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Motor Vehicles

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Motor Vehicles

Motor Vehicles; subsequent convictions for driving under the influence—increased penalties

Vehicle Code §§23101, 23102, 23105, 23106 (amended).
SB 250 (Presley); STATS 1977, Ch 592
Support: California Highway Patrol

Minimum penalties for second and subsequent convictions for driving while under the influence of alcohol and/or drugs have been increased by Chapter 592, when either the first or subsequent conviction was a felony-misdemeanor involving bodily injury or death to someone other than the driver. Previously existing law provided specified penalties for conviction of driving under the influence of drugs [CAL. VEH. CODE §23106], intoxicating liquor, or the combination of intoxicating liquor and drugs [CAL. VEH. CODE §23101], which proximately caused bodily injury to any person other than the driver, but provided for no increased penalty upon a subsequent conviction under the same or any other driving-under-the-influence statute [*See* CAL. STATS. 1976, c. 1139, §§339, 340, at —, —]. The only penalty for conviction under either statute was imprisonment in the county jail for at least 90 days but less than one year or in the state prison (for 16 months, two years, or three years [*See* CAL. PENAL CODE §18]) and a fine of between $250 and $5000 [CAL. STATS. 1976, c. 1139, §§339, 340, at —, —]. Such a sentence, however, could be suspended or the convicted person could be placed on probation in lieu of serving such a sentence [CAL. PENAL CODE §1203.1].

Chapter 592 amends Vehicle Code Sections 23101 and 23106 to provide that if a person is convicted under either statute and has a previous conviction within five years under either Section 23102 (misdemeanor driving under the influence of alcohol or combination of alcohol and drugs) or 23105 (misdemeanor driving under the influence of drugs) of the Vehicle Code he or she must serve a minimum of five days and no more than one year in the county jail and pay a fine of between $250 and $5000 [CAL. VEH. CODE §§23101(d), 23106(d)]. If the prior conviction within five years was for violation of either Section 23101 or 23106, then the minimum jail sentence is increased to 90 days, with all other provisions remaining the same [*See* CAL. VEH. CODE §§23101(d), 23106(d)]. If the probation is granted to a person convicted under these sections, then a condition of such probation is that he or she must serve the minimum time in confinement and pay the minimum fine [CAL. VEH. CODE §§23101(d), 23106(d)].

Sections 23101 and 23106 have also been amended to specifically deny power to a court to absolve a person with any subsequent driving-under-the-influence conviction from spending the minimum amount of time in confinement and paying the minimum specified fine [CAL. VEH. CODE §§23101(e), 23106(e)] except in "unusual cases" in which the interest of justice demands that the court strike a previous conviction for purposes of sentencing [CAL. VEH. CODE §§23101(f), 23106(f)]. In such cases, if a court orders a previous conviction stricken, the court is required to state the reasons for so doing [CAL. VEH. CODE §§23101(f), 23106(f)]. On appeal by the state, it is to be conclusively presumed that the only reasons for striking the prior conviction are the reasons stated by the court, and the order will be reversed if such reasons do not constitute a "substantial basis" for such an order [CAL. VEH. CODE §§23101(f), 23106(f)]. These provisions are now virtually identical to those contained in Sections 23102 and 23105 [*Compare* CAL. VEH. CODE §§23101(e), (f) *and* 23106(e), (f) *with* CAL. VEH. CODE §§23102(f), (g), *and* 23105(g), (h)].

Sections 23102 and 23105 have also been amended by Chapter 592 to provide that a conviction under either section within five years of a prior conviction under Section 23101 or 23106 *must* be punished by imprisonment of between five days and one year in the county jail and a fine of between $250 and $1000 [CAL. VEH. CODE §§23102(d), 23105(e)]. A condition of probation for such a subsequent conviction is that the person must serve the minimum time in confinement and pay the minimum fine [CAL. VEH. CODE §§23102(e), 23105(f)]. The court's power to absolve such punishment or strike the previous conviction for purposes of sentencing are subject to the same restrictions imposed by Sections 23101 and 23106 [*See* CAL. VEH. CODE §§23102(f), (g), 23105(g), (h)].

Chapter 592 also amends Sections 23101(a), 23106(a), and 23106(b) to add "death" to "bodily injury" as the types of harm to a person other than the convicted party which if present, distinguish felony-misdemeanor from misdemeanor driving under the influence. These amendments bring the subsections into conformity with subsection (b) of 23101. Thus, Chapter 592 amends the Vehicle Code to provide *mandatory* jail sentences for driving under the influence of intoxicating liquor and/or drugs if the convicted person has a prior driving-under-the-influence conviction within five years of the latest offense and if either the prior or subsequent offense was the proximate cause of death or bodily injury to anyone other than himself or herself.

See Generally:
1) 5 PAC. L.J., REVIEW OF SELECTED 1973 LEGISLATION 445 (drunk driving penalties) (1974).
2) 4 PAC. L.J., REVIEW OF SELECTED 1972 LEGISLATION 551 (driving under the influence) (1973).

Motor Vehicles; drunk driving alternative sentencing

Vehicle Code §23102.1 (new); §§13201.5, 13352.5 (amended);
Welfare and Institutions Code Article 5 (commencing with §19975.01) (new).
SB 38 (Gregorio); STATS. 1977, Ch 890
Support: California Attorney General; California Peace Officers' Association

Chapter 890 authorizes counties to establish alcohol abuse treatment programs in which a convicted misdemeanor drunk driver may, with court approval, choose to participate for one year in lieu of suspension of his or her driving privilege and/or a jail sentence [CAL. WELF. & INST. CODE §§19975.01-.13]. This statewide authorization for such programs follows a four-country experiment authorized by the legislature in 1975 [*See* CAL. STATS. 1975, c. 1133, §2, at 2805].

Vehicle Code Section 23102 generally provides that a first conviction for driving under the influence of intoxicating liquor or a combination of intoxicating liquor and drugs is punishable by imprisonment in the county jail from 48 hours to six months and a fine of between $250 and $500 [CAL. VEH. CODE §23102(c)]. The court may, however, impose a lesser fine if the convicted person consents to and participates in a driver improvement and/or habitual user of alcohol treatment program [CAL. VEH. CODE §23102(c)]. In addition, Penal Code Section 1203 allows a judge to summarily grant probation to a person convicted of such a misdemeanor [CAL. PENAL CODE §1203(c)]. A second conviction under Section 23102 within five years of a prior conviction under Section 23102, 23105, or 23106 is punishable by imprisonment of between 48 hours and one year and a fine of between $250 and $1000 [CAL. VEH. CODE §23102(d)]. If the prior conviction was for a driving-under-the-influence offense that proximately caused the death of, or bodily injury to, any other person, the minimum jail term under this section is five days [*See* CAL. VEH. CODE §23102(d). *See generally* CAL. VEH. CODE §§23101, 23106]. A condition of any probation for such a subsequent conviction is that the person *must* spend the minimum time in jail and pay a fine [CAL. VEH. CODE §23102(e)]. The court has no power under this section to absolve a person from such punishment upon a second conviction [CAL. VEH. CODE §23102(f)] except in "unusual cases" in which the court may strike a prior conviction in the interest of justice [CAL. VEH. CODE §23102(g)]. Chapter 890 adds Section 23102.1 to the Vehicle Code to expressly modify this required condition of probation to now allow a court to suspend execution of the mandatory jail sentence if the defendant consents to participate, for at least one year in a manner satisfactory to the court, in an approved alcohol abuse treatment program [*See generally* CAL. WELF. & INST. CODE §§19975.01-.13].

The Vehicle Code also provides for discretionary suspension by the court of a person's driving privilege upon conviction of driving under the influence of alcohol or the combination of alcohol and drugs [CAL. VEH. CODE §13201.5]. In addition, the Department of Motor Vehicles is generally *required* to suspend the driving privilege of persons convicted of drunk driving, except, in specified circumstances, for misdemeanor first offenders [*See* CAL. VEH. CODE §13352]. Chapter 890 provides courts with an alternative to license suspension [CAL. VEH. CODE §23102.1] and prohibits the Department from suspending the license of a convicted person who agrees to and participates in, an approved alcohol abuse treatment program for at least one year in a manner satisfactory to the court [CAL. VEH. CODE §13352.5. *Compare* CAL. VEH. CODE §13201.5 *with* CAL. WELF. & INST. CODE §19975.01].

Chapter 890 also establishes detailed requirements for approval of alcohol abuse treatment programs and provides for participation therein [*See* CAL. WELF. & INST. CODE §§19975.01-.13]. To qualify a person for participation in an approved program, the court may consider any relevant information about the person contained in a presentence investigation report or made available through other eligibility screening procedures [CAL. WELF. & INST. CODE §19975.01(b)]. Such information, however, cannot be furnished by one who also provides services or has any interest in a privately operated, approved treatment program [CAL. WELF. & INST. CODE §19975.01(b)]. Furthermore, the court must obtain a copy of the convicted person's driving record to determine the person's eligibility for the program [CAL. WELF. & INST. CODE §19975.01(b)]. The court may also require, as a condition of participation, that the convicted person furnish proof of ability to respond in damages as defined in Vehicle Code Section 16430 [CAL. WELF. & INST. CODE §19975.02(d)] and no person shall be eligible for readmission into such a program if the date of the offense for which he or she is subsequently convicted is within four years of the date he or she previously ceased participation in such a program [CAL. WELF. & INST. CODE §19975.04].

Failure to comply with the rules and regulations of, or to complete, the prescribed treatment program shall result in the court's revocation of the suspension of the original sentence and/or revocation and termination of probation, and the court must proceed in the manner provided in Penal Code Section 1203.2(c) [CAL. VEH. CODE §23102.1]. The court must also immediately suspend or order suspension of the convicted driver's driving privilege [CAL. WELF. & INST. CODE §19975.02(a)]. Furthermore, courts are to require periodic reports on each person referred to such a program and an immediate report on any failure by a participant to comply with the rules and regulations of the program [CAL. WELF. & INST. CODE §19975.02(a)].

Moreover, failure of a participant to consent to a chemical test for determining blood alcohol levels, as provided for in Vehicle Code Section 13353, shall result in termination from the program and suspension or revocation of the driving privilege for the period prescribed in Section 13352 for the original offense for which he or she was convicted in addition to the six month's suspension for such refusal provided for in Section 13353 [CAL. WELF. & INST. CODE §19975.02(b)].

The goal of the program shall be to enable each participant to successfully address his or her alcohol abuse or alcoholism, to eliminate dependence on alcohol, and to protect public health and safety on the highways [CAL. WELF. & INST. CODE §19975.05(a)(5)]. The State Office of Alcoholism has sole authority for program approval [CAL. WELF. & INST. CODE §19975.05(a)], and courts may refer persons only to approved programs [CAL. WELF. & INST. CODE §19975.01(c)]. Withdrawal of approval by the Office shall result in the Department of Motor Vehicles revoking or suspending the driving privilege of participants who do not commence participation in another approved program within 21 days [CAL. WELF. & INST. CODE §19975.02(c)].

All approved programs must include: individual, biweekly face-to-face interviews with each participant [CAL. WELF. & INST. CODE §19975.05(a)(1)]; approved fee schedules for participants and provisions for persons who cannot afford such fees [CAL. WELF. & INST. CODE §19975.05(a)(2)]; either a variety of treatment services for problem drinkers and alcoholics or the capability of referring such persons to similar services [CAL. WELF. & INST. CODE §19975.05(a)(3)]; prescribed standards for other services, which may include lectures, classes, group discussions, and individual counseling [CAL. WELF. & INST. CODE §19975.05(a)(3)]; and when appropriate, services to ethnic minorities, women, youth, or any other group with particular needs relating to the program [CAL. WELF. & INST. CODE §19975.05(a)(4)]. In addition, the Office of Alcoholism may adopt other standards to be issued in the form of regulations to assure effective implementation of the procedures [CAL. WELF. & INST. CODE §19975.05(c)].

Counties are not *required* to establish these programs [CAL. STATS. 1977, c. 890, §6, at —], and two or more counties may jointly establish a program when it is not feasible to do so individually [CAL. WELF. & INST. CODE §19975.11]. Also, a court is to transfer, after conviction, all post-judgment matters to the court in the county of the convicted person's residence for further proceedings regarding program participation if the person agrees to participate in a program in his or her county of residence or a county closer to his or her residence [CAL. WELF. & INST. CODE §19975.03]. Administrative responsibilities for each program are to be delegated by the county

board of supervisors to the alcholism administrator, or where none exists, to the head of a health-related agency or department pursuant to Welfare and Institutions Code Section 19923 [CAL. WELF. & INST. CODE §19975.07(b)].

Finally, the application of these programs as an alternative to a jail sentence or driving privilege suspension is prospective only [CAL. WELF. & INST. CODE §19975.13]. Therefore the alleged offense must have been committed on or after January 1, 1978, and on or after the date on which the program to which the convicted person is to be referred has been approved [CAL. WELF. & INST. CODE §19975.13].

Thus, persons convicted of misdemeanor drunk driving will have the opportunity to participate for one year in closely monitored programs designed to eliminate alcohol abuse in lieu of a jail sentence and loss of driving privilege if counties establish a program as authorized by Chapter 890 and if such participation is approved by the court. Such an alternative is perhaps most significant for persons with prior drunk driving convictions who would otherwise face mandatory jail sentences and loss of driving privilege.

Motor Vehicles; drugs

Vehicle Code §40300.5 (amended).
AB 62 (McAlister); STATS 1977, Ch 16
Support: California District Attorneys' Association; California Highway Patrol; California Peace Officers' Association

Chapter 16 amends Section 40300.5 of the Vehicle Code to authorize a peace officer to arrest a person involved in a traffic accident if the officer has reasonable cause to believe the person had been driving under the influence of any drug (a misdemeanor under Vehicle Code Section 23105) even though the officer was not a witness to such driving. Section 40300.5 is an exception to Penal Code Section 836, which authorizes a warrantless arrest for a misdemeanor only if the crime was committed in the officer's presence. Previously, an arrest under Section 40300.5 was allowed only if the officer had reasonable cause to believe that the suspect had been driving under the influence of intoxicating liquor or the combination of drugs and liquor [CAL. STATS. 1969, c. 956, at 1904]. Chapter 16 corrects an apparent oversight and authorizes a warrantless arrest when the officer has reasonable cause to believe the suspect had been driving under the influence solely of drugs.

See Generally:
1) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 220 (misdemeanor arrests) (1969).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 373 (drugs—driving under the influence) (1972).

Motor Vehicles; challenging prior convictions

Vehicle Code §23102.2 (amended).
SB 619 (Song); STATS 1977, Ch 186
Support: California District Attorneys' Association; California Judges' Association

Chapter 186 has amended Section 23102.2 of the Vehicle Code to provide that in a proceeding to have a previous misdemeanor driving-under-the-influence-of-drugs-and/or-liquor conviction declared invalid on constitutional grounds, the defendant must serve notice on the court that rendered the prior judgment at least five court days prior to this subsequent hearing [CAL. VEH. CODE §23102.2(a)]. This section, also, retains language requiring that such a defendant file with the clerk of the court hearing the present proceeding and the prosecuting attorney in the present proceeding, at least five court days prior to the hearing on the alleged constitutional violation, a written and specific statement as to how his or her constitutional rights were violated [CAL. VEH. CODE §23102.2(a)]. This same statement when properly served on the court that rendered the prior conviction constitutes notice to this court pursuant to Section 23102.2(a) of the Vehicle Code.

A prior conviction for driving under the influence is important in subsequent proceedings because of enhanced penalties, including mandatory jail sentence, upon a subsequent conviction for a similar offense [*See* CAL. VEH. CODE §§23102(d), (e), (f), 23105(e), (f), (g)]. In *Boykin v. Alabama* [395 U.S. 238 (1969)], the United States Supreme Court held that a court may not presume from a "silent record" that a defendant voluntarily and knowingly waived his or her constitutional rights, which he or she implicitly relinquished by entering a guilty plea [*Id.* at 242-44]. Taking into account the then recent *Boykin* decision, the California Supreme Court ruled in *In re Tahl* [1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969)] that a trial court record must contain "*on its face*" direct evidence that the defendant was aware of three major constitutional rights (privilege against self incrimination, right to confrontation of one's accusers, right to jury trial) and voluntarily waived them prior to the guilty plea in order for that conviction to withstand a subsequent collateral attack [*Id.* at 132, 460 P.2d at 456, 81 Cal. Rptr. at 584]. While originally applied only to felony convictions, the *Tahl* requirement was later prospectively extended to misdemeanor convictions [Mills v. Municipal Court, 10 Cal. 3d 288, 301-02, 515 P.2d 273, 282-83, 110 Cal. Rptr. 329, 338-39 (1973)]. Before sentencing a person convicted of driving under the influence, the court must obtain from the Department of Motor Vehicles a record of any prior traffic convictions [CAL. VEH. CODE §13209]. Nevertheless, in any actual hearing on the constitutional validity of a prior driving-under-the-influence conviction, the

prosecution continues to have the burden of producing evidence of such prior offenses [CAL. VEH. CODE §23102.2(b)(2)]. The prosecution may satisfy this burden by introducing an abstract of judgment or a minute order of the court [Hanlon & Ferber, *The Talisman of In Re Tahl: Effects on Misdemeanor Drunk Driving Convictions*, 7 U.S.F.L. REV. 437, 442 (1973)]. The defendant then has the burden of producing evidence that his or her constitutional rights were infringed upon at the prior proceeding [CAL. VEH. CODE §23102.2(b)(3)]. This may be done by introducing the docket of the original proceeding, which, if silent as to the validity of his or her waiver, will be sufficient to support the motion to strike the prior conviction from the accusatory pleading—absent further rebutting evidence by the prosecution [*See* Hanlon & Ferber, *The Talisman of In Re Tahl: Effects on Misdemeanor Drunk Driving Convictions*, 7 U.S.F. L. REV. 437, 442-43 (1973). *See generally* Gonzalez v. Municipal Court, 32 Cal. App. 3d 706, 710-11 & n.5, 108 Cal. Rptr. 612, 616 & n.5 (1973) (Section 23102.2 motion to strike a prior conviction relates only to the accusatory pleadings and should not be confused with a motion to vacate the prior judgment)]. Thus, by requiring notice of the constitutional challenge of a prior conviction to be served on the court that rendered the challenged judgment, it appears that the intent of Chapter 186 is to ensure that the court rendering the prior conviction is afforded the opportunity to be made aware of a challenge to the constitutionality of the judgment and to enable it to supplement the record before the present court, for example, by possibly supplying a transcript of the previous proceeding in which the defendant waived his or her rights, if such a record exists [*See* Hanlon & Ferber, *The Talisman of In Re Tahl: Effects on Misdemeanor Drunk Driving Convictions*, 7 U.S.F.L. REV. at 443].

See Generally:

1) 5 PAC. L.J., REVIEW OF SELECTED 1973 CALIFORNIA LEGISLATION 445 (procedure for challenging prior conviction) (1974).

Motor Vehicles; inadmissibility of evidence

Vehicle Code §§40807, 41103.2 (new); §§4760, 4762, 4763, 41103, 41103.5 (amended).

SB 914 (Foran); STATS 1977, Ch 804

Support: Court Clerks of the Judicial Courts; Department of Motor Vehicles

Chapter 804 adds Section 40807 to the Vehicle Code to prohibit, with specified exceptions, "*any* court in *any* criminal action" (emphasis added) from admitting into evidence the record of any action taken by the Department of Motor Vehicles [hereinafter DMV] against a person's driving

privilege or any testimony regarding the proceedings at, or concerning, or produced at "any hearing held in connection with *such action*" (emphasis added). The exceptions to this exclusionary rule consist of testimony or records that are: (1) necessary to enforce the law relating to driving without a valid license or when the driving privilege has been suspended or revoked; (2) needed in a prosecution for failure to disclose any matter at such a hearing when required by law to do so; or (3) introduced solely to impeach the credibility of a witness [*See* CAL. VEH. CODE §40807].

Since the language of Section 40807 expressly renders records of DMV action against a person's driving privilege and hearing-related testimony inadmissible in "*any court in any criminal action*" (emphasis added), it appears that this exclusion does *not* give standing to object to the introduction of such evidence *solely* to the person whose traffic record was at issue in the hearing. Rather, unless it fits into one of the three narrow exceptions, Section 40807 will apparently grant third party standing and thereby preclude admission of such evidence even in criminal actions only remotely related to the person's traffic record. For instance, if a DMV hearing officer should be criminally charged with accepting a bribe for "fixing" the outcome of the hearing (action or nonaction), the record of the DMV's disposition of the case as well as any testimony *regarding or produced at* the hearing, will be inadmissible and may not be offered by either the defense or the prosecution, even though it may be material in the subsequent criminal proceeding [*See* CAL. VEH. CODE §40807]. By the same token, if a witness to an alleged traffic violation or the arresting police officer testifies under oath at a hearing in which the defendant is adequately represented by counsel with full opportunity to cross examine and challenge such testimony and that officer or witness should later die before the criminal trial of the defendant, then the sworn testimony apparently will be not admissible under Section 40807, even though such testimony might otherwise be admissible under the "former testimony" exception to the hearsay rule [*See generally* CAL. EVID. CODE §§1290(b), 1291(a)(2)]. By contrast, the author of this legislation has indicated that Section 40807 was intended to allow "a person to give testimony and present evidence of his defense at administrative hearings without having that evidence, testimony, or resulting action used against *him* in *the* criminal trial" [Letter from Senator John F. Foran to William Follett, October 19, 1977 (emphasis added), (copy on file at the *Pacific Law Journal*)]. Furthermore, the author has stated that this new provision was also intended "to *allow* for . . . any prosecution *not arising* from the same evidence on which the administrative hearing and action was based" [*Id.* (emphasis added)]. This apparent difference between a literal reading of Section 40807 and the author's stated intent may be clarified by either subsequent legislative amendment or by court construction.

The language of Section 40807 also indicates that only records of "*action taken* by the department *against* a person's" driving privilege and testimony concerning hearings related to "*such action*" are inadmissible in court (emphasis added). Therefore, it appears if a hearing is held, but does not result in "action against" a person's driving privilege, the testimony produced at the hearing will not be rendered inadmissible under Section 40807. For instance, if a person accused of refusing to take a blood alcohol test appears at a department hearing and makes an incriminating statement, but for some reason the department does not take action against his or her driving privilege (*e.g.*, the department finds the person was not properly warned that such refusal would result in license suspension pursuant to Vehicle Code Section 13353(a)), it appears that this testimony may be admissible in a later criminal trial on the matter [*See* CAL. VEH. CODE §40807. *See generally* CAL. VEH. CODE §13353]. On the basis of this literal interpretation of the statute, it is arguable that a person appearing at a DMV hearing in which he or she faces suspension of his or her driving privilege, cannot be assured, at least until after the hearing, that what was said during these proceedings will not be used against that person in a later criminal proceeding. Thus, a logical result may be that such a person's attorney may, to protect his or her client's interest, advise the client at the hearing to invoke the fifth amendment privilege against self-incrimination, which could hinder the probative value of such hearings.

Chapter 804 also authorizes the DMV to charge an administrative fee for collecting bail for outstanding parking violations and related offenses at the time of vehicle registration and makes other conforming changes [*See* CAL. VEH. CODE §§4760, 4762, 4763, 41103, 41103.2, 41103.5]. In conclusion, Chapter 804 provides that records of DMV action against a person's driving privilege and testimony produced at the related hearings are inadmissible, with specified exceptions, in any court in any criminal proceeding, thereby extending the rule that formerly applied only in civil actions [*Compare* CAL. VEH. CODE §40807 *with* CAL. VEH. CODE §§40832-40834].