

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellee,

v.

Wesley Lloyd,

Defendant-Appellant.

:
: Case No. 2011-212
:
:
: On Appeal from the Holmes County
: Court of Appeals, Fifth Appellate
: District, Case No. 09CA12
:
:

Reply Brief of Appellant Wesley Lloyd

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Summary of Argument

When determining how to treat an out-of-state conviction for purposes of Ohio's sex offender registration and notification law, R.C. 2950.01 directs Ohio courts to compare only the out-of-state law to Ohio law. The statute does not permit either the State or defendant to look beyond the text of the statutes.

A Texas conviction for "aggravated sexual assault" differs in substance from all Ohio sex offenses because the Texas statute does not require proof of at least one element in each of Ohio's sex offenses. As a result, the Texas offense is equivalent only to an Ohio charge of aggravating menacing, which does not trigger Ohio's registration laws.

Argument

Proposition of Law No. I:

A court should conduct a "substantially equivalent" elemental test to determine whether a person with an out-of-state sex offense has a duty to register under R.C. 2950.01(A).

Proposition of Law No. II:

Withdrawn by Appellant

Proposition of Law No. III:

A court should conduct a strict elemental comparison of an out-of-state offense when determining the level of offense for failing to properly register or give proper notice of an address change in Ohio under R.C. 2950.99.

I. Uncontested Matters

The State's description of the facts concedes that Mr. Lloyd regularly registered in Auglaize County, notified the Auglaize County Sheriff's Office of his move to Holmes County on the day of the move, and that the Holmes

County Sheriff found and arrested Mr. Lloyd twelve days later living exactly where he told the Auglaize County Sheriff he would be. Brief of Appellee at 3-4, Appendix to Brief of Appellee at A-15 to A-24. For this, the State of Ohio successfully prosecuted Mr. Lloyd for a first-degree felony and obtained a three-year prison term followed by five years of mandatory postrelease control.

The State also does not dispute that the Auglaize County Sheriff's office told Mr. Lloyd that he could not register in Holmes County until he returned to Auglaize County to fill out paperwork in person. The State could not have disputed this fact because the Auglaize County Sheriff's Deputy charged with monitoring sex offenders testified, "I told Mr. Lloyd that he had to come into our facility so we could register him as moving to Holmes County." T.p. 32. Further, the trial court found that on the day he moved, Mr. Lloyd:

called the Auglaize County Sheriff's Department and spoke with Corrections Officer Neal Brincefield. The defendant told him he was now living in Holmes County and provided Officer Brincefield with an address. The officer advised the defendant that he must come in to Auglaize County personally [and] change his address in writing. The defendant responded he didn't know when he could make it back to Auglaize County.

T.p. 3 (sentencing).

The State also does not dispute that Officer Brincefield's order was wrong. Contrary to Officer Brincefield's order, Mr. Lloyd did not have to delay registering in Holmes County until he could arrange round trip transportation to Auglaize County to tell the Auglaize County Sheriff's Department what it already knew.

Further, the State attached to its brief numerous registration forms that Mr. Lloyd signed in Auglaize County. Those forms demonstrate Mr. Lloyd's good faith efforts to comply with a law that probably did not even apply to him. He only fell out of compliance after Officer Brincefield illegally told Mr. Lloyd that Mr. Lloyd could not yet register in Holmes County.

Finally, the State does not contest Mr. Lloyd's argument that being a "spouse" is not substantially equivalent to being "not a spouse." The Ohio General Assembly has recognized this substantial distinction in drafting the sexual assault statutes. Compare R.C. 2907.02(A) ("No person shall engage in sexual conduct with another who is not the spouse of the offender. . .") with R.C. 2907.02(B) ("No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.") And the First District Court of Appeals has correctly held that a foreign statute that does not have a non-spousal element cannot be substantially similar to an Ohio offense that does. *Doe v. Leis*, Hamilton App. No. C-050591, 2006-Ohio-4507, ¶10. While there may be strong policy arguments that support eliminating that distinction, those concerns should be addressed to the General Assembly, not this Court.

Accordingly, if the State loses its argument that "purposeful" is substantially similar to "knowing," no Ohio statute that has a spousal requirement can be substantially equivalent to the Texas statute that Mr. Lloyd was convicted of violating.

II. An Error in Appellant's Merit Brief

The State is correct that the second proposition of law presented in Mr. Lloyd's merit brief was wrong. In the merit brief, counsel incorrectly asserted that if the out-of-state offense constituted a misdemeanor in Ohio, no punishment would result. Mr. Lloyd's counsel apologizes for the error.

The brief came to this conclusion based on the assertion that "comparable category of offense" was not defined. But as the State correctly noted, 2950.01(A)(3) defines "comparable category of offense" as:

"[an offense] that is a violation of an existing or former law of another state and that, if it had been committed in this state, would constitute or would have constituted . . . a felony of the first, second, third, or fourth degree for purposes of division (A)(1)(a)(ii) of this section, a felony of the fifth degree or a misdemeanor for purposes of division (A)(1)(a)(iii) of this section, aggravated murder or murder for purposes of division (A)(1)(b)(i) of this section, a felony of the first, second, or third degree for purposes of division (A)(1)(b)(ii) of this section, a felony of the fourth or fifth degree for purposes of division (A)(1)(b)(iii) of this section, or a misdemeanor for purposes of division (A)(1)(b)(iv) of this section."

In accordance with this definition, if this Court finds that Mr. Lloyd was subject to registration in Ohio under his First Proposition of Law, Mr. Lloyd could be sentenced for his registration offense if the Texas offense of aggravated sexual assault "would constitute" a first, second, third, fourth or fifth degree felony or a misdemeanor "if it had been committed in this state[.]" As a result, Mr. Lloyd withdraws the second proposition of law in his merit brief.

III. Discussion

A. When two offenses differ in wording, but not substance, they are “substantially similar.” When two offenses differ in substance, they are not “substantially similar.”

The State was correct to focus on the differences of wording in the statutes discussed in *Rodimal v. Cook County Sheriff's Office* (Ill. App. Ct. 2004), 111 Ill. App.3d 744, 822 N.E. 2d 7, and *Commonwealth v. Robertson* (Pa. 1999), 555 Pa. 72, 79-80, 722 A.2d 1047, 1051. Those cases explain how Illinois and Pennsylvania approach decide whether a foreign sex offense is “substantially similar” to their local laws. In both cases, the courts decided that foreign offenses were “substantially similar” even though their elements were differently worded. But those examples demonstrate that “substantially similar” means just that—similar in substance even if worded differently.

In *Rodimal*, the Illinois court found that a military conviction that required proof of an “assault” was substantially similar to the “force” language in the Illinois Statute. *Rodimal*, 111 Ill. App.3d at 748, citing *United States v. Foster* (C.M.A. 1994), 40 M.J. 140, 145. Likewise, the Pennsylvania Supreme Court found substantially equivalent the terms “intoxicated” and “under the influence of alcohol to a degree which rendered him incapable of safe driving[.]” 555 Pa. 72, at 77 and 79, citing 75 Pa.C.S. §3731(a) (1994) and Md.Code. Transp. § 21-902(a) (1998).

“Force” is substantially similar to “assault” because a person who has assaulted has used force. And “intoxicated” is substantially similar to “driving under the influence of alcohol to a degree which rendered [the driver] incapable

of safe driving[.]” But “knowing” is not substantially similar to “purposeful”; and “not a spouse” is not substantially similar to “a spouse.”

In its brief, the State asks, “Under what circumstance could Lloyd have satisfied all the elements of Aggravated Sexual Assault knowingly and not also have assaulted his victim purposely?” Brief of Appellee at 8. This Court provided one answer for that question in *State v. Wilkins* (1980), 64 Ohio St.2d 382, 386-387, expressly holding that there is a substantial difference between “knowing” and “purposeful” act in the context of a rape charge:

It is possible for a person to compel another to engage in sexual conduct by force or threat of force knowingly but not purposely. A person could subjectively believe that there is consent where there is none, and in using his strength could coerce another to submit by force. In such a case he would not intend to do the prohibited act. However, if he is aware of the circumstances that probably exist and that under such circumstances there probably is no consent he would have knowingly coerced another to engage in sexual conduct by force. Consequently, sexual battery as defined in R. C. 2907.03(A)(1) may be a lesser included offense of rape as defined in R. C. 2907.02(A)(1) where force is present.

Another possibility that a defendant intended only to come close to causing “penetrat[ion]” but actually penetrated. In such a case, he could be convicted of acting “knowingly,” but not “purposefully.”

The distinction matters because it is the General Assembly that has chosen to make a distinction between “knowing” and “purposeful.” Some crimes require purposeful conduct, while others require mere knowing conduct. If the General Assembly intended for “knowing” and “purposeful” to mean the same thing, it would have merged the two.

B. The statutory language controls over the language of the indictment or the actual conduct of the previous offense.

The State asserts that because the indictment stated “intentionally and knowingly,” this Court should disregard both the statute and the jury instructions which told the jury to convict Mr. Lloyd if he committed the act “intentionally or knowingly[.]” Brief at 7, n.2. The State is wrong for two reasons. First, the General Assembly intended for courts to compare the foreign statute to an Ohio statute, not the out-of-state conduct to an Ohio statute. And even if Ohio trial courts must look beyond the out-of-state statute, the Texas trial court in this case specifically directed the jury to convict Mr. Lloyd if it found that he acted knowingly. The jury instruction regarding the mental state is at page A-3 of the appendix to the State’s merit brief.

1. This Court should conduct an elemental analysis of the two statutes because R.C. 2950.01 requires that the “law of another state” be substantially similar to “any [Ohio] offense listed[.]”

R.C. 2950.01(f) states that a “sexually oriented offense” means a “violation of any . . . law of another state . . . that is or was substantially equivalent to any offense listed in division (D)(1)(a), (b), (c), (d), or (e) of this section[.]” The paragraph plainly requires Ohio courts to compare the foreign “law” to a specific list of Ohio offenses.

More importantly, the words “is or was” before “substantially equivalent” demonstrate that the paragraph refers to statutes, not conduct. Statutes change from year to year, sometimes from month to month. An act that is a violation one day may not be a violation the next. So the “is or was” language

is needed to include defendants regardless of whether their crime is still a crime. On the other hand, the act that constitutes a violation is and will always be what it is—the acts underlying a charge are fixed in time, and there is no need to state “is or was.” The General Assembly intended Ohio courts to compare only statutory language, not to retry the facts of out-of-state trials that occurred more than fifteen years ago.

2. Even if this Court looked beyond the statute, Mr. Lloyd prevails because the jury instructions would control over the indictment.

As the appendix to the State’s brief demonstrates, the Texas jury was instructed to convict Mr. Lloyd if he acted knowingly or intentionally. Appendix to Brief of Appellee at A-3. It is true that the indictment said “knowingly and intentionally” and that the verdict forms and judgment entry say that Mr. Lloyd was convicted as indicted. But this Court has held repeatedly that “[a] trial jury is presumed to follow the instructions given to it by the judge.” *Beckett v. Warren* (2010), 124 Ohio St. 3d 256, quoting *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, citing *Parker v. Randolph* (1979), 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713. Texas has an identical rule. *In the Interest of J.F.C.* (Tex. 2002), 96 S.W.3d 256, 298 (“We presume that the jury understood and followed its instructions”). Judges expect juries to follow their instructions, not to search through other papers to see if they believe the judge’s instructions might be incorrect. So while the court speaks through its journal, the jury is presumed to have followed its instructions. And those instructions ordered the

jury to convict Mr. Lloyd of aggravated sexual assault if they found that he acted “knowingly[.]”

C. Mr. Lloyd would prevail even if the State could look behind the offense to the facts of the case, because the State offered no evidence about the facts of the Texas case.

Finally, even if the State were allowed to look beyond the elements of the Texas Offense, the State did not do so here. The State rested its argument on the indictment, jury instructions and judgment entry from Texas, none of which explain any facts of the Texas case. If there is a fact that shows that Mr. Lloyd acted “purposefully” as opposed to “knowingly,” the State failed to introduce it into evidence.

The State also did not prove that the victim was not Mr. Lloyd’s spouse. Mr. Lloyd actually testified that he had once divorced the victim, but that they subsequently formed a common-law marriage. He said that was she was his “ex-wife” (in that their first marriage had led to a divorce), but they were living together in what a Texas clerk informed them was a lawful common-law (or “informal”) marriage. T.p. 102, see also Tex. Fam. Code §2.401 (recognizing common-law or “informal” marriage). The State did not present any evidence to rebut Mr. Lloyd’s testimony.

D. Looking to the facts would require trial courts to retry old, out-of-state offenses.

The State probably did not try to prove the facts of the underlying case because that would have required the State to retry a fifteen-year-old Texas criminal case. Such a retrial would create significant, expensive, and

complicated logistical problems, including locating Texas witnesses and issuing subpoenas to them, obtaining physical evidence from Texas law enforcement officials (or cross examining them about why the evidence was destroyed), and proving chain of custody from the time the evidence was collected until the time of the Ohio trial.

The difficulty in retrying old, out-of-state cases is a strong policy argument for looking only to the out-of-state statute, and not forcing the parties to relitigate old, out-of-state cases.

IV. Remedy

In his merit brief, Mr. Lloyd showed that the Texas offense of which he as convicted is substantially equivalent only to aggravated menacing, a first-degree misdemeanor in Ohio. R.C. 2950.01(A)(11). The Texas offense cannot be substantially equivalent to rape under R.C. 2907.02(B) because that section only applies to defendants who act purposefully. It cannot be rape under R.C. 2907.02(A), sexual battery, sexual imposition, or sexual imposition because those statutes only apply to defendants who assault people they are not married to. R.C. 2907.03(A), 2907.05(A), 2907.06(A).

Because the Texas offense of aggravated sexual assault is “substantially equivalent” only to a non-sex-offense Ohio misdemeanor, Mr. Lloyd was not required to register in Ohio.

In the alternative, if this Court finds that Mr. Lloyd was subject to registration, he is guilty of, at most, a fourth degree felony because under R.C.

2950.01(A)(1)(b)(iv) and (A)(3), aggravated sexual assault, “if it had been committed in this state, would constitute . . . a misdemeanor.”

The trial court should have dismissed the charges, found Mr. Lloyd not guilty, or, at a minimum, convicted him only of a fourth-degree felony, not a first-degree felony.

Conclusion

This Court should reverse the decision of the court of appeals and discharge Mr. Lloyd. In the alternative, this Court should vacate the decision of the court of appeals and remand this case for trial where Mr. Lloyd can be charged only with a fourth-degree felony.

Respectfully submitted,

Office of the Ohio Public Defender



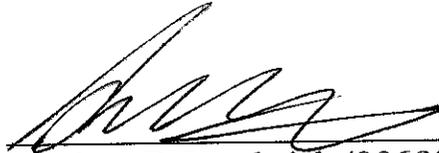
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Certificate of Service

I certify that on, a copy of the foregoing was sent via e-mail to Sean Mathew Warner, Assistant Prosecuting Attorney, Holmes County Prosecutor's Office, 164 East Jackson Street, Millersburg, OH 44654 at swarner@exchange.co.holmes.oh.us. this 17th day of October, 2011.



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Appendix to
Reply Brief of Appellant Wesley Lloyd



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PENNSYLVANIA STATUTES

ARCHIVE DATA

*** THIS DOCUMENT IS CURRENT THROUGH THE 1998 SUPPLEMENT (1997 SESSIONS) ***

TITLE 75. VEHICLES -- PENNSYLVANIA CONSOLIDATED STATUTES
PART III. OPERATION OF VEHICLES
CHAPTER 37. MISCELLANEOUS PROVISIONS
SUBCHAPTER B. SERIOUS TRAFFIC OFFENSES

75 Pa.C.S. § 3731 (1998)

[Pa.C.S.] § 3731. Driving under influence of alcohol or controlled substance

(A) OFFENSE DEFINED.-- A person shall not drive, operate or be in actual physical control of the movement of a vehicle in any of the following circumstances:

- (1) While under the influence of alcohol to a degree which renders the person incapable of safe driving.
- (2) While under the influence of any controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, to a degree which renders the person incapable of safe driving.
- (3) While under the combined influence of alcohol and any controlled substance to a degree which renders the person incapable of safe driving.
- (4) While the amount of alcohol by weight in the blood of:
 - (i) an adult is 0.10% or greater; or
 - (ii) a minor is 0.02% or greater.

(A.1) PRIMA FACIE EVIDENCE.--

- (1) It is prima facie evidence that:
 - (i) an adult had 0.10% or more by weight of alcohol in his or her

75 Pa.C.S. § 3731

blood at the time of driving, operating or being in actual physical control of the movement of any vehicle if the amount of alcohol by weight in the blood of the person is equal to or greater than 0.10% at the time a chemical test is performed on a sample of the person's breath, blood or urine;

(ii) a minor had 0.02% or more by weight of alcohol in his or her blood at the time of driving, operating or being in actual physical control of the movement of any vehicle if the amount of alcohol by weight in the blood of the minor is equal to or greater than 0.02% at the time a chemical test is performed on a sample of the person's breath, blood or urine; and

(iii) a person operating a commercial vehicle had 0.04% or more by weight of alcohol in his or her blood at the time of driving, operating or being in actual physical control of the movement of the commercial vehicle if the amount of alcohol by weight in the blood of a person operating a commercial vehicle is equal to or greater than 0.04% at the time a chemical test is performed on a sample of the person's breath, blood or urine.

(2) For the purposes of this section, the chemical test of the sample of the person's breath, blood or urine shall be from a sample obtained within three hours after the person drove, operated or was in actual physical control of the vehicle.

(B) AUTHORIZED USE NOT A DEFENSE.-- The fact that any person charged with violating this section is or has been legally entitled to use alcohol or controlled substances is not a defense to any charge of violating this section.

(C) CERTAIN ARRESTS AUTHORIZED.-- In addition to any other powers of arrest, a police officer is hereby authorized to arrest without a warrant any person who the officer has probable cause to believe has violated the provisions of this section, regardless of whether the alleged violation was committed in the presence of such officer. This authority to arrest extends to any hospital or other medical treatment facility located beyond the territorial limits of the police officer's political subdivision at which the person to be arrested is found or was taken or removed to for purposes of emergency treatment examination or evaluation provided there is probable cause to believe that the violation of this section occurred within the police officer's political subdivision.

(D) CERTAIN DISPOSITIONS PROHIBITED.-- The attorney for the Commonwealth shall not submit a charge brought under this section for Accelerated Rehabilitative Disposition if:

(1) the defendant has been found guilty of or accepted Accelerated Rehabilitative Disposition of a charge brought under this section within seven years of the date of the current offense;

(2) the defendant committed any other act in connection with the present offense which, in the judgment of the attorney for the Commonwealth, constitutes a violation of any of the specific offenses enumerated within section 1542 (relating to revocation of habitual offender's license); or

(3) an accident occurred in connection with the events surrounding the current offense and any person, other than the defendant, was killed or seriously injured as a result of the accident.

(E) PENALTY.--

(1) Any person violating any of the provisions of this section is guilty of a misdemeanor of the second degree, except that a person convicted of a third or subsequent offense is guilty of a misdemeanor of the first degree, and the sentencing court shall order the person to pay a fine of not less than \$ 300 and serve a minimum term of imprisonment of:

(i) Not less than 48 consecutive hours.

(ii) Not less than 30 days if the person has previously accepted Accelerated Rehabilitative Disposition or any other form of preliminary disposition, been convicted of, adjudicated delinquent or granted a consent decree under the Juvenile Act (42 Pa.C.S. § 6301 et seq.) based on an offense under this section or of an equivalent offense in this or other jurisdictions within the previous seven years.

(iii) Not less than 90 days if the person has twice previously been convicted of, adjudicated delinquent or granted a consent decree under the Juvenile Act based on an offense under this section or of an equivalent offense in this or other jurisdictions within the previous seven years.

(iv) Not less than one year if the person has three times previously been convicted of, adjudicated delinquent or granted a consent decree under the Juvenile Act based on an offense under this section or of an equivalent offense in this or other jurisdictions within the previous seven years.

(2) Acceptance of Accelerated Rehabilitative Disposition, an adjudication of delinquency or a consent decree under the Juvenile Act or any other form of preliminary disposition of any charge brought under this section shall be considered a first conviction for the purpose of computing whether a subsequent conviction of a violation of this section shall be considered a second, third, fourth or subsequent conviction.

(3) The sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory penalties of this section.

(4) The Commonwealth has the right to appeal directly to the Superior Court any order of court which imposes a sentence for violation of this section which does not meet the requirements of this section. The

Superior Court shall remand the case to the sentencing court for imposition of a sentence in accordance with the provisions of this section.

(5) Notwithstanding the provision for direct appeal to the Superior Court, if, in a city of the first class, a person appeals from a judgment of sentence under this section from the municipal court to the common pleas court for a trial de novo, the Commonwealth shall have the right to appeal directly to the Superior Court from the order of the common pleas court if the sentence imposed is in violation of this section. If, in a city of the first class, a person appeals to the court of common pleas after conviction of a violation of this section in the municipal court and thereafter withdraws his appeal to the common pleas court, thereby reinstating the judgment of sentence of the municipal court, the Commonwealth shall have 30 days from the date of the withdrawal to appeal to the Superior Court if the sentence is in violation of this section.

(6) Any person who accepts Accelerated Rehabilitative Disposition of any charge brought under this section shall accept as conditions the imposition of and the judge shall impose in addition to any other conditions all of the following:

(i) A fee to cover the costs referred to in section 1548(e) (relating to costs).

(ii) A mandatory suspension of operating privilege for a period of not less than one month but not more than 12 months.

(iii) A condition that the defendant, as a condition to entering the program, make restitution to any person who incurred determinable financial loss as a result of the defendant's actions which resulted in a charge of violating this section.

(iv) Court supervision for any defendant required to make restitution or submit to counseling or treatment.

(v) Court supervision for a period of not less than six months when the Court Reporting Network indicates that counseling or treatment is not necessary and not less than 12 months when the Court Reporting Network indicates that counseling or treatment is in order.

(vi) A fee to cover the reasonable costs, if any, of a municipal corporation in connection with a charge brought under this section which results in Accelerated Rehabilitative Disposition.

(7) Accelerated Rehabilitative Disposition or other preliminary disposition of any charge of violating this section may be revoked and the court shall direct the attorney for the Commonwealth to proceed on the charges as prescribed in general rules if the defendant:

(i) is charged with or commits any crime enumerated in Title 18 (relating to crimes and offenses) or in section 1542 within the probationary period;

(ii) fails to make restitution as provided for in this section;

(iii) fails to successfully complete the alcohol highway safety school required by section 1548(b);

(iv) fails to successfully complete any program of counseling or treatment, or both, required as a condition of Accelerated Rehabilitative Disposition; or

(v) violates the terms and conditions of Accelerated Rehabilitative Disposition in any other way.

(7.1) In addition to the conditions set forth in paragraph (7) for Accelerated Rehabilitative Disposition of any charge brought under this section, the judge may impose, and the person shall accept, the condition that the person engage in a program of collecting litter from public and private property, especially property which is littered with alcoholic beverage containers. The duration of the person's participation in a litter collection program shall not exceed the duration of the probationary period imposed on the person under Accelerated Rehabilitative Disposition.

(8) With the exception of program costs referred to in section 1548(e) or any restitution referred to in this section, and with the exception of any fees imposed pursuant to paragraph (6)(vi) which shall be distributed to the affected municipal corporation, any fee or financial condition imposed by a judge as a condition of Accelerated Rehabilitative Disposition or any other preliminary disposition of any charge under this section shall be distributed as provided for in 42 Pa.C.S. §§ 3571 (relating to Commonwealth portion of fines, etc.) and 3573 (relating to municipal corporation portion of fines, etc.).

(F) PRELIMINARY HEARING OR ARRAIGNMENT.-- The presiding judicial officer at the preliminary hearing or preliminary arraignment, relating to any charge of a violation of this section, shall not reduce or modify the original charges.

(G) Expired. 1984, Feb. 12, P.L. 53, No. 12, effective June 11, 1988.

(H) WORK RELEASE.-- In any case in which a person is sentenced to a period of imprisonment as a result of a conviction for violating any provision of this section, the judicial officer imposing that sentence shall consider assigning that person to a daytime work release program pursuant to which the person would be required to collect litter from public and private property, especially property which is littered with alcoholic beverage containers.

(I) DRIVING A COMMERCIAL MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR CONTROLLED SUBSTANCE.-- A person shall not drive, operate or be in physical control of the movement of any

commercial vehicle while:

- (1) under the influence of alcohol;
- (2) under the influence of any controlled substance as defined in section 1603 (relating to definitions);
- (3) under the combined influence of alcohol and any controlled substance; or
- (4) the amount of alcohol by weight in the person's blood is 0.04% or more.

(J) DEFINITIONS.-- As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"ADULT." A person 21 years of age or older.

"MINOR." A person under 21 years of age.



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*** ARCHIVE MATERIAL ***

*** THIS DOCUMENT IS CURRENT THROUGH THE 1998 SUPPLEMENT ***
*** 1998 REGULAR SESSION ***

TRANSPORTATION
TITLE 21. VEHICLE LAWS -- RULES OF THE ROAD
SUBTITLE 9. RECKLESS, NEGLIGENT, OR IMPAIRED DRIVING; FLEEING OR ELUDING POLICE

Md. TRANSPORTATION Code Ann. § 21-902 (1998)

§ 21-902. Driving while intoxicated, while intoxicated per se, under the influence of alcohol, or under the influence of a drug, a combination of alcohol and a drug, or a controlled dangerous substance

(a) Driving while intoxicated or intoxicated per se. --

(1) A person may not drive or attempt to drive any vehicle while intoxicated.

(2) A person may not drive or attempt to drive any vehicle while the person is intoxicated per se.

(b) Driving while under the influence of alcohol. -- A person may not drive or attempt to drive any vehicle while under the influence of alcohol.

(c) Driving while under influence of drugs or drugs and alcohol. --

(1) A person may not drive or attempt to drive any vehicle while he is so far under the influence of any drug, any combination of drugs, or a combination of one or more drugs and alcohol that he cannot drive a vehicle safely.

(2) It is not a defense to any charge of violating this subsection that the person charged is or was entitled under the laws of this State to use the drug, combination of drugs, or combination of one or more drugs and alcohol, unless the person was unaware that the drug or combination would make him incapable of safely driving a vehicle.

(d) Driving while under influence of controlled dangerous substance. -- A person may not drive or attempt to drive any vehicle while he is under the influence of any controlled dangerous substance, as that term is defined in Article 27, § 279 of the Code, if the person is not entitled to use the controlled dangerous substance under the laws of this State.

HISTORY: An. Code 1957, art. 66 1/2, § 11-902; 1977, ch. 14, § 2; 1980, ch. 144; 1981, ch. 242; 1988, ch. 562; 1993, ch. 308; 1995, ch. 498; 1996, ch. 652, § 2; 1997, ch. 451.

NOTES: CROSS REFERENCES. --As to programs of alcoholism education or treatment for individuals convicted under this section, see § 8-404 of the Health-General Article.

EFFECT OF AMENDMENTS. --The 1996 amendment, approved May 23, 1996, and effective from date of enactment, substituted "is intoxicated per se" for "has an alcohol concentration of 0.10 or more as measured by grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath as determined at the time of testing" in (a) (2).

The 1997 amendment, effective June 1, 1997, reenacted the section without change.

EDITOR'S NOTE. --Section 2, ch. 308, Acts 1993, provides that "this Act shall be construed only prospectively and may not be applied or interpreted to require the imposition of a restriction for a second or subsequent violation occurring before October 1, 1993."

MARYLAND LAW REVIEW. --For symposium on compulsory use of chemical tests for alcoholic intoxication, see *14 Md. L. Rev. 111 (1954)*.

For article discussing chemical tests for alcoholic intoxication, see *17 Md. L. Rev. 193 (1957)*.

UNIVERSITY OF BALTIMORE LAW REVIEW. --For note, "Maryland's Drunk Driving Laws: An Overview," see *11 U. Balt. L. Rev. 357 (1982)*.

For comment discussing liquor vendor liability for torts of intoxicated patrons, see *12 U. Balt. L. Rev. 139 (1982)*.

UNIVERSITY OF BALTIMORE LAW FORUM. --For article, "Recent Developments," see *19.1 U. Balt. Law Forum 29 (1988)*.

CONSTITUTIONALITY OF SECTION. --There is no constitutional infirmity in this section on grounds of vagueness. While it is seemingly true that the standard, "intoxicated," is capable of more precise definition, the failure of the Maryland General Assembly and courts so to define the term is not a denial of due process in a case in which the evidence discloses beyond a reasonable doubt that defendant was "highly intoxicated," according to the generally accepted meaning of those words. *United States v. Channel, 423 F. Supp. 1017 (D. Md. 1976)*.

Subsections (a) and (b) of this section are not unconstitutionally vague. *Brooks v. State, 41 Md. App. 123, 395 A.2d 1224 (1979)*.

Subsections (a) and (b) of this section are not violative, on grounds of vagueness, of the due process of law clause of the *Fourteenth Amendment to the United States Constitution*. *Brooks v. State, 41 Md. App. 123, 395 A.2d 1224 (1979)*.

DOUBLE JEOPARDY. --A conviction for driving while intoxicated and under the influence of alcohol pursuant to this section following a mandatory suspension of a driver's license pursuant to § 16-205.1 of this article does not constitute double jeopardy, as this section is not designed to be punitive, but to protect other drivers. *Johnson v. State, 95 Md. App. 561, 622 A.2d 199 (1993)*.

LEGISLATIVE INTENT. --Wherever "driving while ability impaired by consumption of alcohol" shall appear in the Code, it is the legislative intent that "driving while under the influence of alcohol" shall be substituted and have the same meaning and effect. *Tereshuk v. State, 66 Md. App. 193, 503 A.2d 254 (1986)*.

SUBSECTIONS (A) AND (B) OF THIS SECTION WERE ENACTED IN INTEREST OF PUBLIC SAFETY to deter individuals who have consumed alcohol from driving on the highways of *Maryland*. *Brooks v. State, 41 Md. App. 123, 395 A.2d 1224 (1979)*.

DRIVING ON PRIVATE ROAD WHILE LICENSE SUSPENDED OR REVOKED. --Where the Agreed Statement of Facts revealed that the property on which defendant was driving was marked "No Trespassing" and thus was not used by the public in general, defendant's conviction for driving while his license was suspended or revoked was reversed. *Locklear v. State, 94 Md. App. 39, 614 A.2d 1338 (1992)*.

IT IS A VIOLATION OF THIS SECTION TO DRIVE A VEHICLE WHILE INTOXICATED ON PRIVATE PROPERTY which is not used by the public. *Rettig v. State*, 334 Md. 419, 639 A.2d 670 (1994).

DENIAL OF JURY TRIAL UNDER SUBSECTION (A) UNCONSTITUTIONAL. --The Maryland constitutional right to a jury trial in the first instance attaches to the offense of driving while intoxicated in violation of subsection (a) of this section, and § 4-302 (e) (2) (ii) of the Courts Article is unconstitutional as applied to that offense. *Fisher v. State*, 305 Md. 357, 504 A.2d 626 (1986).

MEANING OF "DRIVE." --"Drive" as used in this section means to drive, operate, move, or be in actual physical control of the vehicle, including the exercise or control over or the steering of a vehicle being towed by a motor vehicle. *Gore v. State*, 74 Md. App. 143, 536 A.2d 735 (1988).

By using the term "actual physical control" in § 11-114 of this article, the General Assembly intended to differentiate between those inebriated people who represent no threat to the public because they are only using their vehicles as shelters until they are sober enough to drive and those people who represent an imminent threat to the public by reason of their control of a vehicle. When the occupant is totally passive, and has not in any way attempted to actively control the vehicle, and where there is no reason to believe that the inebriated person is imminently going to control the vehicle in his or her condition, the General Assembly did not intend to impose criminal sanctions. *Atkinson v. State*, 331 Md. 199, 627 A.2d 1019 (1993).

What constitutes "actual physical control" for purposes of § 11-114 of this article will inevitably depend on the facts of the individual case. The inquiry must always take into account a number of factors, including: (1) whether or not the vehicle's engine is running or the ignition is on; (2) where and in what position the person is found in the vehicle; (3) whether the person is awake or asleep; (4) where the vehicle's ignition key is located; (5) whether the vehicle's headlights are on; and (6) whether the vehicle is located in the roadway or is legally parked. *Atkinson v. State*, 331 Md. 199, 627 A.2d 1019 (1993).

The primary focus in determining "actual physical control" pursuant to § 11-114 of this article is whether the person is merely using the vehicle as a stationary shelter or whether it is reasonable to assume that the person will, while under the influence, jeopardize the public by exercising some measure of control over the vehicle. *Atkinson v. State*, 331 Md. 199, 627 A.2d 1019 (1993).

USE OF "DRIVING" IN SECTION RATHER THAN "OPERATING." --It is significant that this section speaks of driving rather than operating since the term "operate" is generally regarded as being broader than the term "drive." *Thomas v. State*, 277 Md. 314, 353 A.2d 256 (1976).

MEANING OF "UNDER THE INFLUENCE OF INTOXICATING LIQUOR" is correctly stated in *Clay v. State*, 211 Md. 577, 128 A.2d 634 (1957), i.e., "drinking to the extent of probably affecting one's judgment and discretion or probably affecting one's nervous system to the extent that there is a failure of normal coordination, although not amounting to intoxication." *Alston v. Forsythe*, 226 Md. 121, 172 A.2d 474 (1961).

SUBMISSION TO CHEMICAL ANALYSIS NOT REQUIRED. --An integral part of the legislative scheme to detect and punish the operator of a motor vehicle while intoxicated is that the person accused of violating this section is not compelled to submit to a chemical analysis. *Loscomb v. State*, 45 Md. App. 598, 416 A.2d 1276 (1980), aff'd, 291 Md. 424, 435 A.2d 764 (1981).

SCHMERBER DOCTRINE APPLIED. --For application of *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 908 (1966), holding that the privilege against self-incrimination does not extend to involuntarily obtained blood samples, see *State v. Moon*, 291 Md. 463, 436 A.2d 420 (1981), cert. denied, 469 U.S. 1207, 105 S. Ct. 1170, 84 L. Ed. 2d 321 (1985).

JURISDICTION OF DISTRICT COURT. --The fundamental jurisdiction of the District Court to hear criminal charges

pending under this section would not have been affected by that court's failure to comply with former M.D.R. 751 (now Md. Rule 4-301). *Smith v. State*, 73 Md. App. 156, 533 A.2d 320 (1987), cert. denied, 311 Md. 719, 720, 537 A.2d 273 (1988).

VIOLATIONS OF THIS SECTION ARE WITHIN EXCLUSIVE ORIGINAL JURISDICTION OF THE DISTRICT COURT. *Wilson v. State*, 21 Md. App. 557, 321 A.2d 549, cert. denied, 272 Md. 751 (1974).

DISTRICT COURT MAY BE DIVESTED OF JURISDICTION by the demand of the accused for a trial by jury, and then the offenses of which he is charged by the charging document filed in the District Court come under the jurisdiction of the circuit court. *Wilson v. State*, 21 Md. App. 557, 321 A.2d 549, cert. denied, 272 Md. 751 (1974).

NO CONSTITUTIONAL RIGHT TO JURY TRIAL. --A constitutional right to a jury trial for driving while ability is impaired, under this section, does not exist. *Thompson v. State*, 278 Md. 41, 359 A.2d 203 (1976).

VIOLATION OF THIS SECTION IS MISDEMEANOR. *Dixon v. State*, 23 Md. App. 19, 327 A.2d 516 (1974).

WHEN WARRANTLESS ARREST PERMITTED. --A warrantless arrest for a violation of this section is permitted only when the misdemeanor occurs in the presence of the arresting officer, and without a lawful arrest there can be no constitutional search incident. *Dixon v. State*, 23 Md. App. 19, 327 A.2d 516 (1974).

ALLEGING DRUNKEN DRIVING AND DRIVING WHILE IMPAIRED IN ONE COUNT. --If, under § 26-405 of this article, it is permissible to charge any offense under this section by reference alone to this section, it is likewise permissible to allege in the disjunctive in one count the charges of drunken driving and driving while impaired. *Thompson v. State*, 26 Md. App. 442, 338 A.2d 411 (1975), rev'd on other grounds, 278 Md. 41, 359 A.2d 203 (1976).

EVIDENCE OF ALCOHOLIC CONTENT OF ACCUSED'S BODY, OBTAINED THROUGH CHEMICAL TESTS, NOT PREREQUISITE TO CONVICTION. --The introduction of evidence with respect to the alcoholic content in the accused's body, as shown upon chemical analysis through tests pursuant to §§ 10-302 to 10-309 of the Courts Article, is not a prerequisite to a conviction of the crimes proscribed by subsections (a) and (b) of this section. Conviction may be had on any competent evidence legally sufficient to establish the corpus delicti of the crimes and the criminal agency of the accused. *United States v. Channel*, 423 F. Supp. 1017 (D. Md. 1976); *Major v. State*, 31 Md. App. 590, 358 A.2d 609 (1976).

The General Assembly did not intend that evidence of the alcoholic content of a person's body, obtained through prescribed chemical tests for intoxication, be a prerequisite of conviction for violation of the crime created by this section. *Major v. State*, 31 Md. App. 590, 358 A.2d 609 (1976).

A person may be convicted of driving a vehicle while in an intoxicated condition or while his driving ability was impaired by the consumption of alcohol in the absence of evidence establishing the alcoholic content of his body according to chemical analysis made pursuant to tests prescribed by statute. *Major v. State*, 31 Md. App. 590, 358 A.2d 609 (1976).

A chemical analysis is not a prerequisite to a prosecution so that a conviction may be had without a chemical analysis on any competent evidence legally sufficient to establish the corpus delicti of the crimes and the criminal agency of the accused. *State v. Werkheiser*, 299 Md. 529, 474 A.2d 898 (1984).

PROOF OF UNSAFE OPERATION is not a necessary element of the offenses of driving while intoxicated or driving while under the influence of alcohol. 68 Op. Att'y Gen. 441 (1983).

CONVICTION MAY BE BASED UPON PROOF OF ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE INTOXICATED. --One may be convicted of "driving or attempting to drive any motor vehicle while intoxicated" by proof that the person was in actual physical control of a vehicle while intoxicated. *Gore v. State*, 74 Md. App. 143, 536 A.2d 735 (1988).

ALTHOUGH "DRUGS" MAY BE "CONTROLLED SUBSTANCES," the State may proceed under subsection (c) even though a drug may be classified as a controlled dangerous substance under subsection (d), provided it is prepared to prove the additional statutory element of unsafe operation. *Cook v. State*, 62 Md. App. 634, 490 A.2d 1311 (1985).

SLIGHT INTOXICATION AS EVIDENCE OF NEGLIGENCE. --Instruction that if truck driver was slightly intoxicated, but not drunk, such slight intoxication was not evidence from which jury might infer want of ordinary care, was properly rejected. *Cumberland & Westernport Transit Co. v. Metz*, 158 Md. 424, 149 A. 4, 565, appeal dismissed, 282 U.S. 801, 51 S. Ct. 40, 75 L. Ed. 720 (1930).

APPLICABILITY OF INTOXICATION AND IMPAIRMENT PRESUMPTIONS IN CRIMINAL PROSECUTIONS. --The statutory presumptions set forth in § 10-307 of the Courts Article apply in criminal prosecutions specified in subsection (a) of that section and only when the prerequisites of §§ 10-302 through 10-309 of the Courts Article are met. *Fouche v. Masters*, 47 Md. App. 11, 420 A.2d 1279 (1980).

PRESUMPTIONS NOT APPLICABLE IN CIVIL CASES. --The jury in a civil case may not apply the presumptions relating to intoxication and impairment set forth in § 10-307 of the Courts Article. *Fouche v. Masters*, 47 Md. App. 11, 420 A.2d 1279 (1980).

APPLICABILITY OF EXCLUSIONARY RULE FOR NONCOMPLIANCE. --The exclusionary rule for noncompliance with § 10-303 of the Courts Article is limited to violations of this section. The General Assembly has specifically exempted Article 27, § 388, relating to manslaughter by automobile, and Article 27, § 388A, relating to homicide by motor vehicle while intoxicated, from the coverage of this particular exclusionary rule. *Hasselhoff v. State*, 67 Md. App. 645, 508 A.2d 1030 (1986).

CASE INVOLVING VIOLATION BY 16-YEAR-OLD PROPERLY BEFORE JUVENILE COURT. --Where a 16-year-old was charged with violating this section, which permits the imposition of a sentence of incarceration, the case was properly before the juvenile court. *In re Christine L.*, 54 Md. App. 558, 459 A.2d 1125 (1983).

WHEN STATE ENTERED NOL PROS TO DRUNKEN DRIVING CHARGE, it removed whatever fair-notice problems that may have existed as to the offenses of driving while intoxicated or impaired since they differ only in the grade of proof required to support a conviction. *Thompson v. State*, 26 Md. App. 442, 338 A.2d 411 (1975), rev'd on other grounds, 278 Md. 41, 359 A.2d 203 (1976).

QUESTION FOR JURY. --Question whether driver of vehicle was under influence of intoxicating liquor at time of accident was for jury. *Singleton v. Roman*, 195 Md. 241, 72 A.2d 705 (1950).

It remains ultimately a question for the jury whether an accused was intoxicated, impaired, or under the influence of alcohol in accordance with the common meaning of those terms. *Brooks v. State*, 41 Md. App. 123, 395 A.2d 1224 (1979).

EVIDENCE INSUFFICIENT TO CONVICT UNDER SUBSECTION (B). --Where the accused, in a prosecution under subsection (b) of this section, was not charged with "actual physical control of the vehicle" but only "driving or attempting to drive," the evidence was insufficient to convict where the sole testimony was that the police officer arrested the accused after finding him parked on the side of the road in a car which had no lights on and the motor shut off and the accused was apparently in a drunken state. *Thomas v. State*, 277 Md. 314, 353 A.2d 256 (1976).

EVIDENCE WAS SUFFICIENT TO CONVICT. --Evidence was sufficient to find that the defendant was "driving" his car while under the influence of alcohol where the accused was discovered asleep or passed out in the passenger side of a stopped car, whose windows were up and whose motor was off, the evidence of the accused's state of sobriety tended to establish that he was under the influence of alcohol, the car key was in the ignition in the "on" position, with the

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alternator/battery light lit; the gear selector was in the "drive" position; and that the engine was warm to the touch. *Gore v. State*, 74 Md. App. 143, 536 A.2d 735 (1988).

PERMISSIBLE PENALTY UPON CONVICTION OF VIOLATING THIS SECTION is in excess of three months. *Wilson v. State*, 21 Md. App. 557, 321 A.2d 549, cert. denied, 272 Md. 751 (1974).

INTENT OF § 27-101 OF THIS ARTICLE is that the punishment permitted to be imposed upon every person who is convicted of a first violation of any of the offenses proscribed by subsection (a) is imprisonment for not more than one year or by fine of not more than \$1,000 or both fine and imprisonment. *Wilson v. State*, 21 Md. App. 557, 321 A.2d 549, cert. denied, 272 Md. 751 (1974).

MAXIMUM PUNISHMENT FOR VIOLATION OF SUBSECTION (A) of this section is a fine of not more than \$1,000, imprisonment for not more than one year, or both for a first offense, and for any subsequent offense, a fine of not more than \$1,000, imprisonment for not more than two years, or both. *United States v. Woods*, 450 F. Supp. 1335 (D. Md. 1978).

SUBSECTIONS (A) AND (B) DISTINGUISHED FOR PURPOSE OF SENTENCING AS SECOND OFFENDER. --Appellant cannot be sentenced as a second offender for driving while intoxicated under subsection (a) of this section until he has twice been convicted of that crime. A prior conviction for impaired driving under subsection (b) of this section will not suffice as a substitute. *Blackwell v. State*, 34 Md. App. 547, 369 A.2d 153, cert. denied, 280 Md. 728 (1977).

SENTENCING AS SECOND OFFENDER FOR VIOLATION OF SUBSECTION (B). --A person convicted of driving while under the influence of alcohol under subsection (b) of this section can be sentenced as a second or subsequent offender under § 27-101 (f) of this article when the repeat offender treatment is based on prior convictions for "driving while ability impaired by alcohol" (former subsection (b) of this section. *Tereshuk v. State*, 66 Md. App. 193, 503 A.2d 254 (1986).

TO BE GUILTY OF "HOMICIDE BY MOTOR VEHICLE WHILE INTOXICATED" REQUIRES, of necessity, that the operator of the vehicle be intoxicated within the scope of this section. *Loscomb v. State*, 45 Md. App. 598, 416 A.2d 1276 (1980), aff'd, 291 Md. 424, 435 A.2d 764 (1981).

LESSER INCLUDED OFFENSES. --Driving while under the influence of alcohol in violation of subsection (b) is a lesser included offense within driving while intoxicated, in violation of subsection (a). *Beckwith v. State*, 78 Md. App. 358, 553 A.2d 259 (1989), modified on other grounds, 320 Md. 410, 578 A.2d 220 (1990).

Violations of subsections (c) and (d) are not lesser included offenses within subsection (a). *Beckwith v. State*, 78 Md. App. 358, 553 A.2d 259 (1989), modified on other grounds, 320 Md. 410, 578 A.2d 410 (1990).

Defendant could not be convicted of driving under the influence of alcohol where the police officer had charged him only with driving while intoxicated, and where the charging document was drawn in a way that indicated an intent to exclude the lesser included charge. *Beckwith v. State*, 320 Md. 410, 578 A.2d 220 (1990).

DRIVING WHILE INTOXICATED IS NOT A LESSER INCLUDED OFFENSE OF DRIVING WHILE UNDER THE INFLUENCE, thus a defendant who was fully aware that he was charged with violation of both provisions cannot successfully assert that he was hampered in preparing to defend against the greater offense because the lesser offense was dropped. *Crampton v. State*, 71 Md. App. 375, 525 A.2d 1087 (1987), aff'd, 314 Md. 265, 550 A.2d 693 (1988).

PROBATION BEFORE JUDGMENT FOR SUBSEQUENT OFFENSES. --Violations of different subsections of this section are within the scope of Art. 27, § 641 (a) (2), and probation before judgment is not a permissible disposition for a second offense under this section. *State v. Shilling*, 75 Md. App. 233, 540 A.2d 1184 (1988), vacated on other grounds, 320 Md. 288, 577 A.2d 83 (1990).

If a defendant is found guilty of driving while intoxicated or under the influence of alcohol or a drug within five years of being convicted of, or given probation before judgment for, another drunk or drugged driving offense, the defendant is ineligible for probation before judgment. *State v. Purcell*, 342 Md. 214, 674 A.2d 936 (1996).

PROBATION AFTER SECOND CONVICTION WAS ERROR. --It was error for the trial court to stay entry of judgment and place defendant on probation upon conviction of second offense of driving under influence of alcohol, disregarding Art. 27, § 641 (a) (2) with the blithe statement that the court can do anything it wants at any time. *State v. Fincham*, 71 Md. App. 314, 525 A.2d 265 (1987).

SUSPENSION OF DRIVING PRIVILEGES. --A trial judge may not order, as a condition of probation for a violation of this section, that a defendant abstain from driving for the full probationary term even though the Motor Vehicle Administration restores the driver's license. *Sheppard v. State*, 344 Md. 143, 685 A.2d 1176 (1996).

AVAILABILITY OF ADMINISTRATION RECORDS OF PROBATION BEFORE JUDGMENT. --The Motor Vehicle Administration's records or notations of any probation before judgment on a charge of driving while intoxicated or under the influence of alcohol or drugs are to be available to the hearing officer and to the licensee or to the licensee's attorney in an administrative hearing. 72 Op. Att'y Gen. 362 (1987).

ADMISSIBILITY OF HOSPITAL RECORDS. --No extensive foundation needed to be laid for the hospital report to be admissible under the business record exception. The testimony of the emergency room physician showing that the emergency services report was made in the "regular course of business" and that the toxicological screen of defendant's blood and urine was "pathologically germane to treatment" was sufficient to justify admission. *State v. Garlick*, 313 Md. 209, 545 A.2d 27 (1988).

EVIDENCE INSUFFICIENT FOR INSTRUCTION IN TERMS OF THIS SECTION. --Where there was no evidence presented of the decedent's condition before he began driving, no admission of alcohol consumption, and no observable conditions of intoxication such as demeanor evidence or general appearance, and although the manner of operation of an automobile by an alleged violator could be evidence of driving under the influence or driving while impaired, absent an explanation of decedent's 0.17 alcohol blood content, driving on the wrong side of the road and the driver's (decedent) being slumped over the steering wheel was insufficient to permit the giving of an instruction in the terms of this section. *Fouche v. Masters*, 47 Md. App. 11, 420 A.2d 1279 (1980).

JURY TRIAL ON APPEAL DE NOVO. --A defendant charged under this section is entitled to a jury trial in a de novo appeal even if he elected a nonjury trial in the earlier proceeding. *Kleberg v. State*, 318 Md. 411, 568 A.2d 1123 (1990).

APPLIED IN *Casper v. State*, 70 Md. App. 576, 521 A.2d 1281, cert. denied, 310 Md. 129, 130, 527 A.2d 50 (1987); *McAvoy v. State*, 70 Md. App. 661, 523 A.2d 618 (1987), aff'd, 314 Md. 509, 551 A.2d 875 (1989); *Swinson v. State*, 71 Md. App. 661, 527 A.2d 56 (1987); *United States v. Sauls*, 981 F. Supp. 909 (D. Md. 1997).

QUOTED IN *Vonoppenfeld v. State*, 53 Md. App. 462, 454 A.2d 402 (1983).

STATED IN *In re David K.*, 48 Md. App. 714, 429 A.2d 313 (1981); *Motor Vehicle Admin. v. Mohler*, 318 Md. 219, 567 A.2d 929 (1990).

CITED IN *Kursch v. State*, 55 Md. App. 103, 460 A.2d 639 (1983); *United States v. King*, 824 F.2d 313 (4th Cir. 1987); *Motor Vehicle Admin. v. Lindsay*, 309 Md. 557, 525 A.2d 1051 (1987); *Brice v. State*, 71 Md. App. 563, 526 A.2d 647 (1987); *Wilson v. State*, 74 Md. App. 204, 536 A.2d 1192 (1988); *International Ass'n of Firefighters, Local 1619 v. Prince George's County*, 74 Md. App. 438, 538 A.2d 329 (1988); *Brown v. State*, 76 Md. App. 630, 547 A.2d 1099 (1988); *State v. McGrath*, 77 Md. App. 310, 550 A.2d 402 (1988); *Attorney Grievance Comm'n v. Ficker*, 319 Md. 305, 572 A.2d 501 (1990); *Carter v. State*, 319 Md. 618, 574 A.2d 305 (1990); *Shilling v. State*, 320 Md. 288, 577 A.2d 83

(1990); Krauss v. State, 82 Md. App. 1, 569 A.2d 1284 (1990); Gakaba v. State, 84 Md. App. 154, 578 A.2d 299 (1990); Krauss v. State, 322 Md. 376, 587 A.2d 1102 (1991); Huff v. State, 325 Md. 55, 599 A.2d 428 (1991); Schrimsher v. State, 325 Md. 88, 599 A.2d 444 (1991); Consumers Life Ins. Co. v. Smith, 86 Md. App. 570, 587 A.2d 1119, cert. denied, 323 Md. 185, 186, 592 A.2d 178 (1991); Dashiell v. Maryland State Dep't of Health & Mental Hygiene, 327 Md. 130, 607 A.2d 1249 (1992); Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993); Cameron v. State, 102 Md. App. 600, 650 A.2d 1376 (1994); Reid v. State, 119 Md. App. 129, 704 A.2d 473 (1998).



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TEXAS FAMILY CODE
TITLE 1. THE MARRIAGE RELATIONSHIP
SUBTITLE A. MARRIAGE
CHAPTER 2. THE MARRIAGE RELATIONSHIP
SUBCHAPTER E. MARRIAGE WITHOUT FORMALITIES

GO TO TEXAS CODE ARCHIVE DIRECTORY

Tex. Fam. Code § 2.401 (2011)

§ 2.401. Proof of Informal Marriage

(a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:

(1) a declaration of their marriage has been signed as provided by this subchapter; or

(2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

(c) A person under 18 years of age may not:

(1) be a party to an informal marriage; or

(2) execute a declaration of informal marriage under Section 2.402.

(d) A person may not be a party to an informal marriage or execute a declaration of an informal marriage if the person is presently married to a person who is not the other party to the informal marriage or declaration of an informal marriage, as applicable.

HISTORY: Enacted by Acts 1997, 75th Leg., ch. 7 (S.B. 334), § 1, effective April 17, 1997; am. Acts 1997, 75th Leg., ch. 1362 (H.B. 891), § 1, effective September 1, 1997; am. Acts 2005, 79th Leg., ch. 268 (S.B. 6), § 4.12, effective September 1, 2005.