

FILED
JAMES BONINI
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

2009 MAY 26 AM 10: 33

IN RE: SENTENCING IN DRIVING
UNDER THE INFLUENCE CASES,

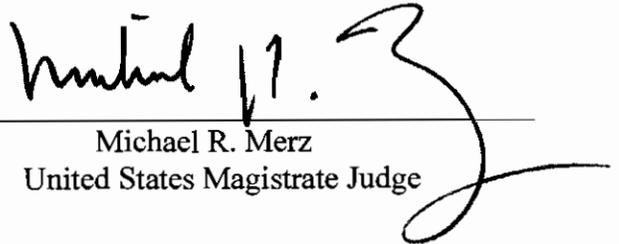
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WESTERN DIV. DAYTON

: Magistrate Judge Michael R. Merz

SECOND AMENDMENT TO MAGISTRATE'S GENERAL ORDER NO. 15

Magistrate's General Order No. 15, dated March 1, 1995, is hereby amended to adopt the attached revised Driving Under the Influence Sentencing Guidelines. These Guidelines shall be effective for all sentences imposed after May 27, 2009.

May 26, 2009.



Michael R. Merz
United States Magistrate Judge

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
U. S. Probation Office**



DRIVING UNDER THE INFLUENCE GUIDELINES

The attached DUI guidelines were developed by the U. S. Probation Office at the request of U. S. Magistrate Judge Michael R. Merz. The guidelines were originally created in an effort to provide the Court with consistent recommendations in regard to DUI offenders. The guidelines were revised in both 2002 and 2009 as the result of statutory changes.

The DUI guidelines are advisory in nature. They attempt to take into consideration the primary sentencing factors considered by the Court for DUI cases, including circumstances surrounding the offense and prior alcohol related convictions. However, individual cases may present factors not considered by the DUI guidelines and, therefore, the attached provisions are intended for general guidance to provide consistency for sentencing all DUI offenders. It is understood the Court reserves the right to sentence a defendant anywhere within the established statutory penalties and is always obliged to consider the factors set forth in 18 U.S.C. § 3553(a).

REVISED: January 9, 2002
RE-REVISED: May 20, 2009

I. Determine Offense Level

1. Offense Conduct
 - (a) Base Offense Level: 2
 - (b) Add 2 levels, if the defendant's BAC was .17 or greater
 - (c) Add 1 level, if the defendant fled or attempted to flee from police and/or resisted arrest
 - (d) Add 1 level, if the offense caused damage to property, other than that belonging to the defendant
 - (e) Add 2 levels, if the offense caused or threatened physical injury to individuals other than the defendant
 - (f) Subtract 1 level, if the defendant's BAC was .08 or below
2. Acceptance of Responsibility
 - (a) Subtract 1 level, if the defendant accepts responsibility for his/her offense conduct, including the true admission of alcohol consumption and impaired ability to drive
 - (b) Subtract 1 level, if the defendant qualifies for the above 1 level reduction and voluntarily seeks substance abuse assessment/treatment prior to sentencing

II. Determine Alcohol Related History

1. Assess 2 points for each prior alcohol related driving conviction that occurred within 10 years of the date of the instant offense
2. Assess 1 point, if the defendant previously participated in any type of treatment intervention

III. DUI Guideline Results

DUI SENTENCING TABLE (in days of imprisonment)

| PRIOR ALCOHOL RELATED HISTORY | | | | | | | | |
|-------------------------------|--------|-------|--------|---------|---------|---------|---------|---------|
| Offense Level | 0 to 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 0 or 1 | 3/WIP | 6-10 | 10-20 | 20-30 | 30-45 | 45-60 | 60-75 | 75-90 |
| 2 | 3/WIP | 6-10 | 10-20 | 20-30 | 30-45 | 45-60 | 60-75 | 75-90 |
| 3 | 6-10 | 6-15 | 10-25 | 20-45 | 30-60 | 45-75 | 60-90 | 75-120 |
| 4 | 5-10 | 6-15 | 15-30 | 30-60 | 60-75 | 75-90 | 90-120 | 120-180 |
| 5 | 7-10 | 10-20 | 20-45 | 45-75 | 75-90 | 90-120 | 120-180 | 180-365 |
| 6 | 10-20 | 15-30 | 30-60 | 60-90 | 90-120 | 120-180 | 150-210 | 180-365 |
| 7 | 10-20 | 20-45 | 45-90 | 90-120 | 120-180 | 150-210 | 180-365 | 180-365 |
| 8 | 15-30 | 30-60 | 60-120 | 120-180 | 150-210 | 180-365 | 180-365 | 180-365 |

Recommended Terms of Probation

1. 6 months to 1 year, for first time offenders with minimal treatment issues
2. 1 to 2 years, for offenders with two or more prior alcohol related convictions

Fine Guideline

1. The fine ranges were constructed after taking into consideration the mandatory minimum fine amounts called for by statute (O.R.C. § 4511.19 and § 4511.99). The ranges represent an attempt to eliminate the potential for wide disparity in regard to financial sentences that could occur if the maximum of the fine range were much greater. The fine ranges are also an attempt to keep financial sanctions in proportion with any period of imprisonment imposed.
 - (a) First Offense \$375 - \$575
 - (b) Second Offense \$525 - \$900
 - (c) Third Offense \$850 - \$1,400
 - (d) Fourth Offense \$1,350 - \$5,000

License Suspension

1. DUI offenders are subject to mandatory driver license suspensions per Ohio Revised Code § 4510.02.
 - (a) First offense - Class 5 suspension - minimum 6 months up to 3 years
 - (b) Second offense - Class 4 suspension - minimum 1 year up to 5 years
 - (c) Third offense - Class 3 suspension - minimum 2 years up to 10 years
 - (d) Fourth or more offense - Class 2 suspension - minimum 3 years up to life

IV. Departures

The following items have been identified as possible departure issues, but do not represent all possible departure issues which can be considered by the Court.

1. Aggravating
 - (a) Defendant has been exposed to and exhausted numerous treatment modalities
 - (b) Defendant has an extensive non-alcohol related criminal history
 - (c) Defendant has failed to comply with conditions of his/her pretrial release
 - (d) Defendant has tested positive or used alcohol or illegal substances pending sentencing
 - (e) A minor child was present in the vehicle at the time of the offense
 - (f) Defendant is pending sentencing for another alcohol related driving offense that occurred after the date of the instant offense
2. Mitigating
 - (a) The offense was motivated by personal hardship suffered by the defendant and the offense was an isolated incident
 - (b) Defendant was tested as having a BAC level of .04 or below

V. BAC of .17 or Greater - Mandatory Minimum Jail Sentences

1. The statute requires certain mandatory minimum jail sentences for offenders who are tested as possessing a BAC of .17 or higher. These mandatory minimum provisions are as follows:
 - (a) First offense within 6 years - 3 days jail and 3 day WIP or 6 days jail
 - (b) Second offense within 6 years - 20 days jail
 - (c) Third offense within 6 years - 60 days jail
 - (d) Fourth or more offense within 6 years - 120 days jail

VI. Application Notes

1. It is intended that if the offense threatened physical injury such as ending in an accident, a 2-level enhancement be given. In the case of actual physical injuries, this enhancement is intended for minor physical injuries that were non-life threatening. In the case of more serious physical injuries, it is believed the defendant would be held accountable for more serious charges, and this guideline would not be applicable.
2. "Alcohol related driving conviction" includes DUI, Prohibited Breath Alcohol Level, Reckless Operation, and Having Physical Control of a Vehicle While Intoxicated that any federal, state, or local court records indicate were alcohol related.
3. "Prior treatment-related intervention" includes, but is not limited to, referral to and/or participation in weekend intervention programs, outpatient treatment, and inpatient treatment. This enhancement applies to defendants who have had the opportunity at treatment regardless of whether they successfully completed treatment.
4. An enhancement was considered for offenders who commit the instant offense while under supervision for a similar offense. However, because the statute provides for greater mandatory minimum sentences for subsequent offenses within six years, no additional enhancement penalty was included. Under such circumstances, it is likely that an offender has violated the conditions of his supervision, which would be an issue to be addressed by the original sentencing Court.
5. The defendant is considered to have "exhausted treatment modalities" if he/she has had an opportunity at both outpatient and inpatient treatment but continues to abuse alcohol.
6. "Personal hardship" is considered to be an isolated, unusual, traumatic, or stressful event in the defendant's life that contributed to the commission of the offense. Examples include, but are not limited to, death of a significant other or serious illness.

MISDEMEANOR GUIDELINE WORKSHEET

DUI CASES ONLY

Defendant Name:

Court: The Honorable

Docket Number:

Count Number: (___ Offense Within 6 Years)

I. Determine Offense Level

- (a) BASE OFFENSE LEVEL 2
- (b) BAC of .17 or Greater* (+2) ___
- (c) Flight/Resisting Arrest (+1) ___
- (d) Property Damage (+1) ___
- (e) Personal Injury (+2) ___
- (f) Defendant tested BAC .08 or lower (-1) ___

Subtotal: ___

*The statute requires certain mandatory minimum jail sentences for offenders who test with a BAC of .17 or greater.

Notes:

If:

- (a) Defendant accepts responsibility (-1) ___
- (b) If (a) applies and defendant voluntarily seeks/receives treatment (-1) ___

Notes:

TOTAL OFFENSE LEVEL: ___

II. Determine Alcohol Related History

Prior Alcohol Related Driving Offenses (assess 2 points for each conviction within 10 years of the instant offense)

| <u>Date of Imposition</u> | <u>Offense and Case Number</u> | <u>Points</u> |
|---------------------------|--------------------------------|---------------|
|---------------------------|--------------------------------|---------------|

If:

| | | |
|---|------|---|
| (a) Defendant had prior treatment opportunity | (+1) | — |
|---|------|---|

| | |
|--------------|---|
| TOTAL POINTS | — |
|--------------|---|

III. DUI Guideline Results

| <u>Total Offense Level</u> | <u>Total Points</u> | <u>DUI Sentencing Range</u> |
|----------------------------|---------------------|-----------------------------|
| | | to days |

Probation range:

Fine range:

License Suspension:

IV. Departures

(a) Aggravating Factors:

(b) Mitigating Factors:

V. *Mandatory Minimum Sentences for Offenders with a .17 BAC or Greater

- (a) First offense within 6 years - 3 days jail and 3 day WIP or 6 days jail
- (b) Second offense within 6 years - 20 days jail
- (c) Third offense within 6 years - 60 days jail
- (d) Fourth or more offense within 6 years - 120 days jail