COLORADO'S NEW DUI-FELONY LAW

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On June 1, 2015, Governor Hickenlooper signed into law House Bill 15-1043, which made Colorado the 46th state to adopt a felony DUI/DWAI law. Drivers can expect the law to take effect August 5, 2015, at 12:01 AM. While the new law has its proponents, much remains unknown about how state prosecutors and the Department of Revenue will implement many of the bill's provisions, thus impeding a full analysis of implications related to the Act. Therefore, this Article will be limited to the basics of the Act and the limited information known so far.

Four Equals an F4—The Basics

Prior to 2015, a person driving in Colorado could only be charged with a felony related to a DUI when the driver caused serious bodily injury or death to another, or when a driver who had been designated as a Habitual Traffic Offender (HTO) committed DUI or DWAI while under restraint for the HTO designation. The new Act subjects a driver accused of DUI, DUI per se, or DWAI to a class 4 felony conviction when the driver's record shows three or more prior convictions to any combination of DUI, DUI per se, DWAI, Vehicular Assault, Vehicular Homicide, or any other act committed out-of-state that, if committed in Colorado, would have constituted one of these offenses. The Act also downgrades the scenario involving a designated HTO driver who commits DUI, DUI per se, or DWAI while under the HTO restraint from a class 6 felony, to a class 1 misdemeanor.

The penalties for a class 4 felony DUI/DWAI include the following as dictated by the felony sentencing statute:

Penalty	Minimum	Maximum
DOC:	Two years	Six years
Parole:	Mandatory three-year period of parole following incarceration	
Fine:	$1000	$500,000

In addition to the penalties described above, a driver convicted of felony DUI/DWAI will be required to have an ignition interlock device installed in each vehicle registered in the driver's name or that the driver otherwise has access to for the entire mandatory parole period, if applicable. Another provision of the new Act allows the DMV to restrict a multiple-offender's license to interlock for a period of two to five years. While the DMV has yet to release information discussing how the new Act will affect the way the DMV implements interlock requirements, it may be prudent to prepare for the possibility that drivers convicted of felony DUI/DWAI might be facing up to a five-year interlock period upon reinstatement. Regardless, drivers subject to the penalty provisions of this Act can expect to incur several thousand dollars in interlock expenses on top of fines, court costs, supervision fees, and other treatment costs.

Since 2005, Colorado has seen a decrease in DUI arrests. Additionally, most states with a felony DUI have seen little to no decrease in DUI offenses. The common consensus is that treatment is the best deterrent. With that in mind, the legislature drafted into the Colorado Act a provision that works to

mitigate the threat of a prison sentence resulting from a felony DUI/DWAI conviction in favor of treatment or alternative programs. The provision is an "exhaustion of remedies" provision, and requires that trial courts sentencing offenders to department of corrections sentences articulate specific findings regarding why incarceration is the most suitable option under the individual facts and circumstances of the case, and why other alternatives are inappropriate.

Altogether, the language of the new Act begs the question of whether a mandatory minimum county jail sentence still exists when a driver is convicted of a felony DUI/DWAI. The Act directs the trial court to sentence a driver in this category under the provisions of the felony sentencing statute. Nevertheless, the misdemeanor DUI/DWAI penalties section retains language that suggests a person convicted of an alcohol-related driving offense with "two or more" prior convictions must serve at least sixty-days in the county jail. At this time, it remains to be seen how the courts will handle these cases and how prosecutors will argue sentencing in felony DUI/DWAI cases.

Driver's License Implications

Because of the exhaustion of remedies provision built into the Act, felony DUI/DWAI convictions may not result in a period of parole, and therefore, the interlock requirement relating to parole may rarely be imposed. Nevertheless, as discussed previously, the Act creates a new driver's license revocation scheme for multiple offenders, including felony DUI/DWAI offenders. Unfortunately, because the Act includes several provisions implicating the powers of the DMV, there is no certainty as of yet how the provisions will be implemented. The only certainties known thus far are as follows:

1. Upon conviction for felony DUI/DWAI, a driver will suffer a one-year revocation period during which the driver will not be eligible for early reinstatement.
2. Following the mandatory one-year revocation period, the driver will then be required to reinstate into an interlock-restricted license for a period of at least two years, but not more than five years.

While some information exists regarding the length of restraint and no-drive period in the felony DUI/DWAI context, much remains to be addressed regarding exact interlock periods to be imposed upon felony DUI/DWAI offenders who do not receive a DOC sentence. This information will presumably be made available by the DMV in July, prior to the effective date of the Act.

Determining Prior Convictions Prior to Issuance of Indictment/Information

Prior to the enactment of the felony DUI legislation, research of prior convictions by the prosecution rarely occurred before sentencing in DUI cases. Under the new legislation, the prosecution is required to include allegations of prior convictions in the indictment or information. Successfully completed deferred judgments or cases that resolve in dispositions other than alcohol-related driving offenses are not considered prior convictions. Therefore, a "wet reckless" conviction should not be considered in the calculation of priors, although defenders can anticipate litigation involving interpretation of what constitutes a prior conviction in the context of out-of-state records.

Additionally, a prosecutor bears the burden of proving priors. A prior must be proven by certified driving record or authenticated court record showing the conviction. Defense counsel would be wise to prepare motions in an effort to demand proof of priors and collaterally attack prior convictions from the outset of a felony DUI/DWAI case to effect a refile into county court when the district attorney cannot prove the requisite number of priors.

Other Provisions Affecting Multiple-offenders

The felony DUI Act also creates a power in the trial courts to order residential treatment for some third-time DUI/DWAI offenders. In particular, when the prosecution proves that a driver convicted of DUI, DUI per se, or DWAI has two prior convictions within a seven-year period from the date of violation of the present offense, then the trial court may order residential treatment as a component of the sentence. The calculation of priors will go from violation date to violation date; therefore, so long as the violation date of the defendant's first DUI/DWAI conviction is within seven years of the date the defendant was arrested for the third offense, then the trial court may impose residential treatment.

Moving Beyond the Bare Bones of the Felony DUI Act

For defenders preparing to take on felony DUI cases, much remains to be seen with respect to best litigation strategies from a defense perspective. The Act, in its simplicity, leaves much for interpretation, and gives rise to some Fourth, Fifth, and Sixth Amendment concerns, which are a topic for another article, that will make for a rich motions practice in litigating felony DUI/DWAIs. Additionally, it may be months, even years before the defense bar can get a sense of sentencing patterns with respect to felony DUI/DWAI. Until answers become more prevalent, the defense of the accused in the felony DUI/DWAI context will very much be a practice of trial and error.