



# Ohio Legislative Service Commission

## Bill Analysis

Amanda M. Ferguson

### H.B. 446

131st General Assembly  
(As Introduced)

Reps. Manning, Baker, Rezabek

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## BILL SUMMARY

- Specifies that the prison term that may be imposed for a third degree felony OVI offense (operating a vehicle while impaired) is 12, 18, 24, 30, 36, 42, 48, 54, or 60 months, rather than 9, 12, 18, 24, 30, or 36 months as specified by the Ohio Supreme Court in *State v. South*.
- Expands the scope of the OVI law by including "harmful intoxicant" within the definition of "drug of abuse."
- Allows a person to assert the existing affirmative defense of driving in an emergency with regard to a prosecution for driving under a suspended driver's license under specified laws.
- Establishes "family necessity" as an affirmative defense with regard to a prosecution for driving under a suspended driver's license under specified laws.
- Specifies that the "enhanced penalty" for specified speeding violations applies regardless of whether the offender previously has been convicted of or pleaded guilty to a speeding offense.

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## CONTENT AND OPERATION

### Prison term for a third degree felony OVI offense

The bill modifies the prison term that may be imposed upon a third degree felony OVI (operating a vehicle while impaired) offender. An OVI offense is a third degree felony if the offender has previously been convicted of, or pleaded guilty to, a felony OVI offense. The prison term for a third degree felony OVI offense is enhanced if

the offender pleads guilty to or is convicted of the "repeat offender specification," which applies if the offender has been convicted of or pleaded guilty to five or more equivalent offenses within 20 years of the OVI offense.<sup>1</sup> Also, the penalty is enhanced if the offender pleads guilty to or is convicted of having a high level prohibited concentration of alcohol in the person's blood, breath, or urine (i.e., at or above 0.17% blood alcohol content) or if the person has been convicted of an OVI offense within the past 20 years and, upon arrest for an OVI offense, refuses to take a chemical test and is convicted of the OVI offense.<sup>2</sup> Reading the changes in the bill in concert with existing law, a third degree felony offender is subject to the following prison terms:<sup>3</sup>

For a standard OVI without a repeat offender specification	A mandatory prison term of 60 consecutive days and a discretionary additional prison term of 12, 18, 24, 30, 36, 42, 48, 54, or 60 months (up to a maximum cumulative total of 5 years).
For a standard OVI with a repeat offender specification	A discretionary prison term of 12, 18, 24, 30, 36, 42, 48, 54, or 60 months for the underlying offense and a mandatory additional prison term of 1, 2, 3, 4, or 5 years for the specification.
For a "high level" OVI without a repeat offender specification	A mandatory prison term of 120 consecutive days and a discretionary additional prison term of 12, 18, 24, 30, 36, 42, 48, 54, or 60 months (up to a maximum cumulative total of 5 years).
For a "high level" OVI with a repeat offender specification	A discretionary prison term of 12, 18, 24, 30, 36, 42, 48, 54, or 60 months for the underlying offense and a mandatory additional prison term of 1, 2, 3, 4, or 5 years for the specification.

Under the existing provisions of the Revised Code, the prison term that may be imposed on a third degree felony OVI offender, particularly where the offender also pleads guilty to or is convicted of the repeat offender specification, is unclear. In *State v. South*, the Ohio Supreme Court considered whether a third degree felony OVI offender who was also convicted of the repeat offender specification was subject to a prison term of 9, 12, 18, 24, 30, or 36 months (i.e., up to three years) or 12, 18, 24, 30, 36, 42, 48, 54, or 60 months (i.e., up to five years) for the underlying OVI offense. The court interpreted

<sup>1</sup> R.C. 2941.1413, not in the bill.

<sup>2</sup> R.C. 4511.19(G)(1)(e)(ii), not in the bill.

<sup>3</sup> R.C. 2929.13(G)(2), not in the bill; 2929.14(A)(3)(a) and (B)(4); 2941.1413, not in the bill; and 4511.19(G)(1)(e)(i) and (ii), not in the bill.



the Revised Code as authorizing the court to impose a discretionary term of 9, 12, 18, 24, 30, or 36 months for the underlying offense and a mandatory 1, 2, 3, 4, or 5 year prison term for the specification upon such an offender.<sup>4</sup>

## Definition of "drug of abuse"

The bill expands the scope of the OVI law by including additional substances within the definition of "drug of abuse." The existing OVI law prohibits the operation of any vehicle while under the influence of alcohol, a drug of abuse, or a combination of both.<sup>5</sup> "Drug of abuse" means any of the following:

(1) Any controlled substance (i.e., any substance classified as a controlled substance under the federal Controlled Substances Act, any substance classified as a schedule I, II, III, IV, or V controlled substance under federal rules, or any drug of abuse);<sup>6</sup>

(2) Any dangerous drug (i.e., any drug that may be dispensed only upon a prescription, any drug that contains a schedule V controlled substance that is exempt from the state Controlled Substances Act, or any drug intended for administration by injection into the human body other than through a natural orifice);<sup>7</sup> or

(3) Any over-the-counter medication that, when taken in quantities exceeding the recommended dosage, can result in impairment of judgment or reflexes.<sup>8</sup>

The bill includes within the definition of "drug of abuse" any "harmful intoxicant." "Harmful intoxicant" means:

(1) Any compound, mixture, preparation, or substance the gas, fumes, or vapor of which when inhaled can induce intoxication, excitement, giddiness, irrational behavior, depression, stupefaction, paralysis, unconsciousness, asphyxiation, or other harmful physiological effects, and includes, but is not limited to, any of the following:

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<sup>4</sup> *State v. South*, 144 Ohio St. 3d 295, 2015-Ohio-3930.

<sup>5</sup> R.C. 4511.19, not in the bill.

<sup>6</sup> R.C. 4506.01(E). For a basic explanation of federally classified controlled substances, see Drug Scheduling, United States Drug Enforcement Agency, <http://www.dea.gov/druginfo/ds.shtml> (last visited 02/11/16).

<sup>7</sup> R.C. 4506.01(M) and 4729.01(F), not in the bill.

<sup>8</sup> R.C. 4511.181(E), not in the bill, and 4506.01(M).



--Any volatile organic solvent, plastic cement, model cement, fingernail polish remover, lacquer thinner, cleaning fluid, gasoline, or other preparation containing a volatile organic solvent;

--Any aerosol propellant;

--Any fluorocarbon refrigerant; or

--Any anesthetic gas.

(2) Gamma Butyrolactone; or

(3) 1,4Butanediol.<sup>9</sup>

### **Provisions applicable to commercial driver's license (CDL) holders**

Current law prohibits a person who holds a commercial driver's license ("CDL") or CDL temporary instruction permit, or who operates a motor vehicle for which a CDL is required, from doing either of the following:

(1) Driving a commercial motor vehicle while having a measurable or detectable amount of alcohol or a controlled substance in the person's blood, breath, or urine; or

(2) Driving a motor vehicle while under the influence of a controlled substance.<sup>10</sup>

As discussed above, the term "controlled substance" includes any "drug of abuse." Thus, by adding "harmful intoxicant" to the definition of "drug of abuse," the existing CDL prohibition now also applies to the previously mentioned "harmful intoxicants."

### **Watercraft OVI offenses**

Current law prohibits the operation of any vessel or the manipulation of any water skis, aquaplane, or similar device on the waters of Ohio if, at the time of the operation, control, or manipulation, the person is under the influence of alcohol, a drug of abuse, or a combination of them.<sup>11</sup> For purposes of this prohibition, the term "drug of

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<sup>9</sup> R.C. 2925.01(I), not in the bill, and 4506.01(M).

<sup>10</sup> R.C. 4506.15(A)(1) and (5), not in the bill.

<sup>11</sup> R.C. 1547.11(A)(1), not in the bill.

abuse" is tied to the meaning above.<sup>12</sup> Thus, the bill expands this prohibition so that it also applies to "harmful intoxicants."

## **Affirmative defenses for certain driving offenses**

### **Expansion of the existing "emergency" defense**

The bill allows a person to assert, as an affirmative defense to driving under a driver's license suspension imposed for specified offenses, that the person was driving due to a substantial emergency and that no other person was reasonably available to drive. Specifically, the bill allows a person to assert the affirmative defense with respect to the following:

(1) Driving under a twelve-point suspension; and

(2) Driving under a suspension imposed for a specified juvenile or underage drinking-related offense, failure to appear in court, failure to pay a fine imposed by the court, or failure to comply with a child support order or with a subpoena or warrant issued by a child support agency.<sup>13</sup>

Under current law, a person may assert the affirmative defense with respect to the following offenses:<sup>14</sup>

(1) Driving under a general license suspension or under a suspension imposed for the violation of a CDL-related requirement or of a license restriction;<sup>15</sup>

(2) Driving under an OVI suspension (including a suspension imposed under the Implied Consent or the Physical Control Law);<sup>16</sup>

(3) Driving under a financial responsibility law suspension or cancellation or under a nonpayment of judgment suspension;<sup>17</sup> or

(4) Failure to reinstate a license.<sup>18</sup>

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<sup>12</sup> R.C. 1547.01(B)(31), not in the bill.

<sup>13</sup> R.C. 4510.037(J), not in the bill; 4510.04; and 4510.111, not in the bill.

<sup>14</sup> R.C. 4510.04.

<sup>15</sup> R.C. 4510.11(D), not in the bill.

<sup>16</sup> R.C. 4510.14(B), not in the bill.

<sup>17</sup> R.C. 4510.16(D), not in the bill.



## New "family necessity" defense

The bill establishes as a new affirmative defense that the person was driving because of a family necessity and no other person was reasonably available to drive in response to the family necessity. This affirmative defense applies to all of the offenses mentioned above (including the offenses added under the bill).<sup>19</sup>

## Enhanced penalties for speeding violations

Under current law, the standard penalties for speeding are as follows:

(1) For a first or second speeding offense within one year, a minor misdemeanor;

(2) For a third speeding offense within one year, a fourth degree misdemeanor;

or

(3) For a fourth or subsequent speeding offense within one year, a third degree misdemeanor.

Current law also establishes an "enhanced penalty" that applies to *a first speeding offense within no specified time frame* if the offender operated a motor vehicle faster than 35 miles per hour ("MPH") in a business district (a 25 MPH zone), faster than 50 MPH in other portions of a municipal corporation (generally a 35 MPH zone), or faster than 35 MPH in a school zone during a time when the 20 MPH speed limit is in effect. The "enhanced penalty" is a fourth degree misdemeanor.

The bill eliminates the language that applies the "enhanced penalty" only to a first speeding offense. Thus, when an offender operates a motor vehicle at or above the accelerated speeds specified above, the offense is a fourth degree misdemeanor regardless of how many prior speeding offenses apply to the offender. Accordingly, under the bill, the following penalties apply to speeding offenses:

	<b>Penalty for speeding when the enhanced penalty does not apply</b>	<b>Penalty for speeding when the enhanced penalty applies</b>
1st or 2nd offense within one year	Minor misdemeanor	4th degree misdemeanor
3rd offense within one year	4th degree misdemeanor	4th degree misdemeanor

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<sup>18</sup> R.C. 4510.21(C), not in the bill.

<sup>19</sup> R.C. 4510.04.



	<b>Penalty for speeding when the enhanced penalty does not apply</b>	<b>Penalty for speeding when the enhanced penalty applies</b>
4th or subsequent offense within one year	3rd degree misdemeanor	4th degree misdemeanor

As noted in the table above, if the offense is the offender's first or second offense within one year, the "enhanced penalty" increases the applicable penalty from a minor misdemeanor to a fourth degree misdemeanor. If the offense is the offender's third offense within one year, the "enhanced penalty" has no effect because the standard penalty is the same as the "enhanced penalty." If the offense is the offender's fourth or subsequent offense, it is unclear whether the standard penalty (a third degree misdemeanor) or the "enhanced penalty" (a fourth degree misdemeanor), which in this case would operate as a reduction rather than an enhancement, would apply.

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## **HISTORY**

<b>ACTION</b>	<b>DATE</b>
Introduced	02-03-16

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