COMMITTEE ON JUDICIARY
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O R E G O N V E H I C L E C O D E

ARTICLE 9. SERIOUS TRAFFIC OFFENSES

Preliminary Draft No. 2; August 1974

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O R E G O N V E H I C L E C O D E

ARTICLE ___. SERIOUS TRAFFIC OFFENSES

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Section 1. (Driving while under the influence of liquor or drugs.) (1) A person commits the offense of driving while under the influence of liquor or drugs if, while being under the influence of intoxicating liquor, dangerous drugs or narcotic drugs, he drives a vehicle upon a highway.

(2) As used in subsection (1) of this section:

(a) "Dangerous drugs" has the meaning provided for that term in ORS 475.010.

(b) "Narcotic drugs" has the meaning provided for that term in ORS 474.010.

(3) Driving while under the influence of liquor or drugs is a Class A traffic infraction.

COMMENTARY

See Commentary under s. 2.

Section 2. (Driving with .10 percent or more blood alcohol content.) (1) A person commits the offense of driving with .10 percent or more blood alcohol content if he drives a vehicle upon a highway when he has .10 percent or more by weight of alcohol in his blood as shown by chemical analysis of the person's breath, blood, urine or saliva made under ORS 483.634 to 483.646.

(2) Driving with .10 percent or more blood alcohol content is a Class A traffic infraction.

COMMENTARY TO SS 1 AND 2

These sections would repeal ORS 483.992 and 483.999. The penalty classification for both offenses would be the same, a Class A traffic infraction. (See, Classification of Offenses; Disposition of Offenders; Preliminary Draft No. 4, for further discussion.)

Although the offense defined in s. 2 would be a non-criminal offense for a first offender, absent dangerous driving, the percentage of blood alcohol content needed to make the section operative is reduced from .15 to .10 percent.

By providing for two separate offenses, ss 1 and 2 are in accord with the Oregon Court of Appeals decisions that have construed the interrelationship between the two existing crimes of DUIL and driving with .15 or more blood alcohol content.

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Oregon Cases:

In State v. Nelson, Wolfe, & Ehrhard, 96 Adv Sh 1843, ___ Or App ___, 509 P2d 36 (1973), the defendants were each charged in justice court with DUIL, ORS 483.992, and driving with .15 percent or more alcohol in blood, ORS 483.999. The state moved to consolidate the charges in each case. The motion was granted and affirmed by the circuit court.

The Court of Appeals affirmed the trial court and held that consolidation was proper.

The court held that this case did not present a double jeopardy problem. In State v. Welch, 96 Adv Sh 631, ___ Or ___, 505 P2d 910 (1973), the Supreme Court pointed out that double jeopardy does not arise unless a defendant is subjected to two different trials. There is nothing improper in charging the defendant with two separate counts. This does not present a double jeopardy problem such as was presented in State v. Brown, 262 Or 442, 497 P2d 1191 (1972), where there were two separate trials.

The court did not rule on the question of cumulative punishment because there had been no trial in the case and thus there was no evidence that the two charges arose out of a single transaction.

It should be noted that in State v. Welch, the Supreme Court ruled that, while a defendant could be tried on two counts of publishing forged checks, he could be subjected to only one penalty, as the publication of two forged checks constituted one transaction.

State v. Abbott, 97 Adv Sh 1735, ___ Or App ___, 514 P2d 355 (1973), was a case in which the defendant was charged in district court with DUIL, ORS 483.992, and driving with .15 percent or more alcohol in blood, ORS 483.999. The district judge found the defendant not guilty of DUIL and guilty of .15.

The defendant appealed and the circuit court dismissed the .15 percent charge. The court ruled that .15 is not a separate crime but rather an enhanced penalty provision of the DUIL statute. Further, the legislature did not intend that a defendant could be convicted and sentenced for both crimes. The circuit court held that it was impossible for one to be found not guilty of DUIL and guilty of .15.

The Court of Appeals reversed. The court first noted that the state could consolidate both charges. State v. Nelson, Wolfe, & Ehrhard, supra. There is no question in this case as to whether the defendant can be convicted and sentenced for both crimes because the defendant was found not guilty of one.

The court held that ORS 482.430, which provides that for revocation a .15 percent conviction will be treated as a DUIL conviction, does not indicate that .15 is merely an enhanced penalty provision. Revocation of a license is not intended to be punishment. State v. Robinson, 235 Or 524 (1963).

Finally, the court held that a defendant could be found not guilty of DUIL and yet be found guilty of .15 percent. Although unlikely, it would be possible for one to conduct himself so as to show few signs of intoxication and yet have .15 percent alcohol in his blood. Thus, there could be a finding of not guilty of DUIL and a finding of guilty of .15.

ORS 483.992 (2) (DUIL) and 483.999 (.15 percent) define separate offenses, as they may require different proof in some respects.

In State v. Rowe, 97 Adv Sh 2346, ___ Or App ___, 515 P2d 1352 (1973), the defendant was found not guilty of DUIL and guilty of .15 percent in district court. Upon appeal, the circuit court found the defendant guilty of .15. The defendant appealed, contending that one may not be found not guilty of DUIL and guilty of .15 percent.

The Court of Appeals affirmed based on State v. Abbott, supra.

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Section 3. (Dangerous driving in the second degree.) (1) A person commits the crime of dangerous driving in the second degree if, with criminal negligence, he drives a vehicle in a manner that endangers the safety of persons or property.

(2) Dangerous driving in the second degree is a Class B misdemeanor.

COMMENTARY

See Commentary under s. 4.

Section 4. (Dangerous driving in the first degree.) (1) A person commits the crime of dangerous driving in the first degree if he recklessly drives a vehicle in a manner that endangers the safety of persons or property.

(2) Dangerous driving in the first degree is a Class A misdemeanor.

COMMENTARY TO SS 3 AND 4

These sections propose two degrees of a new traffic crime, "dangerous driving," to replace the existing reckless driving statute. This approach embodies two objectives: Primarily, to eliminate the old crime which was frequently used for plea negotiation purposes in DUIL cases; and, secondly, to redefine the crime in the context of criminal culpability.

The culpability definitions set forth in the Oregon Criminal Code of "criminal negligence" and "recklessly" would be adopted by the proposed Vehicle Code.

> ORS 161.085. "(9) 'Recklessly,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.
>
> "(10) 'Criminal negligence' or 'criminally negligent,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

ORS 161.125 (2) would also have a significant bearing on the reckless driver who is also intoxicated. It provides:

> "When recklessness establishes an element of the offense, if the defendant, due to drug use, dependence on drugs or voluntary intoxication, is unaware of a risk of which he would have been aware had he been not intoxicated, not using drugs, or not drug dependent, such unawareness is immaterial."

"Reckless driving" is defined in existing law as driving "any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others." ORS 483.992 (1). The crime is punishable, for a first conviction, by imprisonment for not more than 90 days, or by a fine of not more than $500, or both. A second or subsequent conviction is punishable by imprisonment for not more than six months or by a fine of not more than $2,000, or both. These provisions would be repealed.

A Class A misdemeanor is punishable by not more than one year's imprisonment or $1,000 fine, or both. A Class B misdemeanor has a penalty of not more than six month's imprisonment or $500 fine, or both.

ORS 483.343 prohibits driving in "a careless manner," defined as meaning "in a manner that endangers or would be likely to endanger any person or property." The penalty is imprisonment for not more than 60 days or $250 fine, or both. This statute would be repealed.

ORS 483.345 provides that the driver of any vehicle exercise "reasonable control of the vehicle he is driving as may be necessary to avoid colliding with any object." This offense is a Class C misdemeanor and would be punishable by a maximum fine of 30 day's imprisonment or $250 fine, or both. The definition of the offense contains no culpability element, and, therefore, is a "strict liability" type of offense. Retention of this statute would not conflict with any of the proposed sections, although some redefinition of the offense might be desirable.

Adoption of the Criminal Code's culpability terms would be consistent with the objectives of limiting criminal culpability to four clearly defined types of culpability, i.e., "intentional," "knowing," "reckless" or "criminally negligent" conduct.

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Oregon Cases:

State v. Wilcox, 216 Or 110, 337 P2d 797 (1959)

Defendant demurred to an indictment charging criminally negligent homicide. The indictment charged the defendant essentially in the language of the reckless driving statute.

The defendant contended that the language of the reckless driving statute, when used in a homicide indictment, is unclear and could charge negligent homicide, manslaughter or second degree murder. The circuit court sustained the demurrer and the Supreme Court reversed.

Defendant contended that the term "wilful and wanton" in the reckless statute described intentional conduct or at least some degree of negligence higher than gross negligence. Thus the indictment actually charged him with a higher crime than negligent homicide.

The court held that ORS 483.992 (1) "is descriptive of grossly negligent conduct and nothing more nor less . . . . " The court agreed that in some contexts the term "wilful and wanton" had a meaning different than that of "gross negligence." However, the court held that it was not unreasonable to look upon wilful and wanton conduct short of an intent to do a particular harm as an aggravated form of negligence.

The court also pointed out that wilful and wanton, when used together, have a different meaning than when used separately. Thus reference to the definitions in the Criminal Code are not helpful in interpreting the reckless driving statute.

The court discussed some language in the statute which has since been removed ("without due caution and circumspection . . . "). This language could be construed as applying to simple negligence. However, the court regarded the reckless driving statute as requiring more than mere negligence to constitute a violation of the statute. The statutes defining manslaughter, negligent homicide and reckless driving are not violated where the motor vehicle is operated in an ordinary negligent manner.

The court summarized by saying that (1) simple negligence in operating a car is not subject to criminal punishment, (2) reckless driving statute is violated only by acts of gross negligence which, however, may include wilful and wanton misconduct as the term is used in civil cases (e.g., something more than gross negligence), and (3) the negligent homicide statute is the exclusive method of punishing a person for killing another as a result of driving a motor vehicle in a grossly negligent manner unless other specified circumstances are present (such as intoxication as provided in former ORS 483.992 (2) (b)).

Justice Sloan dissented. The indictment charged the defendant drove in a grossly negligent manner. It also charged his action was wilful and wanton. He felt that there is no such thing as "wilful negligence." Gross negligence means nothing more nor less than "great negligence." Wilful conduct, as used in the reckless statute, means advertent, intentional, or quasi-intentional. Thus the indictment in this case could charge either manslaughter or negligent homicide.

State v. Leverich, 97 Adv Sh 850, ___ Or App ___ (1973), 511 P2d 1265

The defendant was tried and convicted in district court of reckless driving. Prior to that trial he was charged by indictment with negligent homicide. The circuit court dismissed the indictment on the grounds of double jeopardy. The Court of Appeals affirmed.

Based on State v. Brown, the court held that the two charges arose out of the same transaction, the prosecutor knew of the second charge, and both charges could have been tried in circuit court.

With regard to both charges being tried in the same court, the court held that (1) both charges could have been initiated in circuit court or (2) the reckless driving charge could have been consolidated with the homicide charge in circuit court.

ORS 134.140 (2) provides that a dismissal of a charge is a bar to a later misdemeanor prosecution for the same crime. To consolidate the charges would require a dismissal of the reckless charge in district court. Brown by implication says that ORS 134.140 (2) is not a bar to a subsequent prosecution for the misdemeanor in circuit court if the dismissal is for consolidation.

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Section 5. (Fleeing or attempting to elude a police officer.) (1) A driver of a motor vehicle commits the crime of fleeing or attempting to elude a police officer if, when given visual or audible signal to bring the vehicle to a stop, he knowingly flees or attempts to elude a pursuing police vehicle.

(2) The signal given by the police officer may be by hand, voice, emergency light or siren.

(3) As used in this section, "police officer" means a sheriff, municipal policeman or member of the Oregon State Police in uniform, prominently displaying his badge of office and who is operating a vehicle appropriately marked showing it to be an official police vehicle.

(4) Fleeing or attempting to elude a police officer is a Class A misdemeanor.

COMMENTARY

This section defines the offense so as to follow UVC s 11-904 more closely. ORS 483.049 would be repealed. Existing Oregon law, the UVC and the proposed section are all very similar, although the penalties differ considerably among the three versions.

Section 6. (Conviction of traffic offenses as grounds for mandatory revocation or suspension.) ORS 482.430 is amended to read:

482.430. (1) The division forthwith shall revoke any person's permit or license to operate motor vehicles upon receiving a record of the conviction of such person of any of the following offenses:

(a) Manslaughter or criminally negligent homicide resulting from the operation of a motor vehicle.

(b) Perjury or the making of a false affidavit to the division under this chapter or any other law of this state requiring the registration of motor vehicles or regulating their operation on highways.

(c) Any crime punishable as a felony in the commission of which a motor vehicle is used.

(d) Conviction or forfeiture of bail upon three charges of reckless driving all within the preceding 12 months.

(e) A conviction of a driver of a motor vehicle involved in an accident resulting in the death or injury of another person, upon a charge of failing to stop and disclose his identity at the scene of the accident.

(2) The division forthwith shall suspend any person's permit or license to operate motor vehicles upon receiving a record of the conviction of such person for the following offenses:

(a) Driving while under the influence of intoxicating liquor, dangerous drugs or narcotic drugs.

(b) Fleeing or attempting to elude a traffic or police officer.

(c) Driving with .10 percent or more by weight of alcohol in driver's blood.

(3) The period of suspension shall be:

(a) First conviction within a 10-year period, 30 days.

(b) Second conviction within a 10-year period, one year.

(c) Third or subsequent conviction within a 10-year period, three years.

COMMENTARY

The statute is amended to specifically include conviction of the crime of driving with .10 blood alcohol content as a ground for mandatory suspension of driver's license. This appears as subsection (5) of ORS 483.999 under existing law.

Section 7. (Suspension for refusing breath test; notice of suspension.) ORS 482.540 is amended to read:

482.540. (1) Upon receipt of the report of a police officer as required in subsection (2) of ORS 483.634, and in accordance with subsection (2) of this section and subsection (1) of ORS 482.550, the division shall suspend the reported person's license, permit or privilege to drive a motor vehicle in this state for a period of [90] 180 days.

(2) Upon receipt of the report of the police officer, the division shall notify the reported person by mail of the intention to suspend and allow said person a 20-day period after the date of mailing said notice to request in writing a hearing before a representative of the division as provided in this section. If no request is filed within the 20-day period, the division shall thereupon suspend the license, permit or privilege of the person to drive a motor vehicle.

(3) Notice of intention to suspend or notice of an order of suspension is presumed to have been received upon the expiration of five days after it is deposited in the United States mail with postage prepaid, addressed to the person at his last address as shown by his application for original, renewal or duplicate license, which mailing may be proved by the certificate of any officer or employe of the division over 18 years of age specifying the time and place of giving notice.

COMMENTARY

The statute is amended to increase the suspension period for refusal to take the breath test from 90 to 180 days.

Section 8. (Hearing on suspension under ORS 482.540.) ORS 482.550 is amended to read:

482.550. (1) If a request for a hearing is filed, the hearing shall be before a representative of the division in the county where the alleged offense occurred unless there is an agreement between the person and the division that the hearing be conducted elsewhere. In connection with such hearing, the division or its authorized representative may administer oaths and shall issue subpenas for the attendance of witnesses requested by the person or the division and the production of relevant documents. The hearing shall be recorded by whatever means may be determined by the division and shall include testimony and exhibits, if any. The record of the proceeding shall not be transcribed unless requested by a party to the proceeding. Upon an affirmative finding on each matter listed in subsection (2) of this section, the division shall issue an order suspending the license, privilege or permit of the person to drive a motor vehicle, effective as provided in ORS 482.560. Otherwise, no suspension shall be ordered.

(2) The scope of the hearing shall be limited to:

(a) Whether the person at the time he was requested to submit to a test was under arrest for driving a motor vehicle while under the influence of intoxicating liquor in violation of [subsection (2) of ORS 483.992] section -- of this 1975 Act or of a municipal ordinance;

(b) Whether the police officer had reasonable grounds to believe, at the time the request was made, that the person refusing to submit to the test had been driving under the influence of intoxicating liquor in violation of [subsection (2) of ORS 483.992] section -- of this 1975 Act or of a municipal ordinance;

(c) Whether the person refused to submit to a test;

(d) Whether such person was informed of the consequences, under ORS 482.540 to 482.560, of his refusal to submit to the test; and

(e) Whether such person was informed of his rights as provided in ORS 483.638.

COMMENTARY

This is a housekeeping amendment to insert the new statutory reference to driving while under the influence. (See section 1, supra.)

Section 9. (Notice of suspension, revocation or cancellation.) ORS 482.570 is amended to read:

482.570. When the division, as authorized or required, suspends, revokes or cancels a license or the right to apply for a license to operate motor vehicles, it shall give notice of such action to the person whose license or right is affected. The notice shall state the nature and reason for the action and, in the case of a suspension, whether it was ordered by a court. Service of the notice is accomplisned either by mailing the notice by certified mail, return receipt requested, to the person's address as shown by division records, or at the option of the division, by personal service in the same manner as a summons is served in an action at law. [When notice sent by certified mail is returned, the receipt unsigned, service of notice shall be accomplished by personal service in the same manner as a summons is served in an action at law. Refusal of the service by the person whose license or right is suspended is prima facie evidence of receipt of the notice.]

COMMENTARY

See Commentary under s. 10.

Section 10. (Driving while suspended or revoked.) (1) A person commits the crime of driving while suspended or revoked if he drives a motor vehicle upon a highway during a period when his license or permit to drive a motor vehicle or his right to apply for a license to drive a motor vehicle in this state has been suspended by a court or by the division or revoked by the division.

(2) In a prosecution under subsection (1) of this section, it is an affirmative defense that:

(a) An injury or immediate threat of injury to human or animal life and the urgency of the circumstances made it necessary for the defendant to drive a motor vehicle at the time and place in question; or

(b) The defendant had not received notice of his suspension or revocation as required by ORS 482.570.

(3) The affirmative defense under paragraph (b) of subsection (2) of this section shall not be available to the defendant if:

(a) The defendant refused to sign a receipt for the certified mail containing the notice;

(b) The notice could not be delivered to the defendant because he had not notified the division of a change in his residence as required by subsection (2) of ORS 482.290; or

(c) At a previous court appearance, the defendant had been informed by a trial judge that the judge was ordering a suspension of the defendant's license, permit or right to apply.

(4) Driving while suspended or revoked is a Class A misdemeanor.

COMMENTARY TO SS 9 AND 10

Subsection (1) restates the crime of driving while suspended or revoked. ORS 482.650 would be repealed.

Subsection (2) sets forth two affirmative defenses to the charge. Paragraph (a) is cast under the existing statute as an exception and has been restated in the draft section.

Paragraph (b) places the burden on the defendant to prove by a preponderance of the evidence that he did not receive the required notice of suspension or revocation. The most vexatious problem that has plagued officials in their attempts to enforce the prohibition against driving while suspended has been their inability to locate the licensee to notify him of the suspension or to prove at trial that notice was received. The draft deals with this dilemma by making the defense unavailable if the certified mail containing the notice has been refused or if the defendant has not kept the division advised of his residence as required by statute. This approach to the notice problem is consistent with State v. Buen, infra. ORS 482.570 is amended to delete the provision for mandatory personal service when the certified mail is returned, receipt unsigned. (See section 9.)

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Oregon Cases:

In State v. Buen, 97 Adv Sh 150, ___ Or App ___, 509 P2d 865 (1973), the defendant was convicted in three separate trials of DWS. A certified copy of suspension was mailed to his address, return receipt requested. The receipt was returned, signed by another, with the defendant's name written below the signature. In district court defendant was sentenced to four days, eight days and sixteen days. In circuit court the defendant was sentenced to thirty days, six months and one year, to run consecutively. The Court of Appeals affirmed.

The defendant first contended that he had not received adequate notice of suspension. The court noted that prior to 1971 ORS 482.570 provided that notice by mailing is afforded a disputable presumption of receipt. In 1971 the legislature removed the disputable presumption language and said that notice is given by mailing the notice by certified mail, return receipt requested, or by personal service. Proof of the following of this procedure by the MVD alone is sufficient to support conviction. Further, ORS 482.290 (2) requires a driver to notify the MVD of a change of address.

With regard to the sentence, the court relied on State v. Madden, 10 Or App 643, 501 P2d 71 (1972), in holding the sentence legal.

State v. Cesaro, 8 Or App 274, 494 P2d 256 (1972), was a case in which the defendant was cited for speeding in Medford. The citation contained the statutory notice that failure to appear could result in a warrant for arrest or suspension or both. ORS 484.150 (7) (a). Defendant failed to appear in municipal court. The court sent him notice to appear on a certain date. Defendant claimed he never received the notice. After the second date, the court sent notice to MVD and defendant's license was suspended. Defendant was convicted three times of driving while suspended. The Court of Appeals affirmed.

Defendant contended the procedure violated due process in that it did not give him notice and an opportunity to be heard prior to suspension. The court held that the defendant had been given notice and an opportunity to be heard through the statutory notice on the citation. Defendant conceded that an arrest warrant could issue without additional notice and an opportunity to be heard. The same is true of suspension. This is similar to forfeiture of bail, ORS 484.130, or a default judgment in a civil case, ORS 18.080.

In State v. Miles, 8 Or App 190, 492 P2d 497 (1972), the defendant was convicted of DUIL, driving while suspended and driving with no operator's license in possession (discussion of DUIL issues omitted). Defendant contended that he could not be convicted of DWS and no operator's license based on the same act of driving. The Court of Appeals reversed as to this issue and vacated the no operator's license charge.

ORS 482.650 (DWS) and 482.300 (2) (no operator's license) are two separate offenses. One may not, however, be convicted of both. No operator's license presumes the driver had a valid license. DWS presumes the nonexistence of a valid license to operate a motor vehicle. Thus the two charges are incompatible.

In City of Oakland v. Moore, 1 Or App 80, 457 P2d 659 (1969), the defendant was convicted of driving while his right to apply was suspended. The officer checked "no licensed operator" and "suspended" boxes on the Uniform Traffic Citation. The Court of Appeals affirmed.

The defendant alleged that the citation was sufficient to charge only driving while suspended and not driving while right to apply suspended. The court first noted that the legislature, in adopting the Uniform Traffic Citation, intended a minimum of formality. The citation is effective even though the person must make reasonable inquiry of the officer or another person to determine the crime charged. State v. Waggoner, 228 Or 334, 365 P2d 291 (1961).

ORS 482.010 (7) (b) defines "license" to include "the privilege of any person to drive a motor vehicle whether or not such person holds a valid license." This broad definition would include driving while right to apply is suspended.

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Section 11. (Implied consent to chemical test; police report of refusal; evidence of refusal inadmissible.) ORS 483.634 is amended to read:

483.634. (1) Any person who operates a motor vehicle upon the highways of this state shall be deemed to have given consent, subject to ORS 483.634 to 483.646, to a chemical test of his breath for the purpose of determining the alcoholic content of his blood if arrested for driving a motor vehicle while under the influence of intoxicating liquor in violation of [subsection (2) of ORS 483.992] section -- of this 1975 Act or of a municipal ordinance. A test shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving while under the influence of intoxicating liquor in violation of [subsection (2) of ORS 483.992] section -- of this 1975 Act or of a municipal ordinance.

(2) If a person under arrest for driving a motor vehicle while under the influence of intoxicating liquor in violation of [subsection (2) of ORS 483.992] section -- of this 1975 Act or of a municipal ordinance, refuses the request of a police officer to submit to a chemical test of his breath as provided in subsection (1) of this section, and if the person has been informed of the consequences of such refusal as provided by ORS 482.540 to 482.560 and of his rights as provided in ORS 483.638, no test shall be given, but the police officer shall prepare a sworn report of the refusal and cause it to be delivered to the division. The report shall disclose:

(a) Whether the person at the time he was requested to submit to a test was under arrest for driving a motor vehicle while under the

influence of intoxicating liquor in violation of [subsection (2) of ORS 483.992] section -- of this 1975 Act or of a municipal ordinance;

(b) Whether the police officer had reasonable grounds to believe, at the time the request was made, that the person refusing to submit to the test had been driving under the influence of intoxicating liquor in violation of [subsection (2) of ORS 483.992] section -- of this 1975 Act or of a municipal ordinance;

(c) Whether the person refused to submit to a test;

(d) Whether such person was informed of the consequences, under ORS 482.540 to 482.560, of his refusal to submit to the test; and

(e) Whether such person was informed of his rights as provided in ORS 483.638.

(3) If a person under arrest refuses to submit to a chemical test of his breath under the provisions of subsection (2) of this section or refuses to consent to chemical tests as provided by ORS 483.636, evidence of his refusal shall not be admissible in any civil or criminal action, suit or proceeding arising out of acts alleged to have been committed while the person was driving a motor vehicle on the highways while under the influence of intoxicating liquor.

COMMENTARY

The amendments are of a housekeeping nature to conform to section 1 of the Article which would redefine and reclassify the offense of driving under the influence.

Section 12. (Use of chemical analyses to show intoxication.) ORS 483.642 is amended to read:

483.642. (1) At the trial of any civil or criminal action, suit or proceeding arising out of the acts committed by a person driving a motor vehicle while under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's breath, blood, urine or saliva shall give rise to the following presumptions:

(a) Not more than .05 percent by weight of alcohol in his blood, supports a disputable presumption that he was not then under the influence of intoxicating liquor.

(b) More than .05 percent but less than [.10] .08 percent by weight of alcohol in his blood, is indirect evidence that may be used to determine whether or not he was then under the influence of intoxicating liquor.

(c) Not less than [.10] .08 percent by weight of alcohol in his blood, supports a disputable presumption that he was then under the influence of intoxicating liquor.

(2) Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood.

(3) Nothing in this section is intended to limit the introduction of any competent evidence bearing upon the question of whether or not a person has been under the influence of intoxicating liquor.

COMMENTARY

This is a companion amendment to s. 2 and reduces the disputable presumption figure from .10 percent to .08.

Section 13. (Definitions.) ORS 484.010 is amended to read:

484.010. As used in ORS 1.510 to 1.530 and 484.010 to 484.320, unless the context otherwise requires:

(1) "Bail" means money or its equivalent deposited by a defendant to secure his appearance for a traffic offense.

(2) "City court" means a municipal court, whether or not it is exercising authority under the charter or ordinances of a city or as a justice court under the laws of this state.

(3) "City policeman" includes a city marshall or a member of the police of a city, municipal or quasi-municipal corporation.

(4) "City traffic offense" means any violation of a traffic ordinance of a city, municipal or quasi-municipal corporation, except ordinances governing parking of vehicles.

(5) "Major traffic offense" means a violation of any of the following provisions of law or a city ordinance conforming thereto:

(a) [Reckless driving, as defined in subsection (1) of ORS 483.992.] Dangerous driving as defined in sections -- and -- of this 1975 Act.

(b) Driving while under the influence of intoxicating liquor, dangerous drugs or narcotic drugs, as defined in [subsection (2) of ORS 483.992 or ORS 483.999] section -- of this 1975 Act.

(c) Driving with .10 percent or more blood alcohol content, as defined in section -- of this 1975 Act.

[(c)] (d) Failure to perform the duties of a driver involved in an accident or collision, as defined in subsections (1) and (2) of ORS 483.602 and ORS 483.604 [, which would be punishable under subsection (1) of ORS 483.990].

[(d)] (e) Operating a motor vehicle while the operator's or chauffeur's license is suspended or revoked, as defined in [ORS 482.650] section -- of this 1975 Act.

[(e)] (f) Fleeing or attempting to elude a [traffic or] police officer, as defined in [subsection (1) of ORS 483.049] section -- of this 1975 Act.

(6) "Owner" means the person having all the incidents of ownership in a vehicle or where the incidents of ownership are in different persons, the person, other than a security interest holder or lessor, entitled to the possession of a vehicle under a security agreement, or a lease for a term of 10 or more successive days.

(7) "Police officer" includes a member of the Oregon State Police, a sheriff or deputy sheriff and a city policeman.

(8) "State court" means a circuit, district or justice court or magistrate.

(9) "State traffic offense" means a violation of any provision of law for which a [misdemeanor] criminal or traffic infraction penalty is provided in ORS chapter 481, 482, 483, ORS 485.010 to 485.420, 485.990 and ORS chapter 486 or 767.

(10) "Traffic offense" includes an offense mentioned in subsections (4), (5) and (9) of this section.

COMMENTARY

The amendments to this statute are to make the section consistent with the Articles on Classification of Offenses; Disposition of Offenders and Serious Traffic Offenses. The most significant aspect of this section, however, is

subsection (5) because by operation of ORS 133.310 a probable cause warrantless arrest by a peace officer would be authorized for any "major traffic offense" listed.

ORS 484.100, authority of police officer to arrest or issue citation, is not amended by the draft. The statute describes situations in which a police officer may arrest or issue a citation for a "traffic offense." Inasmuch as traffic offenses under the proposed code will include both traffic crimes and traffic infractions, the statute cited is left unchanged to permit arrests for all classes of infractions. Most traffic offenses under the proposed code would be handled by Uniform Traffic Citation, as is presently the case.

Section 14. (Traffic citation requirements; exceptions; uniform citation.) ORS 484.150 is amended to read:

484.150. (1) Except for violation of laws governing parking of vehicles, a traffic citation conforming to the requirements of this section shall be used for all traffic offenses in this state.

(2) The citation shall consist of at least four parts. Additional parts may be inserted by law enforcement agencies for administrative use. The required parts are:

(a) The complaint.

(b) The abstract of record.

(c) The police record.

(d) The summons.

(3) Each of the parts shall contain the following information or blanks in which such information shall be entered:

(a) The name of the court and the court's docket or file number.

(b) The name of the person cited.

(c) The offense of which the person is charged, the date, time and place at which the offense occurred, the date on which the citation was issued and the name of the complainant.

(d) The time and place at which the person cited is to appear in court.

(e) The bail fixed for the offense.

(4) Each of the parts shall also contain such identifying and additional information as may be necessary or appropriate for law enforcement agencies in the state.

(5) The complaint shall contain a form of certificate by the complainant to the effect that he certifies, under the penalties provided in ORS 484.990, that he has reasonable grounds to believe, and does believe, that the person cited committed the offense contrary to law. The certification if made by a police officer need not be made before a magistrate or any other person. A private person shall certify before a magistrate, clerk or deputy clerk of the court and this action will be entered in the court record. The reverse side of the complaint shall contain the substance of the matters appearing on the reverse side of the Uniform Traffic Ticket and Complaint promulgated by the American Bar Association, and set forth in the Model Rules Governing Procedure in Traffic Cases, approved by the National Conference of Commissioners on Uniform Laws, July 8-13, 1957. A certificate conforming to this section shall be deemed equivalent of a sworn complaint.

(6) The reverse side of the abstract of court record shall contain such matters and shall be in such form as may be prescribed by the Motor Vehicles Division for the purpose of carrying out the requirements of subsection (1) of ORS 484.240.

(7) The summons shall also contain a notice to the person cited that the complaint will be filed. The reverse side of the summons shall contain the following:

(a) A form substantially as follows:

READ CAREFULLY

You must appear in court at the time mentioned in this citation if you are charged with any of the following offenses:

1. [Reckless] Dangerous driving.

2. Driving while under the influence of intoxicating liquor, barbiturates or narcotic drug.

3. Leaving the scene of an accident.

4. Operating a motor vehicle while your driver's license was suspended or revoked.

5. Attempting to flee or elude a [traffic or] police officer.

6. Driving with [a .15 percent (or higher) level of alcohol in blood] .10 percent or more blood alcohol content.

If you are charged with any OTHER offense, you MUST do ONE of the following:

1. Appear in court at the time mentioned in this summons and request a hearing. The court will then set a time for a hearing.

2. Mail to the court this summons, together with a check or money order in the amount of the bail indicated on the other side of this summons and tell the court you request a hearing. This summons and the bail must reach the court before the time when this summons requires you to appear in court. If you don't want a hearing, but wish to explain your side, send your explanation with the summons and bail. The court will then consider your explanation and may forfeit your bail, or part of it, on the basis of your explanation and what the officer tells the court.

3. Sign the plea of guilty below and send this summons to the court, together with check or money order in the amount of bail indicated on the other side of this summons. If you wish to explain your side, you may send your explanation with the guilty plea, summons and bail.

This summons and the bail must reach the court before the time when this summons requires you to appear in court.

NOTE: If you have already given bail or other security for your appearance, proceed as mentioned above but do not send in any additional sum as bail.

IF YOU FAIL TO COMPLY WITH THESE INSTRUCTIONS, THE COURT IS AUTHORIZED TO ISSUE A WARRANT FOR YOUR ARREST OR BY NOTICE TO THE MOTOR VEHICLES DIVISION TO CAUSE YOUR OPERATOR'S LICENSE TO BE SUSPENDED, OR BOTH.

THE COURT MAY IN ANY CASE, AFTER NOTICE, REQUIRE YOU TO APPEAR FOR A HEARING.

(b) A "Notice" and "Appearance, Plea of Guilty and Waiver" substantially in the form appearing on the reverse side of the summons in the form of Uniform Traffic Ticket and Complaint mentioned in subsection (5) of this section.

(8) The complaint shall be set aside by the court upon the motion of the defendant before plea when it does not conform to the requirements of this section. However, this section does not prohibit the use of a uniform citation for other offenses in addition to traffic offenses and containing other language in addition to that specified in this section.

COMMENTARY

The section amends the statute on Uniform Traffic Citation requirements to conform to proposed changes in offenses and to indicate that the person cited may make an explanation along with a guilty plea.

Section 15. (Appearance by defendant.) ORS 484.190 is amended to read:

484.190. (1) The defendant shall appear in court at the time mentioned in the summons if the citation is for:

(a) A major traffic offense.

(b) Any felony.

(2) In other cases, the defendant shall either appear in court at the time indicated in the summons, or prior to such time shall deliver to the court the summons, together with check or money order in the amount of the bail set forth in the summons, and inclosing therewith:

(a) A request for a hearing; or

(b) A statement of matters in explanation or mitigation of the offense charged; or

(c) The executed appearance, waiver of hearing and plea of guilty appearing on the summons. A statement in explanation or mitigation also may be inclosed with the guilty plea.

(3) In any case in which the defendant personally appears in court at the time indicated in the summons, if he desires to plead guilty and the judge accepts the plea, the judge shall hear any statement in explanation or mitigation that the defendant desires to make.

COMMENTARY

The amendments provide for optional explanatory statements by the defendant if he so desires when pleading guilty either by mail or in person. The subcommittee believes that a cited motorist should be given an opportunity to tell "his side of the story" even though he wants to plead guilty. This now may be the practice in most courts, but it is not spelled out in the statutes.

Section 16. (Impounding vehicles operated by driver convicted of driving while license revoked or suspended; redemption; suspension of registration; rights of security interest holders.) ORS 484.222 is amended to read:

484.222. (1) (a) When a person is convicted for driving a motor vehicle [in violation of ORS 482.650] while his license is suspended or revoked, the court shall order impounded for not more than 120 days from judgment any motor vehicle of which the convicted person is the owner and any motor vehicle which the convicted person is operating at the time of arrest for violation of [ORS 482.650] section -- of this 1975 Act. He shall be liable for the expenses incurred in the removal and storage of the vehicle under this subsection, whether or not the vehicle is returned to him. The vehicle shall be returned to the person convicted or the owner only upon payment of such expenses.

(b) If the vehicle is not reclaimed within 30 days after the time set for the return of the vehicle in the impounding order, the vehicle may be disposed of in accordance with ORS 483.380 to 483.396.

(2) (a) When a person is convicted for driving a motor vehicle in violation of [ORS 482.650] section -- of this 1975 Act, the court, instead of or in addition to impoundment under subsection (1) of this section, may order the Motor Vehicles Division to suspend for not more than 120 days the registration required under ORS chapter 481 of any vehicle of which the convicted person is the owner or any vehicle which the convicted person is operating at the time of his arrest [for violation of ORS 482.650]. The division shall forthwith suspend the registration and require the owner to return the registration card and

plates. If the vehicle has not been impounded and the owner fails to return the registration card and plates to the division within 10 days after the date notice to do so is mailed to him, return receipt requested, the division shall forthwith direct any peace officer to secure possession thereof and return the registration card and plates to the division.

(b) The division shall return the registration card and plates to the owner upon expiration of the period specified by the court in its order provided in paragraph (a) of this subsection upon payment by the owner to the division of a restoration fee of $10.

(3) The court may order that a motor vehicle of which the convicted person is not the owner be impounded or its registration suspended under this section only if the court is satisfied by clear and convincing evidence that the owner knew or had good reason to know that the convicted person did not have a valid operator's license and knowingly consented to the operation of the motor vehicle by the convicted person.

(4) The authority of the court under this section to impound any motor vehicle shall be subject to the rights of a holder of a security interest under a security agreement executed before an arrest for violation of [ORS 482.650] section -- of this 1975 Act, and the vehicle shall be released for the purpose of satisfying a security interest if:

(a) Request in writing is made to the court; and

(b) If the vehicle has been impounded, the security interest holder pays the expenses incurred in removal and storage of the vehicle; and

(c) If the registration of the vehicle has been suspended, the security interest holder takes possession of the vehicle subject to the suspension of the registration remaining in effect against the registered owner.

COMMENTARY

The housekeeping amendments are to conform with s. 10 of this Article.

Section 17. (Penalties.) ORS 484.990 is amended to read:

484.990. Any person who in connection with the issuance of a citation, or the filing of a complaint, for a traffic offense, as defined in subsection (10) of ORS 484.010, [wilfully] knowingly certifies falsely to the matters set forth therein [is punishable upon conviction by imprisonment in the county jail for a term not exceeding one year or by a fine of not more than $5,000, or both] commits a Class A misdemeanor.

COMMENTARY

The section amends the statute penalizing false certification of a traffic citation or complaint to insert the criminal culpability term of "knowingly" in place of "wilfully," and to classify the crime as a Class A misdemeanor. This would make the penalty range the same as that provided under the Criminal Code for "false swearing," ORS 162.075.

SUPPLEMENTARY COMMENTARY

The crime of "failure to perform the duties of a driver involved in an accident or collision" (hit and run), ORS 483.602 (1), (2) and 483.604 (1), (2), would be continued as a major traffic offense under s. 13 of this Article. The existing penalties for this offense are set out in ORS 483.990 (1) and 483.991 (12). The new code would repeal these general penalty statutes and classify crimes in question as a Class A misdemeanor if property damage only were involved and a Class C felony if injury or death of another results from the accident.

Vehicular homicides are covered by the Criminal Code, with the nature of the crime depending on the degree of culpability of the offender. See, ORS 163.005 to 163.415.

TEXT OF UNIFORM VEHICLE CODE

ARTICLE IX—SERIOUS TRAFFIC OFFENSES[1]

§ 11-901—Reckless driving

(a) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

(b) Every person convicted of reckless driving shall be punished upon a first conviction by imprisonment for a period of not less than five days nor more than 90 days, or by fine of not less than $25 nor more than ($500), or by both such fine and imprisonment, and on a second or subsequent conviction shall be punished by imprisonment for not less than 10 days nor more than six months, or by a fine of not less than $50 nor more than ($500) or by both such fine and imprisonment. (REVISED, 1971.)

§ 11-902—Driving while under influence of alcohol or drugs

(a) A person shall not drive or be in actual physical control of any vehicle while:

1. There is 0.10 percent or more by weight of alcohol in his blood; (NEW, 1971.)

2. Under the influence of alcohol;[2] (REVISED, 1971.)

3. Under the influence of any drug to a degree which renders him incapable of safely driving; or (FORMERLY § 11-902.1; REVISED, 1971.)

4. Under the combined influence of alcohol and any drug to a degree which renders him incapable of safely driving. (NEW, 1971.)

(b) The fact that any person charged with violating this section is or has been legally entitled to use alcohol or a drug shall not constitute a defense against any charge of violating this section. (FORMERLY § 11-902.1; REVISED, 1971.)

(c) Except as otherwise provided in § 11-902.2, every person convicted of violating this section shall be punished by imprisonment for not less than 10 days nor more than one year, or by fine of not less than $100 nor more than $1,000, or by both such fine and imprisonment and, on a second or subsequent conviction, he shall be punished by imprisonment for not less than 90 days nor more than one year, and, in the discretion of the court, a fine of not more than $1,000. (FORMERLY § 11-902.2; REVISED, 1971.)

[1] This article covers what are generally regarded as *relatively* serious offenses carrying significantly higher penalties. All sections in this article apply on and off the highways under § 11-101.

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[2] Enactment of subsection (a)2 is necessary to cover cases where no chemical test evidence is available to prosecute under subsection (a)1.

TEXT OF UNIFORM VEHICLE CODE (Cont'd)

§ 11-902.1—Chemical tests

(a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol or drugs, evidence of the amount of alcohol or drug in a person's blood at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath or other bodily substance, shall be admissible. Where such a chemical test is made the following provisions shall apply: (NEW, 1971.)

1. Chemical analyses of the person's blood, urine, breath, or other bodily substance to be considered valid under the provisions of this section shall have been performed according to methods approved by the (State department of health) and by an individual possessing a valid permit issued by the (State department of health) for this purpose. The (State department of health) is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the (State department of health). (FORMERLY § 11-902(c).)

2. When a person shall submit to a blood test at the request of a law enforcement officer under the provisions of § 6-205.1, only a physician or a registered nurse (or other qualified person) may withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of breath or urine specimens. (FORMERLY § 11-902(d).)

3. The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer. (FORMERLY § 11-902(e).)

4. Upon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or his attorney. (FORMERLY § 11-902(f).)

5. Percent by weight of alcohol in the blood shall be based upon grams of alcohol per 100 cubic centimeters of blood. (FORMERLY § 11-902(b)4.)

(b) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance shall give rise to the following presumptions:

TEXT OF UNIFORM VEHICLE CODE (Cont'd)

1. If there was at that time 0.05 percent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol.

2. If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol.

3. If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol.*

4. The foregoing provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of alcohol. (FORMERLY § 11-902(b).)

OPTIONAL (c) If a person under arrest refuses to submit to a chemical test under the provisions of § 6-205.1, evidence of refusal shall be admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs. (FORMERLY § 11-902(g).)

§ 11-902.2—Post conviction examination and remedies

(a) Before sentencing any person convicted for a first offense of violating § 11-902, the court may, and upon a second or subsequent conviction of such an offense committed within five years of a prior offense the court shall, conduct or order an appropriate examination or examinations to determine whether the person needs or would benefit from treatment for alcohol or drug abuse.

(b) After the examination, the court may impose penalties specified in this act or, upon a hearing and determination that the person is an habitual user of alcohol or drugs, the court may order supervised treatment on an outpatient basis, or upon additional determinations that the person constitutes a danger to himself or others and that adequate treatment facilities are available, the court may order him committed for treatment at a facility or institution approved by the (State department of health).

(c) Any person subject to this section may be examined by a physician of his own choosing and the results of any such examination shall be considered by the court.

(d) No commitment or supervised treatment on an outpatient basis ordered under subsection (b) shall exceed one year. Upon motion duly made by the convicted person, an attorney, a relative or an attending physician, the court at any time after an order of commitment shall review said order. After determining the progress of

* Subsection (b)3 need not be enacted in any state adopting § 11-902(a)1.

TEXT OF UNIFORM VEHICLE CODE (Cont'd)

treatment, the court may order its continuation or the court may order the person's release, supervised treatment on an outpatient basis, or it may impose penalties specified by this act giving credit for the time of commitment.

(e) Upon application by any person under an order of commitment or supervised treatment for a driver's license, the results of the examination referred to in subsection (a) and a report of the progress of the treatment ordered shall be forwarded by the applicant to the department for consideration by the medical advisory board (appointed under § 6-118).

(f) The department may after receiving the advice of the medical advisory board issue a license to such person with conditions and restrictions consistent with the person's rehabilitation and with protection of the public notwithstanding the provisions of § 6-208. (NEW SECTION, 1971.)

§ 11-903—Homicide by vehicle

(a) Whoever shall unlawfully and unintentionally cause the death of another person while engaged in the violation of any state law or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic shall be guilty of homicide when such violation is the proximate cause of said death. (REVISED, 1968.)

(b) Any person convicted of homicide by vehicle shall be fined not less than $500 nor more than $2,000, or shall be imprisoned in the county jail not less than three months nor more than one year, or may be so fined and so imprisoned, or shall be imprisoned in the penitentiary for a term not less than one year nor more than five years. (REVISED, 1962.)

§ 11-904—Fleeing or attempting to elude a police officer

(a) Any driver of a motor vehicle who willfully fails or refuses to bring his vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police vehicle, when given visual or audible signal to bring the vehicle to a stop, shall be guilty of a misdemeanor. The signal given by the police officer may be by hand, voice, emergency light or siren. The officer giving such signal shall be in uniform, prominently displaying his badge of office, and his vehicle shall be appropriately marked showing it to be an official police vehicle.

(b) Every person convicted of fleeing or attempting to elude a police officer shall be punished by imprisonment for not less than 30 days nor more than six months or by a fine of not less than $100 nor more than $500, or by both such fine and imprisonment. (NEW SECTION, 1968.)