of a trial judge sitting without a jury, this court will overturn a guilty verdict only if it is clearly erroneous. *State v. Walker*, 743 P.2d

191, 192-93 (Utah 1987). The basis of this standard is rule 52(a), Utah Rules of Civil Procedure, "Findings by the court":

In all actions tried upon the facts without a jury... the court shall find the facts specially and state separately its conclusions of law thereon... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

State v. Taylor, 818 P.2d 1030 (Utah 1991) (Footnote omitted).

The Supreme Court has defined the "clearly erroneous" standard as follows:

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Further clarification is offered by Wright & Miller:

The appellate court... does not consider and weigh the evidence de novo. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.

State v. Walker, 743 P.2d 191 (Utah 1987).

Finally, the Utah Court of Appeals followed the guidance of the Utah Supreme Court in *State v. Germondo*, 886 P.2d 50 (Utah 1983), by stating:

In considering the challenge to the sufficiency of the evidence, we review the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict... If, during the review, we find some evidence or inferences upon which findings of all the requisite elements of the crime can reasonably be made, we affirm.

State v. Perry, 871 P.2d 576 (Utah App. 1994).

An examination of the record of this case demonstrates that the evidence presented to the trial court was more than sufficient to sustain a conviction. Also, the Appellant's brief fails to adequately marshal the evidence against him, specifically including the evidence cited by the court in making its ruling. Marshaling the evidence supporting the conviction is a requirement of Utah law. *State v. Moosman*, 794 P.2d 474 (Utah 1990). That evidence which supports the conviction and was relied upon by the trial court can be fairly summarized as follows:

1. The defendant was in physical control of and operating a motor vehicle. (Tr. 14-16)
2. That Hunsaker had the odor of alcohol on his breath. (Tr. 29).

3. That Hunsaker was observed by Officer Newbold as swaying, being unstable, and having difficulty in standing. (Tr. 29).
4. That upon administration of a horizontal gaze nystagmus test by Officer Newbold, Hunsaker performed in all aspects of the test as would be expected from a person who had been consuming alcohol. (Tr. 30-35).
5. Hunsaker was also unable to satisfactorily complete the one leg stance field sobriety test administered by Officer Newbold. The court specifically found that Hunsaker was only able to count to five and then put his foot down. He then raised his foot again and counted from six to 13 before again putting his foot down. Finally, he raised his foot, counted 14 and 15 and then discontinued the test. (Tr. 35-18).
6. Upon lowering his foot and discontinuing the one leg stance field sobriety test, the court found that Hunsaker told the officer, "I can't do it, I've had too much, just arrest me." (Tr. 38).
7. The court also found that Mr. Hunsaker's testimony lacked credibility. (Tr. 150-152). Specifically, Hunsaker's extensive testimony that no disturbance or altercation

had occurred in the bar was specifically contradicted by the testimony of his wife, April Hunsaker. She testified that he told her of the disturbances when she picked him up at the police station following his arrest. (Tr.92-94, 132-133). Also, Hunsaker changed his testimony regarding the clothing he was wearing that night, and his description of the position of his arms during the one leg stance field sobriety test was contradicted by the testimony of Officer Newbold. (Tr. 100-101, 115-117, 130-131, 102-103, 117-118, 136-137).

Based on the foregoing, it is clear that the trial court was presented with sufficient evidence or inferences upon which findings of all the elements of the crime of driving under the influence can be made. The trial court made an excellent record of its findings of fact in announcing its verdict. (Tr. 147-152). The only evidence presented which contradicted the evidence of guilt was the testimony of Hunsaker, which the trial court clearly regarded as having little credibility.

The verdict of the trial court in this case is clearly supported by sufficient evidence in the record and should be affirmed.

**POINT II: WEST VALLEY CITY POLICE OFFICERS HAD
REASONABLE SUSPICION TO DETAIN AND
QUESTION HUNSAKER PRIOR TO HIS
ARREST.**

West Valley City agrees with Hunsaker that the stopping of a motor vehicle and detention of its occupants constitutes a seizure within the meaning of Article 1, Section 14 of the Utah Constitution and the Fourth Amendment to the Constitution of the United States. *State v. Case*, 884 P.2d 1274 (Utah App. 1994). The City also agrees that a limited crime investigation stop is justified if there is a reasonable suspicion of criminal activity. As the court stated in *Case*:

While the required level of suspicion is lower than the standard required for probable cause to arrest, the same totality of facts and circumstances approach is used to determine if there are sufficient "specific and articulable facts" to support reasonable suspicion. *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. See *United States v. Sokolow*, 490 U.S. 1, 7-8, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1 (1989). Accord *State v. Bello*, 871 P.2d 584, 587 (Utah App. 1994); *Strickling*, 844 P.2d at 983.

Case, at p. 1276.

The Court of Appeals has stated that in determining the existence of reasonable suspicion, a court must look to the totality of the circumstances. The conduct observed must suggest to an officer, in light of that officer's experience, that criminal

activity may be afoot. *State v. Nguyen*, 878 P.2d 1183 (Utah App. 1994). In this case, the trial court found the following facts:

1. Officer Pearce was patrolling the Westerner Bar parking lot as part of his normal and regular duties. The court found that this was something the officer frequently does and "he goes as part of his duty to the Westerner parking lot to check up on and with security officers of the Westerner to see if things are in control, if any illegal activity or problems criminally are going on." (Tr. p. 87).
2. The court found that Officer Pearce had established a relationship with the security officers at the Westerner. (Tr. 87).
3. The court found that the security officers for the Westerner are there to maintain peace and order and have a regular interchange with West Valley City police officers. (Tr. 87).
4. The court found that in this particular situation Officer Pearce had made contact with a specific security officer 15 minutes prior to being advised of the situation involving Hunsaker. The court specifically found that

Officer Pearce was already on the scene and knew the security officer personally. (Tr. 88).

5. The trial court found that 15 minutes after Officer Pearce's first contact with the security officer, he was advised by the security officer that there were persons in the Westerner parking lot who were intoxicated and had attempted to cause fighting inside the Westerner bar. (Tr. 88).

Based on the totality of these facts, the trial court determined that Officer Pearce was privy to articulable facts that would give an officer a reasonable suspicion that there was criminal activity afoot. Based on those facts, the court determined that Officer Pearce's detention of the Hunsaker vehicle was lawful and appropriate. (Tr. 89-90).

Hunsaker has mistakenly relied on a line of cases specifically dealing with vehicle stops made in response to police dispatch bulletins or fliers. That is clearly not the situation in this case.

Officer Pearce did not receive any information regarding this situation through police dispatch or a police flyer. Officer Pearce received his information, regarding possible criminal activity by Hunsaker, directly from a citizen, albeit a citizen acting as a

security person or "bouncer" for the Westerner bar. Officer Pearce was familiar with the individual providing the information and was aware that the security person was in radio contact with other bar employees inside the Westerner. (Tr. 19-20) This is simply not analogous to a "dispatch stop" case as those cited by Hunsaker, such as *State v. Case*, 884 P.2d 1274 (Utah App. 1994). In *State v. Case*, the court raised several questions regarding facts that are often missing in dispatch cases. The court stated:

However, the findings wholly fail to establish the department's reasonable, articulable suspicion to issue the "possible car prowler" bulletin to officers on duty. We are left to speculate as to how the dispatch instructions came to be made: Was a call received from a citizen? If so, what did the citizen say? Did the dispatcher interpret the report? If so, in what manner? Did a supervising officer direct that the investigation be made based on a pattern of similar activity in the area? If so, what were the sources of the supervisor's information? Merely providing descriptive information to an officer about *whom* to stop, by itself, is not enough to justify the stop if there are no articulable facts point to which establish *why* a stop was to be made.

Case at p.1278 (Footnote omitted) (Emphasis in original).

In this case, no such questions existed. Officer Pearce was on the scene prior to the time the incident occurred. Also, Officer Pearce was and had been in direct contact with the person from whom he received information. He worked with this person on

a frequent basis and knew him to be in direct radio contact with other personnel inside the Westerner bar. Furthermore, the person relaying the information to Officer Pearce provided Pearce with a description of the suspected criminal activity and directly pointed out the individuals suspected to be involved. (The altercation in the bar was later confirmed by the testimony of April Hunsaker. Tr. 132-133). Based on the foregoing, it is clear that the totality of the facts incident to the stop and detention of Hunsaker provided Officer Pearce with a reasonable suspicion of criminal activity. The trial court's analysis of those facts was correct and should be affirmed.

POINT III: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SETTLE THIS CASE BY APPROVING A PLEA BARGAIN AGREEMENT.

The City agrees with Hunsaker's description of Rule 11 of the Utah Rules of Criminal Procedure and the relevant case law when Hunsaker states "it appears to be well established as a matter of law that a trial judge is generally under no duty to accept a negotiated settlement of a case, nor is he bound by any agreement between the parties, and that the acceptance of a plea of guilty to a lesser offense included in the offense charge is generally a

matter addressed to the sound discretion of the court. (Appellant's brief, p. 16-17).

In this case, Hunsaker has provided no citation to the record indicating he objected to the trial courts refusal of the plea agreement, nor is the City able to locate such an objection in the record. This being an issue raised for the first time on appeal, it is therefore not appropriate for the Appellate Court to consider this argument. *State v. Jaeger*, 265 Utah Adv. Rep. 23 (Utah App. 1995).

Hunsaker makes essentially two arguments as a basis for his contention that the trial court abused its discretion in refusing to approve the plea agreement. Neither argument is persuasive.

First, Hunsaker argues that a plea agreement should have been approved because of the weakness of the prosecution's case. Apparently, however, the prosecution's case was not as weak as Hunsaker would have this court believe since he was, in fact, convicted. Had the case been a truly weak case, it would not have been supported by the evidence at trial and Mr. Hunsaker would have been found not guilty. This argument is further undermined by Hunsaker's apparently willingness to accept a plea agreement requiring him to plead guilty to an alcohol related reckless driving charge. Apparently, the prosecution's case was strong

enough that Hunsaker was willing to plead guilty to a reduced charge rather than proceed to trial in hopes that the City could not prove its case.

Hunsaker's second abuse of discretion argument concerns the trial court's ability to disapprove plea agreements unlawfully impinges upon the discretion of the prosecutor. This is not an abuse of discretion argument at all, but is rather a direct attack on the court's ability to approve and disapprove a plea agreement as set forth in Rule 11, Utah Rules of Criminal Procedure, and the cases cited approvingly by Hunsaker. The process for the approval of a plea agreement by the trial court is clearly set forth in Rule 11 and the trial court in this case did not abuse its discretion in refusing to approve the plea agreement.

The reason stated by the trial court was "...I don't allow a plea negotiation to a reckless driving after there has been a previous conviction or one previous reckless driving alcohol related. That's just, in my mind, upsetting the scheme of things as the legislature has proposed it."

The foregoing provides valid basis for the trial court's refusal to approve a plea agreement in this case. Hunsaker has failed to demonstrate that the trial court abused its discretion in

refusing to approve the plea and the decision of the trial court should be upheld.

CONCLUSION

Based on the foregoing, the City respectfully requests that Hunsaker's appeal be denied, and the conviction of the trial court be affirmed.

DATED this 29th day of November, 1995.

WEST VALLEY CITY

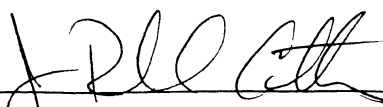


CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 29th day of November, 1995, I served upon Tom Jones two (2) copies of the Brief of the Appellee, by causing said Briefs to be mailed to him, by first class mail, with sufficient postage prepaid, to the following address:

Tom Jones
Attorney at Law
211 East Broadway, Suite 217
Salt Lake City, UT 84111

WEST VALLEY CITY



J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee

ADDENDUM

UTAH RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill pursuant to Rule 21.5. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(2) the plea is voluntarily made;

(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(4) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements,

(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences,

(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached,

(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea, and

(8) the defendant has been advised that the right of appeal is limited

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) (1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(h) (1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(Amended effective May 1, 1993.)

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

- (1) (a) A person may not operate or be in actual physical control of a vehicle within this state if the person:
 - (i) has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control; or
 - (ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.
- (2) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.
- (3) (a) A person convicted the first or second time of a violation of Subsection (1) is guilty of a:
 - (i) class B misdemeanor; or
 - (ii) class A misdemeanor if the person:
 - (A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner; or
 - (B) had a passenger under 16 years of age in the vehicle at the time of the offense.

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

(c) In this section, a reference to this section includes any similar local ordinance adopted in compliance with Section 41-6-43.
- (4) (a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours nor more than 240 hours.

(b) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 24 hours nor more than 50 hours.

(c) (i) In addition to the jail sentence or community-service work program, the court shall order the person to participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility, as appropriate.

(ii) For a violation committed after July 1, 1993, the court may order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility if the licensed alcohol or drug dependency rehabilitation facility determines that the person has a problem condition involving alcohol or drugs.
- (5) (a) Upon a second conviction for a violation committed within six years of a prior violation under this section the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours nor more than 720 hours.

(b) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 80 hours nor more than 240 hours.

- (c) In addition to the jail sentence or community-service work program, the court shall order the person to participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility, as appropriate. The court may, in its discretion, order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.
- (6) (a) A third conviction for a violation committed within six years of two prior violations under this section is a:
 - (i) class B misdemeanor except as provided in Subsections (ii) and (7); and
 - (ii) class A misdemeanor if both of the prior convictions are for violations committed after April 23, 1990.

(b) (i) Under Subsection (a)(i) the court shall as part of any sentence impose a mandatory jail sentence of not less than 720 nor more than 2,160 hours.

(ii) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours.

(iii) In addition to the jail sentence or community-service work program, the court shall order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility, as appropriate.
 - (c) (i) Under Subsection (a)(ii) the court shall as part of any sentence impose a fine of not less than \$1,000 and impose a mandatory jail sentence of not less than 720 hours nor more than 2,160 hours.
 - (ii) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours, but only if the court enters in writing on the record the reason it finds the defendant should not serve the jail sentence. Enrollment in and completion of an alcohol or drug dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long-term closely supervised follow through after the treatment.
 - (iii) In addition to the jail sentence or community-service work program, the court shall order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.
- (7) (a) A fourth or subsequent conviction for a violation committed within six years of the prior violations under this section is a third degree felony if at least three prior convictions are for violations committed after April 23, 1990.

(b) The court shall as part of any sentence impose a fine of not less than \$1,000 and impose a mandatory jail sentence of not less than 720 hours nor more than 2,160 hours.

(c) (i) The court may, as an alternative to jail, require the person to work in a community-service work program for not less than 240 nor more than 720 hours, but only if the court enters in writing on the record the reason it finds the defendant should not serve the jail sentence.

(ii) Enrollment in and completion of an alcohol or drug dependency rehabilitation program approved by the court may be a sentencing alternative to incarceration or community service if the program provides intensive care or inpatient treatment and long-term closely supervised follow through after the treatment.

- (d) In addition to the jail sentence or community-service work program, the court shall order the person to obtain treatment at an alcohol or drug dependency rehabilitation facility.
- (8) (a) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.
- (b) The department may not reinstate any license suspended or revoked as a result of the conviction under this section, until the convicted person has furnished evidence satisfactory to the department that:
- (i) all required alcohol or drug dependency assessment, education, treatment, and rehabilitation ordered for a violation committed after July 1, 1993, have been completed;
 - (ii) all fines and fees including fees for restitution and rehabilitation costs assessed against the person have been paid, if the conviction is a second or subsequent conviction for a violation committed within six years of a prior violation; and
 - (iii) the person does not use drugs in any abusive or illegal manner as certified by a licensed alcohol or drug dependency rehabilitation facility, if the conviction is for a third or subsequent conviction for a violation committed within six years of two prior violations committed after July 1, 1993.
- (9) (a) (i) The provisions in Subsections (4), (5), (6), and (7) that require a sentencing court to order a convicted person to: participate in an assessment and educational series at a licensed alcohol or drug dependency rehabilitation facility; obtain, in the discretion of the court, treatment at an alcohol or drug dependency rehabilitation facility; obtain, mandatorily, treatment at an alcohol or drug dependency rehabilitation facility; or do any combination of those things, apply to a conviction for a violation of Section 41-6-45 that qualifies as a prior conviction under Subsection (10).
- (ii) The court shall render the same order regarding education or treatment at an alcohol or drug dependency rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under Section 41-6-45 that qualifies as a prior conviction under Subsection (10), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), (6), and (7).
- (b) For purposes of determining whether a conviction under Section 41-6-45 that qualified as a prior conviction under Subsection (10), is a first, second, or subsequent conviction under this subsection, a previous conviction under either this section or Section 41-6-45 is considered a prior conviction.
- (c) Any alcohol or drug dependency rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Human Services.
- (10) (a) (i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45 or of an ordinance enacted under Section 41-6-43 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.
- (ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.
- (b) (i) The court shall advise the defendant before accepting the plea offered under this subsection of the consequences of a violation of Section 41-6-45 as follows.
- (ii) If the court accepts the defendant's plea of guilty or no contest to a charge of violating Section 41-6-45, and the prosecutor states for the record that there was consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation, the resulting conviction is a prior conviction for the purposes of Subsections (5), (6), and (7).
- (c) The court shall notify the department of each conviction of Section 41-6-45 that is a prior offense for the purposes of Subsections (5), (6), and (7).
- (11) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.
- (12) (a) The Department of Public Safety shall:
- (i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (1); and
 - (ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (1) if the violation is committed within a period of six years from the date of the prior violation.
- (b) The department shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223, if the previous suspension was based on the same occurrence upon which the record of conviction is based. 1994