Evaluating Changes to Pennsylvania's DUI Law

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Chairmen Langerholc and Sabatina, members of the Transportation Committee, thank you for the opportunity to speak with you today. And thank you for your continued bipartisan work to keep us safe on our roads, highways, and bridges. My name is Dave Sunday, and I am the York County District Attorney. On behalf of the Pennsylvania District Attorneys Association, thank you for consideration or views on two important topics that Senator Phillips-Hill and Chairman Langerholc included in Senate Co-sponsorship Memo 1128.

Commonwealth v. Chichkin

The cosponsor memo outlines legislation that will help ensure our ARD statute for DUI complies with recent caselaw, C*ommonwealth v. Chichkin*, regarding use of the ARD in sentencing for those who are convicted of subsequent DUI offenses.

ARD is a program that allows a DUI offender, if and only if he or she elects to enter it, to avoid any formal conviction. It allows a DUI offender to avoid incarceration, shortens the period of license suspension, and allows expungement of the DUI charge upon successful completion of the program. Until recently, an ARD for DUI always counted as a prior offense if the defendant failed to rehabilitate himself or herself and instead chose to commit another DUI.

The proposal would restore what was always the law until *Chichkin* came along. In *Chichkin*, the Superior Court held that ARDs cannot count as a first offense because the applicable statute does not require notice about the effect of the prior ARD on the sentencing associated with a subsequent DUI conviction. It would make the effect of an ARD clearer because it ensures that defendants are explicitly informed of what they are agreeing to. In doing so, the legislation addresses the issues raised by the *Chichkin* court. The legislation has notice requirements, and it does not add new penalties. And individuals do not have to participate in ARD. If they do not want to, they can elect to go to trial.

It would address *Chichkin* in a simple and straightforward manner: requiring that the Commonwealth notify DUI offenders that if they enter the ARD program and are convicted of a subsequent DUI crime in the future, the ARD will count as a first offense for purposes of sentencing and requiring offenders to agree to this provision in order to receive the benefit of ARD. In this way it would ensure that ARD for impaired drivers complies with recent caselaw and gives force to the dual goals of ARD for first-time offenders and graduated punishment for repeat impaired drivers.

Prosecutors believe it is important that those who get the enormous benefit of the ARD program also not be given a free pass if they become a recidivist. Impaired driving is dangerous, and sometimes deadly. Providing alternatives to incarceration and expungements for first-time offenders is good public policy; but not having appropriate consequences for repeat impaired drivers makes our roads more dangerous.

Nothing in this proposal would restrict the rights of the accused. The ARD program is not mandatory; no one is required to enter it. The fix to *Chichkin* would ensure that for sentencing

purposes DUI ARD only has negative consequences if you drive impaired again after being given the benefit of the rehabilitative programs that are part of ARD. It would have no effect on the first-time DUI driver who enters and completes ARD and does not commit such an offense again.

Opponents of this provision have argued that if an individual fails to complete ARD, the admission that the Commonwealth's evidence would prove the elements beyond a reasonable doubt could somehow be used against them. Our laws clearly do not permit this to happen.

- PA Rule of Criminal Procedure 311(b) says "[i]nformation or statements supplied by the defendant to the attorney for the Commonwealth in an ARD application shall not be used against the defendant for any purpose in any criminal proceeding except a prosecution based on the falsity of the information or statement supplied."

- PA Rule of Criminal Procedure 313(B) provides that in the context of an ARD "[n]o statement presented by the defendant shall be used against the defendant for any purpose in any criminal proceeding except a prosecution based on the falsity of the information or statement supplied."

- PA Rule of Criminal Procedure 317 provides that "[i]f a defendant refused to accept the conditions required by the judge, the judge shall deny the motion for accelerated rehabilitative disposition**. In such case, the case shall proceed in the same manner as if these proceedings had not taken place."** (emphasis added)

- PA Rule of Evidence 410 specifically prohibits using admissions against a defendant in the context of guilty plea negotiations or guilty pleas that are later withdrawn.

As a result of these vast rules and law, statements made pursuant to an agreement for ARD cannot be used against the defendant if the ARD is not completed. Any assertion to the contrary is flatly wrong as a matter of law.

The cosponsor memo also addresses problems caused by the recent Supreme Court case of *Commonwealth v. Eid.* As a result of this decision, those who are driving on a suspended license because of a prior DUI and who are subsequently suspected of driving while impaired but refuse a blood or breath test can only receive a fine, not any jail time for the refusal. These are repeat offenders. The absence of a remedy in this instance is troubling and will make our roads more dangerous. Let me take a moment to explain the facts and holding of the case. The decision by the Court was technical in nature, so a brief explanation will help illustrate the need for a legislative fix.

Defendant was arrested for DUI. His car was stopped facing the wrong way on a one-way street with the engine still running and had collided with two other vehicles. Defendant was

intoxicated but refused testing. He was driving on a suspended license related to a prior DUI. He was convicted of DUI offenses and with violating section 1543(b)(1.1.)(i) of Title 75 for his refusal to submit to testing while driving on a suspended license. He was subject to a mandatory fine of $1000 and a period of imprisonment of "not less than 90 days." Ultimately, he was sentenced to 90 days to six months' incarceration and a $1000 fine on the section 1543(b)(1.1)(i) violation.

On appeal, the defendant argued that this statute was unconstitutionally vague and overbroad in violation of the due process clauses of the United States and Pennsylvania Constitutions because it did not set out a statutory maximum sentence. As you may know, the vast majority of all sentences in Pennsylvania have a minimum and a maximum sentence.

The Court found that the words "not less than 90 days" established a minimum term of imprisonment but not a maximum, and that this was not permitted absent a specific authorization for a flat sentence. Generally speaking, Pennsylvania's sentencing law requires a minimum and maximum term, unless a statute specifically says otherwise. The Court declined to speculate as to the intent of the General Assembly with regard to a maximum term where none was established in the statute.

As a result, the Court found that section 1543(b)(1.1)(i) lacked clarity in that it did not set forth the range of available sentences rendering the statute vague and unconstitutional and left it to the General Assembly to remedy the deficiency by providing a maximum term or expressly permitting a flat sentence which does not exceed the statutory maximum.

The Court vacated the sentence of imprisonment for the section 1543(b)(1.1.)(i) violation. It left in place the fine of $1,000 as that portion of the sentence could legally be imposed.

The result is that presently, if someone is driving on a suspended license for a prior DUI and refuses to submit to a blood or alcohol test if he or she is suspected of driving while impaired, the only penalty for a first offense of section 1543(b)(1.1) is a fine. That in our view is dangerous and unacceptable, and we would ask that you remedy this significant problem.

The remedy would specifically authorize a flat, determinate sentence in our sentencing code (Title 42) and would also indicate what the flat sentences are in our DUI law. The length of sentence would be the same as what it was before the *Eid* decision and would not create a longer penalty than was originally intended with section 1543(b) was enacted. It should address the specific statute cited by the court in *Eid,* as well as two other instances in the DUI law that are similarly written and, thus, would not likely withstand constitutional scrutiny: penalties for first and second offenses for driving with a DUI suspended license where the person has not refused testing and does not have a BAC of .02 or greater, or any Schedule 1 or nonprescribed Schedule II or III controlled substance in his or her system.

Thank you for your time and attention to these important issues. If these two court cases are addressed in legislation, our roads will be safer, ARD will be restored to where it was previously, and dangerous repeat impaired drivers will face appropriate consequences, while treatment options for others will continue.