



IN THE NEWS

Felony DUI Bill Returns

By **Doug Chartier**
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IF YOU'RE CAUGHT driving under the influence in Colorado, you will be charged with a misdemeanor. Earn five more DUIs, and that's five more misdemeanor charges — and so on. A DUI by itself is considered a misdemeanor in this state no matter how many DUI convictions the driver has earned prior, as Colorado is currently one of four states (in addition to the District of Columbia) without a felony DUI law, according to Mothers Against Drunk Driving.

Why has Colorado been in that minority? That's hard to determine, said 18th Judicial District Attorney George Brauchler, although he adds, "Over the past 10 years we've had a legislature that has not been controlled by the law-and-order crowd, and there have been different priorities that the state has focused on through that legislature."

Given the results of the 2014 state elections, the state's priorities may shift. Felony DUI bills were proposed in 2013 and 2014, and each passed in the House before being



JAY TIFTICKJIAN | LAW WEEK PHOTO ALI BIBBO

postponed indefinitely in Senate committee.

The 2015 session, however, may bring a felony DUI bill with the highest chance of passing thus far. With Republicans bearing more influence in both the House and Senate,

where the GOP now holds a one-seat majority, several Republican-backed initiatives that were previously unsuccessful are making a reappearance. Such bills include House Bill 1041, which would make abortion a class-3 felony, and House Bill 1049, which would authorize the use of deadly force against intruders by business owners and employees at their workplace

How much the current legislature will support those measures remains to be seen. But a felony DUI bill, at least, may become law in Colorado sooner rather than later, sources say.

"I foresee it will probably happen this year, and if doesn't happen this year, then we'll probably be having the same conversation next year," said Denver DUI attorney Jay Tiftickjian.

House Bill 1043 was introduced in last

Wednesday's opening session and is sponsored by Lori Saine, a Republican, and primary co-sponsor Beth McCann, a Democrat.

"Right now in Colorado, district attorneys are limited to prosecuting a third, fourth or tenth DUI no differently, providing them very few options to get these habitual, dangerous drunk drivers off our streets," Saine said in Jan. 7 press release from the Colorado House Republicans.

House Bill 1043 would make a DUI, DUI per se or DWAI chargeable as a class-4 felony if the driver has had two prior convictions within a seven-year period. It would also make the fourth and any subsequent drunk driving offense within the driver's lifetime chargeable as a felony. The felony charge would carry a presumptive prison sentence range of two to six years.

Should the bill reach the Senate, Republican Sen. John Cooke and Democratic Sen. Michael Johnston are its primary Senate sponsors. The bill has been assigned to the House Judiciary Committee.

Handling repeat offenders

As a whole, DWAI/DUI filings in Colorado are down 23 percent from 2005 to 2014, according to the Colorado Judicial Branch's Annual Statistical Report, but repeat offenders remain a serious concern. They can also be difficult to track, according to Brauchler. He said that when he had a prosecutor look into the number of active, licensed drivers in Arapahoe County with three or more DUI convictions, the county said that they were unable to pull that information. He adds that the county cannot determine whether it has 10 or 1,000 drivers with three or more DUIs.

"The metrics here matter because I don't think we truly know the scope of the problem," Brauchler said. He added that the state and its counties have the data to tell how many habitual drunk drivers are on the roads, but that data isn't properly aggregated and accessible to policymakers. "Don't we

have the ability in Colorado to know the numbers and adjust policy to affect those numbers? The answer right now is no."

Experts agree that the system needs to respond differently to habitual drunk drivers than it does to one-time offenders. The main difference of opinion seems to be whether the response to repeat DUI offenders should be more punitive or rehabilitative.

Tiftickjian said the focus should remain on rehabilitative measures to help prevent repeat DUIs. When judging the potential benefit of harsher penalties for repeat drunk drivers, he compares the situation to felony drug offenses.

"For many years, the way that the government dealt with drug offenses and sentencing was through felonies and to put people in prison, and it proved over the years that it didn't work," Tiftickjian said. "And now we have specialized drug courts that focus on rehabilitation as opposed to incarceration, and we're seeing a different sort of outcome with people who, instead of being repeat offenders, are actually getting their lives back together and without the stigma of a felony following them around."

Tiftickjian said that rehabilitation programs for convicted drunk drivers still have plenty of room for improvement, however. For example, he said, drivers go through the Colorado state-mandated alcohol and therapy program upon their first DUI conviction, and if they earn additional DUIs, they re-enter the same program, recycling the same material that is failing to deter those particular drivers from additional offenses.

Some proponents of a felony DUI law, however, look at rehabilitation-focused approach to repeat drunk drivers and say we've been down that road before.

"I think the breakdown in the conversation of the last few years has revolved around whether we're doing enough in evaluation, assessment and treatment on the first one,

two or three DUIs (and if) those programs are strong enough to help people stop this behavior,” said Thomas Raynes, executive director of the Colorado District Attorneys’ Council. “I have no doubt that we could do better on the first few charges. But I also have no doubt that if you’re getting three or four (DUIs), I’m not as concerned about your treatment as I am about the innocent people on the street.”

Raynes is familiar with the counterargument that escalating the punishment for repeat DUIs may not improve the long-term rehabilitation outlook for the driver. But even assuming that harsher penalties don’t deter the convicted drunk driver from once again taking the wheel while intoxicated, he said, repeat offenses should still warrant tougher consequences.

“One of the fundamental purposes of sentencing, aside from rehabilitation, is punishment,” Raynes said. “After a certain number of offenses that pose an extraordinary risk of harm or death to citizens, punishment is a legitimate resolution of a case.”

The New Bill’s Nuances

The felony DUI bill state lawmakers will see this year won’t be quite the same as the one that failed in 2014. In the current iteration, the third DUI (within the seven-year period) can be either a misdemeanor or felony depending on the circumstances surrounding the incident. If the incident involves certain “aggravators” including property damage, bodily harm, the presence of a minor and a driver blood-alcohol content at 0.15 or higher, the third offense will merit a felony. The fourth DUI and beyond would

all be considered felonies even with those aggravators absent.

Currently, a Colorado driver with multiple drunk-driving convictions must use an interlock device on his or her vehicle for at least one year. Under the new bill, the court would mandate the driver’s interlock use for a minimum of two years and a maximum of five.

How these adjustments will affect the felony DUI proposal’s chances of passage remains to be seen, but what ultimately killed last year’s bill in the Senate Committee on Appropriations, experts say, was the question of cost.

Democrats raised concerns about the financial burden of increased incarcerations and the district court resources that would be spent on trying the additional felonies. These costs, critics contested, would outweigh the benefits in terms of improved safety and deterrence, which are difficult to assess. That money, Tiftickjian said, could be spent on refining rehabilitation measures and restructuring the system to include a specialized DUI court for multiple offenses. Offenders going through those specialized systems, he said, tend to have more success in avoiding additional DUIs.

This cost argument is likely to challenge the bill again in 2015, and amendments are likely, Raynes said.

“But as long as we end up with something that said that after X number of deadly behaviors where you’re probably only caught one out of 80 times that you do it, you should get a felony, I will be okay.” •

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