

Phone (814) 863-2797
Telefax (814) 863-2129



P.O. Box 1200
State College, PA 16804-1200

COMMONWEALTH OF PENNSYLVANIA
THE PENNSYLVANIA COMMISSION ON SENTENCING

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
TASK FORCE ON DRIVING UNDER THE INFLUENCE

Public Hearing
August 18, 1998

Mark H. Bergstrom
Executive Director

Good morning Representative Ori and members of the House Judiciary Committee Task Force on Driving Under the Influence. I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing. Thank you for providing this opportunity to discuss the packet of house bills under review and other issues related to DUI. I will limit my remarks this morning to the sentencing-related aspects of the legislation, discussing the current framework for sentencing under the guidelines and mandatories, and then commenting on the proposals before you.

Background

Act 319 of 1978 established the Pennsylvania Commission on Sentencing, and brought about a system of sentencing guidelines intended, according to the House Journal at the time, "... to make criminal sentences more rational and consistent, to eliminate unwarranted disparity in sentencing, and to restrict the unfettered discretion we give to sentencing judges." (PA House Journal 3130, September 21, 1978). At the time, guidelines were viewed as an alternative to mandatories, with guidelines channeling but not removing judicial discretion. The intervening twenty years have brought about a number of changes in the original guidelines, as well as an expanding list of mandatory minimum sentencing statutes.

Under the guidelines, every offense in statute is ranked in terms of seriousness, with a sentence recommendation based primarily on the current conviction offense (i.e., offense gravity score or OGS) and the offender's criminal history (i.e., prior record score or PRS). A matrix reflecting these recommendations under the current guidelines is attached to my prepared remarks. The court is required to consider the guideline recommendations when imposing sentence for each misdemeanor and felony conviction. The court may depart from the guideline recommendations, but must provide reasons on the record for doing so, and such departures are subject to appeal.

Under the mandatories, which apply only to selected offenses, the court is required to impose a minimum sentence as provided in statute. For certain mandatories, such as drug trafficking, the mandatory provision is only triggered if the District Attorney gives notice of applicability. Other mandatories, such as DUI, automatically apply upon conviction.

Pennsylvania's first sentencing guidelines, enacted in 1982, had specific penalties for Driving Under the Influence (DUI). These were eliminated on January 2, 1986 because they were inconsistent with the mandatory minimum sentences, and subsequent editions of the guidelines simply included the mandatory provisions provided in 75 Pa.C.S. §3731 (relating to DUI) and 75 Pa.C.S. §3735 (relating to Homicide by Vehicle While DUI).

In 1991, the Commission responded to enactment of County Intermediate Punishment legislation (Acts 1990-193 and 1990-201) by recommending the diversion of offenders with mandatory DUI county sentences to designated programs. The designated programs were identified as Qualified Restrictive Intermediate Punishment programs, and were those programs permitted in 37 Pa. Code §451.52 for DUI: residential inpatient drug and alcohol programs; residential rehabilitative center programs; or house arrest and electronic monitoring combined with drug and alcohol treatment. At the same time, the Commission provided enhanced recommendations for DUI offenses involving accidents where there was serious bodily injury, so as to reflect the serious nature of the offense and recognizes the impact such accidents have upon the victims.

In 1997, the 5th edition of the guidelines returned to the policy of providing specific sentence recommendations for DUI and Homicide by Vehicle While DUI. With the incorporation of DUI into the sentencing guidelines, the prior record score, based both on previous DUI and non-DUI offenses, is now used to determine a sentence recommendation for a current conviction for DUI. As with all other convictions, the court is required to first consider the sentence recommendation based on the applicable offense gravity score and prior record score. If the mandatory minimum sentence requires a longer period of incarceration, the mandatory statute supersedes the guideline recommendations. With the enactment of an Aggravated Assault by Vehicle While DUI (75 Pa.C.S. §3735.1) statute in 1996, the enhanced sentence recommendation was eliminated and an offense gravity score was assigned to the new offense.

The decision to incorporate DUI-related offenses into the sentencing guidelines after an 11 year absence was adopted for several reasons. First, as a misdemeanor offense, the Commission was required by statute to specify a range of sentences applicable to DUI-related offenses, and to

provide increased severity for defendants with any previous adjudications or convictions. It had been argued that reliance on the mandatory minimum and the statutory limit did not satisfy this requirement. Second, DUI-related offenses were the only offenses with mandatory provisions which the Commission excluded from the sentencing guidelines. And third, the increase in the grade of third and subsequent DUI offenses from an M2 to an M1 increased the possibility of unwarranted disparity in the absence of guideline sentence recommendations. Previously, as an M2 offense with a statutory limit of one year, any DUI recommendation in addition to the mandatory would have had little impact.

As mentioned earlier, the court is required to consider the sentencing guidelines for all conviction offenses, including DUI-related offenses, and to report the sentences imposed to the Commission. No guideline form is required if the offender is accepted into an ARD program. During 1996, excluding those accepted into the ARD program, 14,843 DUI sentences were reported to the Commission. This represented approximately 20% of the 70,990 sentences reported that year. Clearly, any changes in DUI-related statutes, especially changes that increase the mandatory penalties and expand the behaviors covered by the statutes, have the potential to substantially impact correctional populations and community-based services. In order to address much of the pending legislation in a systematic, timely and comprehensive fashion, I will offer some brief comments regarding five existing statutes, and then discuss the proposed amendments that relate to those statutes.

75 Pa.C.S. §3731 -- Driving Under the Influence

Existing Statute:

Effective September 4, 1995: A person convicted of DUI is guilty of an M2, except that a person convicted of a third or subsequent DUI is guilty of an M1. There is some confusion in the field as to whether the seven year look-back period applies to the grading.

Effective January 14, 1983: The mandatory minimums are: 48 hours for first conviction; 30 days for second conviction; 90 days for third conviction; and 1 year for fourth or subsequent conviction. All prior convictions must have been within the previous seven years. For mandatory minimum purposes, a prior accelerated rehabilitative disposition

(ARD) for DUI counts as a prior conviction.

Effective June 13, 1997: An M2 DUI is assigned an OGS of 2; an M1 DUI is assigned an OGS of 3. Court must consider all prior convictions [not just prior DUI's] for sentence recommendation, including prior DUI convictions outside of seven year look back. For guideline purposes, a prior ARD does not count in the Prior Record Score. Mandatory minimum supersedes the guideline recommendation.

1996 sentencing data: Based on sentences reported to the Commission, and excluding ARD's, 14,843 DUI sentences were imposed. Of those, 10,079 had no prior convictions within seven years; 3,771 had one prior conviction; 817 had two prior convictions; and 176 had three or more priors. This data does not include sentences from Philadelphia Municipal Court.

Proposed Amendments

H1165: Add 'driving after drinking' provision.

H669: Add provision requiring mandatory maximum of four years for M1 convictions and authorizes county parole supervision of cases with mandatory conditions.

H1817: Add provision that potentially doubles the mandatory minimum if new DUI occurs during license suspension period.

H1883: Add provision that permits vehicle immobilization for period of suspension for third or subsequent conviction.

H1889: Increases grading of third offense to F3; increases grading of fourth or subsequent to F1; increases grading of DUI with previous Homicide by Vehicle while DUI or Aggravated Assault by Vehicle while DUI within seven years to F1.

H1889: Increases mandatory minimum for second offense to 90 days; increases mandatory minimum for third offense to one year; increases mandatory minimum for fourth offense to three years.

Discussion:

[H1165] Should the Committee also consider a reduction in the BAC to .08?

[H669] Based on the enactment of the statute and the processing time for cases, courts have only had the authority to impose a maximum sentence of greater than two years since 1996. Does

every M1 DUI sentence require a four year maximum sentence? Do counties and/or the state have the resources necessary to provide the supervision and services required under the proposal? What compelling reason drives the decision to permit county supervision of these state cases, and does the same reason apply to other offenses/cases?

[H1817] It is unclear if the intent of this amendment is to double the maximum penalty permitted if the offense occurs while a license is suspended, or to double the mandatory minimum, or both.

[H1883] 'Suspension' and 'revocation' are both used in the Vehicle Code (75 Pa.C.S.A. §1532). Should both terms be used to describe the period of immobilization? Is the third or subsequent conviction within a seven year look-back period or a lifetime? Should an administrative license suspension be considered for a more expedient removal of the license?

[H1889] Is a fourth DUI comparable to other F1 offenses? Is it appropriate to provide a 20 year statutory maximum to an offense that in 1982 had a one year statutory maximum; an increase to an F1 from an M3? Are the current DUI mandatories effective, and would the more than doubling of the mandatories provide any significant change in outcomes? Would an equal level of investment by the Commonwealth in drug treatment and community-based supervision be more effective?

75 Pa.C.S. §3732 -- Homicide by Vehicle

Existing Statute:

Effective July 1, 1977: A person convicted of Homicide by Vehicle is guilty of an M1.

No mandatory provisions.

Effective June 13, 1997: Homicide by Vehicle when there is also a conviction for DUI in the same incident (but no nexus) is assigned an OGS of 8; Homicide by Vehicle when there is no conviction for DUI is assigned an OGS of 6.

1996 sentencing data: Based on sentences reported to the Commission, 63 Homicide by Vehicle sentences were imposed.

Proposed Amendments

H1165: Add 'driving after drinking' provision.

H1795: Increases grading from M1 to F3.

Discussion:

No additional comment.

75 Pa.C.S. §3735 -- Homicide by Vehicle while DUI

Existing Statute:

Effective April 23, 1996: A person convicted of Homicide by Vehicle While DUI is guilty of an F2.

Effective September 9, 1996: The mandatory minimum for Homicide by Vehicle While DUI is three years for each victim whose death is a result of the DUI.

Effective June 13, 1997: Homicide by Vehicle While DUI is assigned an OGS of 8; the mandatory minimum supersedes the guideline recommendation.

1996 sentencing data: Based on sentences reported to the Commission, two Homicide by Vehicle While DUI sentences were imposed.

Proposed Amendments

H1165: Add 'driving after drinking' provision.

H1307: Increase the mandatory minimum provision from three years to five years.

H1889: Increases grading from F2 to F1 if two prior DUI convictions within seven years.

Discussion:

[H1307] Anecdotally, the Commission has received feedback that cases could potentially fall under this statute are handled as separate Homicide by Vehicle and DUI convictions because of the inability to prove the nexus or to avoid the mandatory provision. This could explain the low numbers in the sentencing data. Does the amendment intend to increase the mandatory minimum to five years for each victim? Could these sentences be served concurrently?

75 Pa.C.S. §3735.1 -- Aggravated Assault by Vehicle while DUI

Existing Statute:

Effective April 23, 1996: A person convicted of Aggravated Assault by Vehicle While DUI is guilty of an F2.

No mandatory minimum.

Effective June 13, 1997: Aggravated Assault by Vehicle While DUI is assigned an OGS of 7.

1996 sentencing data: Based on sentences reported to the Commission, and due to the recent enactment of the statute, no Aggravated Assault by Vehicle While DUI sentences were imposed. However, 27 DUI sentences involved serious bodily injury.

Proposed Amendments

H1165: Add 'driving after drinking' provision.

H1889: Increases grading from F2 to F1 if two prior DUI convictions within seven years.

Discussion:

No comment.

42 Pa.C.S. §9763 – Sentence of Intermediate Punishment

Existing Statute:

Effective July 1, 1991: A person convicted of DUI may only be sentenced to intermediate punishment in a residential inpatient program or in a residential rehabilitative center; or by house arrest or electronic surveillance combined with drug and alcohol treatment.

No mandatory minimum.

Effective June 13, 1997: Identifies as Qualified Restrictive Intermediate Punishments those programs permitted in 37 Pa. Code §451.52 for DUI: residential inpatient drug and alcohol programs; residential rehabilitative center programs; or house arrest and electronic monitoring combined with drug and alcohol treatment.

1996 sentencing data: Based on sentences reported to the Commission, 1,909 DUI sentences were satisfied by placement in intermediate punishment programs, as were three Homicide by Vehicle sentences.

Proposed Amendments

H1165: Add 'driving after drinking' provision.

Discussion:

For a number of years, the Commission has worked with other state and county agencies and associations to modify certain provisions of the County Intermediate Punishment Act. While most

of these recommendations will be presented to that task force this Thursday in Gettysburg, two provisions relate to Section 9763. First, the Commission recommends that the eligible offenses under this section be expanded to include violations of 75 Pa.C.S.A. §1543(b)(1) (Driving while operating privilege is suspended or revoked; DUI-related). This summary offense requires a mandatory minimum sentence of incarceration of 90 days. The qualified restrictive intermediate punishments referenced earlier should be available to the court for consideration in lieu of incarceration. Second, work release, combined with drug and alcohol treatment, should be included as a intermediate punishment program which could satisfy the mandatory minimum period of incarceration. While rather technical, work release as a partial confinement sentence may be used to satisfy a DUI mandatory, but work release as an intermediate punishment cannot. This change would facilitate the greater use of intermediate punishments in appropriate cases.

Closing Comments

The Commission on Sentencing is an agency of the General Assembly. We were created to provide the Commonwealth with a structured sentencing system which would in some ways serve as an alternative to mandatory minimums. In order to develop such recommendations, the Commission, and particularly the guideline adoption process, was purposely insulated from the normal political process. After nearly twenty years, the Commission has provided that structured sentencing system, albeit coexisting with a number of mandatory minimums.

In recent years, and particularly following the Special Session on Crime, there has been increased coordination between legislation and guidelines. As examples, the offenses designated as completed crimes of violence under 'three strikes' are all included in the top tier of the sentencing matrix, which exclusively recommends state sentences. And similar to 'three strikes,' an offender with a current conviction for a violent crime who has two prior convictions for violent crimes is exclusively recommended for the statutory limit (the longest minimum sentence permitted under statute). But the guidelines also try to provide opportunities for the most efficient use of correctional resources. The Commission developed five levels in the sentencing matrix which correspond with the basic sentencing options available to the court under the Judicial Code, and encourage the consideration of intermediate punishments and other

community-based programs in appropriate cases.

As you are well aware, it is very difficult to eliminate or scale back mandatory provisions once enacted. My concern today is that this packet of legislation relies heavily on using mandatory provisions to increase periods of incarceration and conditions of parole for a very large group of offenders. I am afraid that the impact in terms of increases in jail and prison populations, parole caseloads and treatment resources will be substantial. Is the Commonwealth willing to invest in this undertaking, and if so, what return do you expect on this investment? How do these actions compare to or impact other types of offenders? Are the penalties proposed proportional?

I encourage the Committee to carefully study the costs and benefits associated with these proposals before taking any action. This is particularly necessary when considering increases in mandatory minimum sentencing provisions. Please feel free to contact me if the Commission's staff can be of any assistance.

Thank you for inviting me to participate this morning.

§303.16. Basic Sentencing Matrix

Level	OGS	Example Offenses	Prior Record Score					RFEL	REVOG	AGG/MIT	
			0	1	2	3	4				5
LEVEL 5 State Incar	14	<i>Murder 3</i> <i>Inchoate Murder/SBI</i>	72-240	84-240	96-240	120-240	168-240	192-240	204-240	240	+/- 12
	13	<i>Inchoate Murder/no SBI</i> Drug Del. Result in Death PWID Cocaine, etc. (>1,000 gms)	60-78	66-84	72-90	78-96	84-102	96-114	108-126	240	+/- 12
	12	<i>Rape</i> <i>IDS</i> <i>Robbery (SBI)</i> <i>Robbery/car (SBI)</i>	48-66	54-72	60-78	66-84	72-90	84-102	96-114	120	+/- 12
	11	<i>Agg Asst (SBI)</i> <i>Voluntary Manslaughter</i> <i>Sexual Assault</i> PWID Cocaine, etc. (100-1,000 gms)	36-54 BC	42-60	48-66	54-72	60-78	72-90	84-102	120	+/- 12
	10	<i>Kidnapping</i> <i>Arson (person inside)</i> <i>Agg Asst (att. SBI)</i> <i>Robbery (threat. SBI)</i> Agg. Indecent. Asst Causing Catastrophe(F1) PWID Cocaine, etc. (50-<100 gms)	22-36 BC	30-42 BC	36-48 BC	42-54	48-60	60-72	72-84	120	+/- 12
	9	<i>Robbery/car (no SBI)</i> <i>Robbery (F1/F2)</i> <i>Burglary (home/person)</i> <i>Arson (no person)</i>	12-24 BC	18-30 BC	24-36 BC	30-42 BC	36-48 BC	48-60	60-72	120	+/- 12
LEVEL 6 State Incar RIP track	8 (F1)	Agg Asst (BI w/DW) Agg Asst (att. BI w/DW) Invol. Mans. (when DUI) Hom. by Vehicle (when DUI) Theft (>\$100,000) PWID Cocaine, etc. (10-<50 gms)	9-16 BC	12-18 BC	15-21 BC	18-24 BC	21-27 BC	27-33 BC	40-52	NA	+/- 9
LEVEL 7 State Cnty Incar RIP track	7 (F2)	Robbery (inflicts/threatens BI) Burglary (home/ no person) Statutory Sexual Assault Theft (>\$50,000-\$100,000) Sexual Abuse/Child (take photo) PWID Cocaine, etc. (2.5-<10 gms)	6-14 BC	9-16 BC	12-18 BC	15-21 BC	18-24 BC	24-36 BC	35-45 BC	NA	+/- 6
LEVEL 8 Cnty Incar RIP track	8	Invol. Mans. (when no DUI) Hom. by Vehicle (when no DUI) Burglary (not home/person) Theft (>\$25,000-\$50,000) Arson (property) PWID Cocaine, etc. (<2.5 gms)	3-12 BC	6-14 BC	9-16 BC	12-18 BC	15-21 BC	21-27 BC	27-40 BC	NA	+/- 6
LEVEL 2 Cnty Incar RIP RS	5 (F3)	Burglary (not home/no person) Corruption of Minors Robbery (prop by force) Firearms (loaded) Theft (>\$2000-\$25,000) PWID (1-<10 lb of marij)	RS-9	1-12 BC	3-14 BC	6-16 BC	9-16 BC	12-18 BC	21-36 BC	NA	+/- 3
LEVEL 4 Cnty Incar RIP RS	4	Indecent assault Forgery (money, stock, etc.) Firearms (unloaded) Crim Trespass (breaks in)	RS-3	RS-9	RS-<12	3-14 BC	6-16 BC	9-16 BC	21-30 BC	NA	+/- 3
LEVEL 3 Cnty Incar RIP RS	3 (M1)	Simple Assault Terr. Threats Theft (\$200-\$2000) Retail Theft (3rd) DUI (M1) Drug Poss.	RS-1	RS-6	RS-9	RS-<12	3-14 BC	6-16 BC	12-18 BC	NA	+/- 3
LEVEL 2 Cnty Incar RIP RS	2 (M2)	Theft (\$50-<\$200) Retail Theft (1st, 2nd) DUI (M2) Bad Checks	RS	RS-2	RS-3	RS-4	RS-6	1-9 BC	6-<12	NA	+/- 3
LEVEL 1 Cnty Incar RIP RS	1 (M3)	Most Misd. 3's; Theft (<\$50) Drug Paraph. Poss. Small Amount Marij.	RS	RS-1	RS-2	RS-3	RS-4	RS-6	3-6	NA	+/- 3

- Shaded areas of the matrix indicate restrictive intermediate punishments may be imposed as a substitute for incarceration.
- When restrictive intermediate punishments are appropriate, the duration of the restrictive intermediate punishment program shall not exceed the guideline range.
- When the range is RS through a number of months (e.g. RS-6), RIP may be appropriate.

Key:

CNTY	= county	NP	= restrictive intermediate punishments
INCAR	= incarceration	RS	= restorative sentences
PWID	= possession with intent to deliver	< ; >	= less than; greater than
REVOG	= repeat violent offender category	BC	= best case
RFEL	= repeat felony 1 and felony 2 offender category	BC	= best case
		Indic	= Three Strike Offense