

**House Judiciary Committee  
Special Task Force on Driving Under the Influence  
Public Hearing  
Gold Room, Allegheny County Courthouse  
Friday, April 17, 1998**

**TESTIMONY OF STEPHEN A. ZAPPALA, JR,  
DISTRICT ATTORNEY OF ALLEGHENY COUNTY**

The proposed legislation of the House Judiciary Committee's Special Task Force on Driving Under the Influence is a welcome and necessary addition to the existing law in Pennsylvania. The Special Task Force's proposed legislation will act not only to properly redefine the dangerous condition of combining alcohol consumption with driving, but sets forth a mechanism that will provide both the police and prosecutors with the ability to target offenders and prosecute them in a more efficient and productive manner.

As I know the Special Task Force is well aware, the statistical evidence regarding the seriousness of drunk driving is staggering:

- In 1996, 17,126 people died in alcohol-related traffic accidents nationwide, an average of one fatality every 32 minutes
- For that same year, proportionally consistent with the national average, 575 people died in alcohol-related traffic accidents in Pennsylvania

According to MADD statistics:

- Economic costs of alcohol-related crashes are estimated to be \$45 billion yearly, nationwide.

- Every weekday night from 10 p.m. until 1 a.m., one in 13 drivers has a BAC of .08 percent or greater
- Between 1 a.m. and 6 a.m. on weekend mornings, one in seven drivers has a BAC of .08 percent or greater
- The rate of alcohol involvement in fatal crashes is three and one-third times as high at night than as during the day. For all crashes, the alcohol involvement rate is nearly five times as high at night

It is with the object of reducing these disturbing numbers that I welcome and join the efforts of the Special Task Force in creating an appropriate statutory environment to confront and eliminate the problem of drunk driving in this Commonwealth.

One of the most important features contained in the proposed legislation is the addition in House Bill 1165 of the new and distinct crime of “driving after drinking,” which will appear in the Motor Vehicle Code under its own section, Title 75, section 3731.2 (75 Pa. C.S. § 3731.2). The primary significance of proposed section 3731.2, is that it constitutes an express statement by the General Assembly that, in exercising its police powers to ensure public safety on the highways, the criminal activity of drinking and driving is conceptually redefined and enlarged in order to better handle the realities of prosecuting drunk driving cases.

With the enactment of section 3731.2, drinking excessive amounts of alcoholic beverages and operating a motor vehicle would be strictly prohibited in Pennsylvania. This statute targets what I would call the “hazardous condition” of drinking a substantial quantity of alcohol and then driving a motor vehicle. Using the established benchmark of a blood alcohol content (“BAC”) of .10 percent, and a three hour time frame that is

reasonably related to the absorption and dissipation rates of the average person, this proposed statute criminalizes drinking and driving conduct. If a person consumes a quantity of alcohol sufficient to cause their BAC to rise to .10 percent or greater and then drives a motor vehicle, that person will have created a hazardous condition that is simply unacceptable and that is a crime. This new statute is reasonable and does not target the average person who simply has a couple of drinks and then drives, but instead targets persons who drink --at a minimum-- four to five alcoholic drinks or more in a short time period of approximately an hour, and then get behind the wheel.

The new section 3731.2 takes into account scientific facts concerning intoxication. The average alcoholic drink or beer represents an influence on a person's BAC of .025 percent -- which is one-fourth the legal limit of .10 percent. Even taking into account normal absorption rates of thirty minutes on an empty stomach and a dissipation rate for the average person of .015 percent per hour, in order for a person to reach the legal limit of .10 percent they must at a minimum drink approximately 5 drinks and probably more in a very short period of time. The time frame of three hours employed by the statute is reasonable in view of the various absorption rates and dissipation rates and other factors. Thus, this statute does not criminalize all drinkers, but only those who drink excessively and only then if they get behind the wheel of a car.

With the addition of section 3731.2, the General Assembly will have put the risk of an error of judgment on the driver who drinks too much and then drives, and not upon the unwitting victims of that judgment. The statute avoids prior void for vagueness arguments by squarely placing the criminal liability on the hazardous condition of excessive drinking and then driving and not requiring liability to be hinged on what the BAC was "at the time of driving," as previous statutes have done. With the enactment of section 3731.2, the General Assembly has placed the drinking driver on notice that if he or she chooses to drink and drive than he or she had better be sure to

limit alcohol consumption to a reasonable amount.

Lastly, in order to withstand judicial scrutiny, it is imperative that in the preamble to this new Act the General Assembly set forth its clear intent that it is no longer targeting criminal liability at the time of the vehicle stop (or accident); rather, it is the hazardous condition of excessive drinking and then driving which is at stake. I would therefore urge the individual members of the General Assembly to formulate an extensive legislative history to support the rational basis for this new statute.

Next, House Bill 1889, sponsored by Representative Orie, increases the mandatory minimum penalties for DUI under existing section 3731. Currently a first time offender gets a minimum of forty-eight hours in jail, followed by thirty days for second offense, ninety days for a third offense, and one year for a fourth offense. The new amendment would increase the mandatory minimum penalty for a second offense to ninety days, for a third offense to one year, and for a fourth or subsequent offenses to three years. While, as a prosecutor, I would normally welcome stiffer penalties in this area in general --and especially for repeat offenders-- I believe that extending the mandatory minimum penalty for a second offense from thirty days to ninety days may be too large of an increase. Generally, most DUI offenders will be accepted into the Accelerated Rehabilitative Disposition ("ARD") program for a first offense and, thus, will have suffered no jail time when a second offense is committed. When the second offense is committed, the sentencing courts will typically permit alternative housing in the form of inpatient alcohol or substance abuse treatment to satisfy the jail requirement. Consequently, most alcohol and substance abuse treatment programs are now geared for a 28-day or 30-day period, in which the offender can receive instruction and treatment for their drinking problem. These alternative programs are a valuable part of our criminal justice system and represent the only true treatment that the system provides to drunk drivers. A ninety-day program may be cost prohibitive and unproductive. Consequently, I believe that for second time offenders a thirty-day

penalty is adequate. Should the offender demonstrate that he or she is a recidivist drunk driver by committing a third offense, then the harsher one year penalty would be appropriate because at that time it will be apparent that pretrial diversion programs and treatment have failed.

Also, as a practical matter, too harsh a penalty too soon on a second offense, with no hope for treatment, may create a situation where defendants will seek a trial in an attempt to avoid the ninety day penalty. This will add to our already overburdened criminal courts and correctional system, and will effectively tie up prosecutorial resources with cases which may have resulted in guilty pleas but for the greater penalty involved. Therefore, I would submit that a more graduated response for second time offenders that would allow for treatment is in order.

In this regard, I would also note that the penalty provisions for the new crime of "driving after drinking" in section 3731.2 will have to be reconciled to reflect whatever progress is made on House Bill 1889.

Another key provision in this legislative package which bears comment is House Bill 1883 of 1997 (proposed 75 Pa. C.S. § 3731(e.1)), the vehicle immobilization statute.

In dealing with the problem of drunk driving, many alternatives have been pursued, all seeking to protect the safety and well-being of our citizens. Generally, we have focused on punishment, through incarceration and fines, and rehabilitation of the drunk driver. However, other means have also been used to modify the drunk driver's behavior, including the suspension of the drunk driver's driving privilege, and the criminalization of driving while the privilege is suspended. Some jurisdictions have taken this tactic one step further by adopting forfeiture statutes which authorize the seizure, impoundment and/or confiscation of the drunk driver's automobile.

However, this approach, while having a certain appeal in the abstract, has engendered numerous problems in the execution. Problems such as separate forfeiture proceedings and related due process concerns, proliferated litigation and appeals, as well as the practical difficulties associated with impounding, storing and disposing of forfeited vehicles, among others. Such an approach can also put local municipalities in the used car business.

The proposed vehicle immobilization amendment appears to create an appropriate middle ground between outright forfeiture of the drunk driver's automobile and doing nothing at all.

The amendment as proposed adds an additional punitive measure to the sentencing judge's arsenal of weapons against the drunk driver. Essentially, the amendment permits the judge to deny the drunk driver access to his or her vehicle for a period of time equal to the duration of the drunk driver's license suspension.

This aspect of the proposed legislation serves the same function as the forfeiture approach --removing easy access to a vehicle-- without the resulting litigation and headaches associated with separate forfeiture proceedings and the practical problems associated with dealing in forfeited vehicles.

This approach should also have a deterrent effect in that individuals will know that not only will their driving privileges be suspended, their means of driving will also be "suspended."

This in turn will have the added benefit of operating as a means of enforcing DUI-related suspensions. Frankly, there is no mechanism to enforce DUI-related suspensions. The police are unable to determine simply by observation whether a particular motorist is driving while on a DUI-related license suspension. Indeed, most

prosecutions for driving during a DUI-related suspension arise out of a stop or investigation of a separate motor vehicle code violation; quite often being a subsequent DUI-related offense.

Unfortunately, we must rely on the scrupulousness of those serving DUI-related suspensions to not drive. Yet, judging by the number of prosecutions for driving while under a DUI-related suspension, it is clear that the fact of a suspended license is not a sufficient deterrent to prevent driving during a DUI-related suspension.

However, by removing access to the means of driving as well as the privilege, it will at least be more difficult for one inclined to drive during a DUI-related suspension.

This proposal also impacts upon those who knowingly and willingly provide vehicles to those whom should not be driving. Indeed, those who knowingly permit an individual whose driving privileges are suspended to operate their motor vehicle will face the loss of use of that vehicle for the duration of the drunk driving defendant's license suspension. This too should effectively limit the ability of one under suspension to drive a motor vehicle.

My support for this provision does not mean, however, that the forfeiture of a drunk driver's vehicle would never be an appropriate step in our efforts to fight drunk driving. However, this extreme sanction should not be used in every case, but should be reserved for the true recidivist drunk driver. The vehicle immobilization statute represents the most valid and productive intermediate response among the available alternatives.

Certainly, the approach contained in this statute will not prevent all drunk driving --or even driving-- during the term of a license suspension. But this approach will certainly make it more difficult for most drunk drivers to gain access to a vehicle while

their driving privileges are suspended. And, importantly, when viewed in the larger context of the battle against drunk driving, this is but one more arrow in the judicial quiver, to be used to make our highways and trafficways safer for all.

Lastly, I would like to make one additional comment on a related matter that came to my attention just this week. As you may be aware, on Tuesday, a drunk driver in Allegheny County entered a plea of guilty to two counts of Homicide by vehicle while driving under the influence and several other related offenses. The trial court sentenced the defendant to the mandatory minimum three-year terms on each of the two counts, but, acting within his discretion, he ordered the sentences to run concurrently.

Although an appeal was considered, we determined that, under the current statutory framework, including the existing DUI laws and the Sentencing Code, the court had the discretion to impose the sentence that it did and that, therefore, an appeal would be frivolous.

A more effective approach, I believe, would be an amendment to the Homicide by vehicle while driving under the influence statute which would conclusively require the imposition of a separate and consecutive mandatory minimum sentence for each fatality. I have submitted just such a proposal to Senator Mellow and I will see that each of you also receive a copy of this proposal. With this simple amendment, I believe that we can ensure that every DUI-related death will be the basis of a separate and independent punishment.

I would conclude by pledging my full support to the Legislature's efforts to combat drunk driving, and particularly to this body's efforts to make this Commonwealth a safer place for all of its citizens. I thank you for your time.