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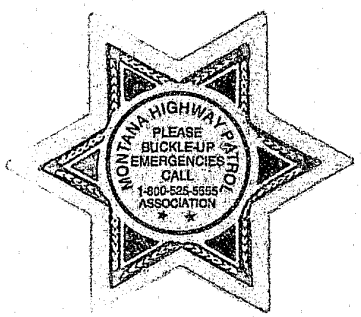
PROCESSING CHARGES OF DRIVING UNDER THE INFLUENCE OF ALCOHOL/DRUGS IN MONTANA



PROCESSING CHARGES OF DRIVING UNDER THE INFLUENCE OF ALCOHOL/DRUGS IN MONTANA

BY

JOHN ALBRECHT

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INTRODUCTION

In writing this manual I had two goals. First, it is meant as a resource for common legal issues. Second, it outlines a post-conviction procedure for processing offenders through the different agencies.

Not all situations could be covered. Rather, the manual emphasizes what commonly occurs. The legal references should be helpful in addressing the unusual and unique problems which arise.

The procedures for referring the offender to a Court School (or ACT Program) are designed to reduce the work for all agencies and make the procedure uniform. Hopefully, this will increase the number of offenders who successfully complete the programs. That should reduce the number of repeat DUI offenders.

In preparing the manual I interviewed numerous City and County Attorneys, City Judges and Justices of the Peace and chemical dependency counselors. Their suggestions and comments were invaluable in writing a manual which will be used by those professionals. I thank them for their help.

John Albrecht

May, 1985

APPREHENSION

Apprehension of a driver accused of driving under the influence of alcohol (hereafter "DUI") involves four basic steps. They are: (1) determination of particularized suspicion; (2) stop of the vehicle; (3) Blood Alcohol Concentration (hereafter "BAC") Test and (4) filing of the complaint. At any step a driver may be directed out of the process for various reasons.

First, a law enforcement officer determines if he has a particularized or reasonable suspicion that a driver is driving under the influence of alcohol, see State vs. Gopher 631 P.2d 293 (Mont., 1981), State vs. Stemple 646 P.2d 539 (Mont., 1982). Those cases describe particularized or reasonable suspicion as: (1) objective data from which officer may make certain inferences; and (2) a resulting suspicion that the driver is or was engaged in wrong-doing.

The particularized or reasonable suspicion standard is less strict than the "probable cause" standard. Probable cause is not required for stopping a motor vehicle, State vs. Schatz 634 P.2d 1193 (Mont., 1981).

There are no Montana DUI cases on what is sufficient information to establish a particularized or reasonable suspicion. A telephone call to a law enforcement agency reporting erratic driving may be adequate. Observation by the law enforcement officer of poor driving would be better although may not be necessary. An accident or observation of illegal driving behavior

would be sufficient to allow a stop of the vehicle.

The law enforcement officer stops the vehicle. The officer is not required to give the warnings of Miranda vs. Arizona 384 U.S. 436, 16 L.Ed. 2d. 694, 86 S. Ct. 1602 (1966) at the time of the stop, Berkemer vs. McCarthy 82 L.Ed. 2d 317 (1984).

Usually, the officer will check the credentials of the driver and vehicle. This is the drivers license,(1) vehicle registration,(2) and proof of insurance.(3) The officer may check the drivers license and vehicle registration with the Helena office of the Montana Highway Patrol.

In addition, the officer will observe the driver and check for the odor of alcoholic beverages. If the odor of alcoholic beverages indicates the driver is under the influence of alcohol, then the officer may request the driver to complete field manuevers.

The officer need not inform the driver of his right to refuse to perform the field tests, State vs. Purdie 680 P.2d 576 (Mont., 1984). Further, the observation of the performance of the tests is not a search requiring a warrant, Purdie. Some of the tests which may be given are called the Rhomberg test and the horizontal gaze nystagmus. One California Appellate Court excluded the results of the horizontal gaze nystagmus, People vs. Loomis 156 Cal. App. 3d Supp. 1 (1984). If the driver successfully performs the tests, then he may be charged with other offense(s) or be allowed to proceed.

Probable cause for an arrest may be established by the facts

and circumstances observed by the officer. The information the officer has may include the observation of erratic driving, the smelling of the odor of alcoholic beverages, the observation of the driver after the stop but before the field tests and the observation of the performance of the field tests.

A blood alcohol concentration (BAC) test is authorized only after a lawful arrest, State vs. Mangels 166 Mont. 190, 531 P.2d 1313 (1975).[4] An arrest may be made at any time and place except in the defendant's home or private dwelling place at night, Section 46-6-105. If a person is suspected of driving under the influence of alcohol and goes home before being arrested, the investigating officer must obtain a warrant for the person's arrest directing that the person may be arrested at his home or private dwelling place. The warrant must be signed by a judge.

The defendant does not have a right to speak to an attorney before the test is administered, State vs. Armfield 693 P.2d 1226 (Mont., 1984). Since a defendant does not have the right to an attorney before the BAC test is administered, the arresting officer may choose to not inform the defendant of his Miranda rights until after the BAC test is administered. This will prevent any questioning by the officer of the defendant until after the completion of the BAC test. But, a defendant who is given his Miranda rights before the BAC test and then informed he has no right to consult an attorney before the BAC test may become confused. The voluntariness of the consent or refusal of the BAC test may be questioned.

The defendant may refuse to allow the BAC test to be administered. If he is unconscious or in a condition rendering him incapable of refusal, then he is considered to have not withdrawn his consent. Further, no formal arrest is needed in this situation, State vs. Campbell 615 P.2d 190 (Mont., 1980). A conscious driver who was confused and suffering from abrasions and contusions was not in a condition rendering him incapable of refusal, Mangel. The BAC test could not be administered without his consent. A conscious driver whose eyes were closed, had intravenous needles in him, had a nurse attending him and whose doctor refused to allow a law enforcement officer to interview him was in a condition rendering him incapable of refusal, State vs. Morgan 646 P.2d 1177 (Mont., 1982). The BAC test could be administered without his consent.

If a defendant consents to the test, then it is done at the direction of the officer having reasonable grounds to believe a DUI was committed. The officer decides if a breath, blood or urine test is given, Section 61-8-402(1). A defendant may have a second sample taken at his own expense, Section 61-8-405(2). The North Dakota Supreme Court held that the State is not required to take two samples, State vs. Larson 313 N.W. 2d 750 (1981). The U.S. Supreme Court held that the U.S. Constitution does not require two samples to be taken, California vs. Trombetta 81 L.Ed 2d 413 (1984). There is no Montana case available on this issue.

The officer must include a name of the person drawing the blood on the lab analysis form submitted to the Montana Crime

Laboratory. The failure to do so will result in the exclusion of the results of the BAC test, State vs. McDonald 42 St. Rptr. 414 (Mont., 1985).

If the defendant refuses to have the test administered, the officer seizes his drivers license, Section 61-8-402(3). The officer issues the defendant a 72 hour temporary driving permit. The defendant's drivers license is suspended for 90 days if it is his first refusal. If it is his second or subsequent refusal within five years, then his drivers license is revoked for one year. The defendant has 30 days to appeal to suspension or revocation to District Court.

Section 61-8-402(3) specifies that the drivers license of a "resident driver" may be seized for refusal to take a BAC test. But, Subsection (6) of Section 61-8-402 says, "Like refusal by a nonresident shall be subject to suspension by the division in a like manner, and the same temporary driving permit shall be issued to nonresidents." This would appear to authorize the seizure of the drivers license of a nonresident for refusal to take a BAC test.

There is no Montana Supreme Court decision on whether a search warrant may be obtained to draw a blood sample if a defendant refuses to take a BAC test. The Alaska Court of Appeals says a search warrant may be obtained, Pena vs. State 664 P.2d 169 (1983). The Pena case involved a manslaughter charge. The Montana Supreme Court ruled that Section 61-8-402(3) does not limit the evidence gathering procedures for crimes other than DUI, State

vs. Thompson 674 P.2d 1094 (Mont., 1984). The Thompson case involved a negligent homicide charge. But, Section 61-8-402(3) says if a driver refuses to allow a BAC test, "none shall be given." That language may be interpreted to limit the evidence gathering procedures for charges of DUI.

Medical records may include evidence of intoxication, including BAC level. These records may be obtained by subpoena by the prosecution, State vs. Campbell 146 Mont. 251, 405 P.2d 978 (1965).

A complaint should be prepared and a copy of it given to the defendant. The officer may charge (1) Driving Under the Influence of Alcohol or Drugs (DUI), Section 61-8-401(1)[5] or (2) Driving with a .1% or more BAC (hereafter referred to as "DUI Per Se"), Section 61-8-406.[6] Alternatively, the officer could charge (1) DUI or (2) DUI Per Se on the same complaint.[7]

The officer does not have to state on the complaint whether it is the defendant's first, second or third offense, State vs. Nelson 178 Mont. 280, 583 P.2d 435 (1978). But, the officer may want to state which offense it is because many defendants plea guilty at their initial appearance. If the defendant pleas not guilty, then the prosecuting attorney could amend the complaint to not specify the number of the offense. If the complaint does not say second or third offense, the court may consider it a first offense.

Justice and City Courts have exclusive jurisdiction over first and second DUI offenses. The Justice, City and District Courts have concurrent jurisdiction over the third offense (House Bill

476, 1985 Legislature, amending Section 3-10-303, M.C.A.). If the officer wants to file a third offense DUI, he may file the charge with the Justice or City Court. The Justice of the Peace or City Judge should conduct an initial appearance. Then, the Justice of the Peace or City Judge should ask the county or city attorney if he will prosecute the case in the lower court or the district court. If the case will be prosecuted in the lower court, an arraignment should be scheduled. If the case will be prosecuted in district court, no further action should be taken by the lower court judge.

The defendant may try to post bail according to the bail schedule set by the Justice of the Peace. Any law enforcement officer may accept bail and release the defendant or may refuse to accept bail and keep the defendant incarcerated.(8) A personal check is acceptable if the check is drawn on a bank in Montana and the person writing the check has two forms of identification.(9)

State law does not specifically authorize a law enforcement officer to release a defendant on his own recognizance after an arrest was made.(10) A judge should be contacted to authorize a release on the defendant's own recognizance.

If the defendant remains incarcerated, then he must be taken before a judge "without unnecessary delay," Section 46-7-101(2), MCA. The original complaint and disposition copy should be filed with the court.

APPREHENSION - STATUTORY REFERENCES

(1) Section 61-5-116. Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same upon demand of a justice of the peace, a peace officer, a highway patrolman, or a field deputy or inspector of the division. However, no person charged with violating this section shall be convicted if he produces in court or the office of the arresting officer an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

(2) Section 61-3-322(3). Every owner, upon receiving a registration receipt, shall write his signature thereon with pen and ink in the space provided. Every registration receipt or a notarized photostatic copy or duplicate thereof furnished by the division shall at all times be carried in the vehicle to which it refers or shall be carried by the person driving or in control of such vehicle, who shall display it upon demand of a police officer or any officer or employee of the division or the highway department.

(3) Section 61-6-302(4). Every person shall carry in a motor vehicle being operated by him an insurance card approved by the division but issued by the insurance carrier of the motor vehicle owner as proof of compliance with 61-6-301. A motor vehicle operator shall exhibit the insurance card upon demand of a justice of the peace, a peace officer, a highway patrolman, or field deputy or inspector of the division. However, no person charged with violating this subsection may be convicted if he produces in court or the office of the arresting officer proof of insurance valid at the time of his arrest.

(4) Section 61-8-402. (1) Any person who operates a motor vehicle upon ways of this state open to the public shall be deemed to have given consent, subject to the provisions of 61-8-401, to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if arrested by a peace officer for driving or in actual physical control of a motor vehicle while under the influence of alcohol. The test shall be administered at the direction of a peace officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon ways of this state open to the public while under the influence of alcohol. The arresting officer may designate which one of the aforesaid tests shall be administered.

(2) Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (1) of this section.

(3) If a resident driver under arrest refuses upon the request of a peace officer to submit to a chemical test designat-

ed by the arresting officer as provided in subsection (1) of this section, none shall be given, but the officer shall, on behalf of the division, immediately seize his driver's license. The peace officer shall forward the license to the division, along with a sworn report that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle upon ways of this state open to the public, while under the influence of alcohol and that the person had refused to submit to the test upon the request of the peace officer. Upon receipt of the report, the division shall suspend the license for the period provided in subsection (5).

(4) Upon seizure of a resident driver's license, the peace officer shall issue, on behalf of the division, a temporary driving permit, which is valid for 72 hours after the time of issuance.

(5) The following suspension and revocation periods are applicable upon refusal to submit to a chemical test:

(a) upon a first refusal, a suspension of 90 days with no provision for a restricted probationary license;

(b) upon a second or subsequent refusal within 5 years of a previous refusal, as determined from the records of the division, a revocation of 1 year with no provision for a restricted probationary license.

(6) Like refusal by a nonresident shall be subject to suspension by the division in like manner, and the same temporary driving permit shall be issued to nonresidents.

(7) All such suspensions are subject to review as hereinafter provided.

(5) Section 61-8-401. (1) It is unlawful and punishable as provided in 61-8-714 for any person who is under the influence of:

(a) alcohol to drive or be in actual physical control of a motor vehicle upon the ways of this state open to the public;

(b) a narcotic drug to drive or be in actual physical control of a motor vehicle within this state;

(c) any other drug to a degree which renders him incapable of safely driving a motor vehicle to drive or be in actual physical control of a motor vehicle within this state; or

(d) alcohol and any drug to a degree that renders him incapable of safely driving a motor vehicle to drive or be in actual physical control of a motor vehicle within this state.

(2) The fact that any person charged with a violation of subsection (1) is or has been entitled to use alcohol or such a drug under the laws of this state does not constitute a defense against any charge of violating subsection (1).

(6) Section 61-8-406. It is unlawful and punishable as provided in 61-8-722 for any person to drive or be in actual physical control of a motor vehicle upon the ways of this state open to the public while the alcohol concentration in his blood, breath, or urine is 0.10 or more.

(7) Section 61-8-408. When the same acts may establish the commission of an offense under both 61-8-401 and 61-8-406, a person charged with such conduct may be prosecuted for a violation of both 61-8-401 and 61-8-406. However, he may only be convicted of an offense under either 61-8-401 or 61-8-406.

(8) Section 44-1-1101 - Upon making an arrest, a patrolman shall:

(1) deliver the offender to the nearest justice of the peace during office hours or to the county jail;

(2) give the offender a summons describing the nature of the offense with instructions there on for the offender to report to the nearest justice of the peace; or

(3) accept bail determined pursuant to Title 46, Chapter 9, part 3.

Section 46-9-302 - (1) A justice of the peace or city judge may, in his discretion, establish and post a schedule of cash bail for offenses not amounting to a felony.

(2) A peace officer may accept bail in behalf of the justice of the peace or city judge in accordance with the schedule. In the event the peace officer accepts bail, he shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the justice of the peace or city judge before whom the offender is to appear, and the justice of the peace or city judge shall give a receipt to the peace officer for the bail delivered.

(9) Section 44-1-11-3 - (1) In the case of traffic violation bond may be made by personal check in lieu of cash provided that:

(a) the check is drawn on a bank domiciled in the state of Montana; and

(b) the person who writes the check in lieu of cash bond has two documents identifying him.

(2) If a check is offered in lieu of cash, the highway patrolman or other authorized agent who accepts the check is not liable in the case of nonpayment.

(3) A person who writes a check in lieu of cash bond which is returned for insufficient funds is subject to prosecution under 45-6-316, and obtaining bond constitutes securing services for the purposes of that section.

(10) See Statutory Reference Note 8 for text of Section 44-1-1101.

Section 46-6-404 - (1) Whenever a peace officer is authorized to arrest a person without a warrant, he may instead issue to such person a notice to appear.

(2) The notice shall:

(a) be in writing;

(b) state the name of the person and his address, if known;

(c) set forth the nature of the offense;
(d) be signed by the officer issuing the notice; and
(e) direct the person to appear before a court at a certain time and place.
(3) Upon failure to the person to appear, a summons or warrant of arrest may be issued.

ADJUDICATION

After a complaint is filed with a Justice or City Court there are three basic stages to adjudication. They are: (1) Initial appearance; (2) Arraignment; and (3) Trial, if a not guilty plea is entered.

If a defendant remained in custody, an initial appearance is required.(1) No initial appearance is required if the defendant is not in custody. The judge must advise the defendant of the right to counsel and to remain silent and set bail or release the defendant on his own recognizance.(2)

If the defendant is charged with DUI, he is entitled to court appointed counsel if he is indigent and he requests one, Argersinger vs. Hamlin 407 U.S. 25, 32 L.Ed 2d 530, 92 S.Ct. 2006 (1972). This is because the penalty for DUI includes mandatory jail time.(3) If the defendant is charged only with DUI Per Se and the court will not impose jail time, then the court need not appoint an attorney for an indigent defendant, Scott vs. Illinois 440 U.S. 367, 59 L.Ed 2d 383, 99 S.Ct. 1158 (1979). This is because the penalty for DUI Per Se does not include mandatory jail time.(4) But, if an indigent defendant charged with DUI Per Se is not given the right to appointed counsel, then that conviction may not be used to enhance the penalty of a second DUI Per Se conviction, Baldasar vs. Illinois 446 U.S. 222, 64 L.Ed 2d 169 100 S.Ct. 1585 (1980).

If counsel is appointed and the defendant is found guilty,

then the court may require the costs of the court appointed counsel to be paid by the defendant.[5] The court must inform a defendant of this possibility.[6]

The court should set a date and time for the arraignment after the completion of the initial appearance. If the defendant and court wish, the arraignment may be held immediately following the initial appearance.

The arraignment is the proceeding where the defendant enters a plea.[7] In explaining the nature of the crime the judge may explain that the defendant is charged with driving under the influence of alcohol or drugs or driving with more than .1% BAC. He is not accused of what is traditionally known as "Drunken Driving."

At a minimum the court should inform the defendant of certain rights. They are: (1) the right to counsel and to have an attorney appointed for him if he cannot afford one (if applicable, see above); (2) the right to a jury trial; (3) the right to cross-examine the state's witnesses; (4) the right to subpoena witnesses on his own behalf; (5) the right to be proven guilty beyond a reasonable doubt.

The court should make a record of the defendant's waiver of rights, especially his right to an attorney. If a second or subsequent DUI is charged later and the record does not show these rights were given, then the court may not consider the prior conviction in sentencing, United States vs. Tucker 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed 2d 592 (1972), State vs. Herrera

643 P.2d 588 (Mont., 1982), Ryan vs. Christ 563 P.2d 1145 (Mont., 1977). The record may be made by writing on the back of the Notice to Appear and Complaint, "Defendant informed of and gave up right to counsel and to have counsel appointed for him if he could not afford one." A similar notation should be made for each of the above rights.

The court must inform the defendant of the statutory penalty. The jail, fine, alcohol course and treatment and driver license suspension or revocation and the points under the habitual traffic offender system should all be explained. It is important to realize that driver license suspension or revocation will be based upon the state's official record maintained by the Motor Vehicle Division.

The jail, fine, alcohol course and treatment and driver license suspension or revocation are detailed further under the sentencing section. Montana's habitual traffic offender point system is explained here. Section 61-11-203(2) defines an habitual traffic offender as a person who has accumulated 30 or more points within a 3 year period. A conviction of DUI or DUI Per Se gives a person 10 points, Section 61-11-203(2)(d) and Section 61-8-722(4).

As mentioned above, an officer may charge DUI or, in the alternative DUI Per Se in the same complaint. If he does, then a defendant may plea guilty to either charge. If only DUI is charged, then a defendant may not plea guilty to DUI Per Se.

There is no Montana case on whether a defendant may plea guilty to DUI Per Se without having taken a BAC test. But, the

case law relating to the entry of a plea would indicate he may.

A plea must be a voluntary and intelligent choice among alternative courses of action, North Carolina vs. Alford 400 U.S. 25, 27 L.Ed. 2d 162, 91 S.Ct. 160 (1970). If a defendant understands the crime and the penalty and voluntarily pleas guilty, the court may accept his plea.

At the arraignment, an adequate factual basis for the crime should be established, In Matter of Brown 605 P.2d 185 (Mont., 1980). If a defendant wants to plea guilty to DUI Per Se the judge may question the defendant about the amount of alcohol he drank before he was stopped. If the amount consumed appears to be enough to create a BAC level above .1%, the court may accept his plea. This is despite the fact that no blood test was given or the results are not available. Nevertheless, the court may refuse to accept any plea.(8)

If the defendant pleas guilty and the court accepts his plea, the procedure is covered under Sentence and Treatment, below. If the defendant pleas not guilty, then the remainder of this section on Adjudication applies.

The court should set the case for trial within six months of the plea.(9) There are no statutory restrictions on plea bargaining between the defendant and the prosecutor. Discovery is limited to those applicable sections of Section 46-15-101, et. seq. Some of those statutes are limited to district court cases and may not apply to lower courts.

There are numerous issues which may arise at trail. This

manual covers some of the more common issues which may be raised.

A videotape of the defendant at the time of the offense or soon after without the Miranda warnings being given is admissible, State vs. Finley 173 Mont. 162, 566 P.2d 1119 (1977). A proper foundation for the recording or taping must be laid, State vs. Warwick 494 P.2d 627 (Mont., 1972). The foundation includes: (1) a showing that the recording device is capable of making a record; (2) a showing that the operator was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that changes, additions or deletions were not made; (5) a showing of the manner of preservation of the record; (6) identification of the persons recorded; (7) a showing of voluntariness of the statements to be introduced. If no testimony of the defendant is taken during the course of the taping, the last element need not be fulfilled, Finley.

The defendant's refusal to take a BAC test may be admitted into evidence, State vs. Jackson 672 P.2d 255, 40 St. Rptr. 1698 (1983), South Dakota vs. Neville 459 U.S. 553, 74 L.Ed. 2d 748, 103 S.Ct. 916 (1983). The results of the BAC test are admissible.(10)

Law witnesses may testify about a defendant's intoxification. This testimony may be given in the form of an opinion, State vs. Hardy 604 P.2d 792 (Mont., 1980) State vs. Trueman 34 Mont. 249, 85 P.1024 (1906).

The prosecution may want to introduce expert testimony on the degree of impairment of drivers at particular BAC levels.

Before admitting such testimony the court should decide if it is relevant. The Montana Attorney General stated that such evidence is not necessary for a conviction, 37 A.G. Op. 120 (1978).

The prosecution need not prove at trail that the present charge is the second or third offense, Nelson, State vs. Campbell 615 P.2d 190 (Mont., 1980). The fact needs to be proved at the sentencing hearing to increase the penalty.

There are no Montana Supreme Court cases deciding whether a jury instruction for DUI Per Se must be given when only DUI is charged. The discussion of this issue is based upon Montana Supreme Court cases on other crimes.

Whether a DUI Per Se jury instruction must be given if only DUI is charged depends on whether DUI Per Se is a lessor included offense of DUI, Montclirc Memorandum File Number 2845. An offense is a lessor included offense of a greater offense if the greater offense includes every element of the lessor offense plus other elements, State vs. Lagerquist 152 Mont., 21, 445 P.2d 910 (1968). DUI Per Se contains an additional element not contained in DUI. DUI Per Se requires proof of a BAC level over .1%. DUI does not necessarily require proof of BAC level over .1%.

This is a question not yet answered by the Montana Supreme Court. If the Trial Court is convinced by a party that DUI Per Se is a lessor included offense of DUI and there is evidence to support a conviction of DUI Per Se, then the court must give the instruction, see State vs. Gopher 633 P.2d 1195 (Mont., 1981).

The prosecution may avoid the problem and assure that both

jury instructions are given. This is by amending the complaint to DUI or, alternatively, DUI Per Se. This is allowed under Montana Law.(11) But, the prosecution must move to amend the complaint in a timely manner.(12)

The Montana Supreme Court approved a jury instruction explaining the phrase "under the influence of (alcohol)." It is found in State vs. Cline 339 P.2d 657, at 662 (Mont., 1959).

The jury instructions should include a definition of actual physical control if the evidence supports such a finding. Actual physical control is defined as existing or present bodily restraint, directing influence, domination or regulation of a motor vehicle, State vs. Ruona 133 Mont. 243, 321 P.2d 615 (1958). Movement of the vehicle is not necessary, State vs. Taylor 661 P.2d 33 (Mont., 1983). Further, the defendant may be asleep or passed out behind the steering wheel and be in actual physical control of the motor vehicle, Taylor.

If the jury or court (in a non-jury trial) finds the defendant not guilty, then he should be discharged. The bail, if any, should be returned to the defendant. If he is found guilty, the court should proceed to the Sentence and Treatment Section of this manual.

ADJUDICATION - STATUTORY REFERENCES

(1) Section 46-7-101(2) - Any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest or most accessible judge in the same county, and a complaint stating the charges against the arrested person shall be filed forthwith.

(2) Section 46-7-102 - (1) The Judge shall inform the defendant:

(a) of the charge against him;

(b) of his right to counsel;

(c) of his right to have counsel assigned by a court of record in accordance with the provisions of 46-8-101;

(d) that he is not required to make a statement and that any statement made by him may be offered in evidence in his trial.

(2) The judge shall admit the defendant to bail in accordance with the provisions of this title.

Section 46-9-102 - (1) All persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense charged.

(2) On the hearing of an application for admission to bail made before or after indictment or information for a capital offense, the burden of showing that the proof is evident or the presumption great that the defendant is guilty of the offense is on the state.

Section 46-9-111 - Any person in custody, if otherwise eligible for bail, may be released on his personal recognizance subject to such conditions as the court may reasonably prescribe to assure his appearance when required. Any person released as herein provided shall be fully apprised by the court of the penalty provided for failure to comply with the terms of his recognizance.

(3) Section 61-8-714 - (1) A person convicted of a violation of 61-8-401 shall be punished by imprisonment in the county jail for not less than 24 consecutive hours or more than 60 days, and shall be punished by a fine of not less than $100.00 or more than $500.00. The jail sentence may not be suspended unless the judge finds that the imposition of the jail sentence will pose a risk to the defendant's physical or mental well-being.

(2) On a second conviction, he shall be punished by a fine of not less than $300.00 or more than $500.00 and by imprisonment for not less than 7 days, at least 48 hours of which must be served consecutively, or more than 6 months. Three days of the jail sentence may not be suspended unless the judge finds that the imposition of the jail sentence will pose a risk to the defendant's physical or mental well-being.

(3) On the third or subsequent conviction, he shall be

punished by imprisonment for a term of not less than 30 days, at least 48 hours of which must be served consecutively, or more than 1 year, to which may be added in the discretion of the court, a fine of not less than $500.00 or more than $1,000.00. Notwithstanding any provision to the contrary for suspension of execution of a sentence imposed under this subsection, the imposition or execution of the first 10 days of the jail sentence imposed for a third or subsequent offense that occurred within 5 years of the first offense may be deferred or suspended.

(4) In addition to the punishment provided in this section, regardless of disposition, the defendant shall complete an alcohol information course at an alcohol treatment program approved by the department of institutions, which may include alcohol or drug treatment, or both, if considered necessary by the counselor conducting the program. Each counselor providing such education or treatment shall, at the commencement of the education or treatment, notify the court that the defendant has been enrolled in a course or treatment program. If the defendant fails to attend the course or the treatment program, the counselor shall notify the court of the failure.

(5) For the purpose of determining the number of convictions under this section, "conviction" means a final conviction, as defined in 45-1-101, or a forfeiture of bail or collateral deposited to secure the defendant's appearance in court, which forfeiture has not been vacated. An offender is considered to have been previously convicted for the purposes of this section if less than 5 years have elapsed between the commission of the present offense and a previous conviction. If there has been no additional conviction for an offense under this section for a period of 5 years after a prior conviction hereunder, then such prior offense shall be expunged from the defendant's record.

(4) Section 61-8-722 - (1) A person convicted of a violation of 61-8-406 shall be punished by a fine of not less that $100.00 or more than $500.00

(2) On a second conviction of a violation of 61-8-406, he shall be punished by imprisonment for not less than 48 consecutive hours or more than 30 days and by a fine of not less than $300.00 or more than $500.00.

(3) On a third or subsequent conviction of a violation of 61-8-406, he shall be punished by imprisonment for not less than 48 consecutive hours or more than 6 months and by a fine of not less than $500.00 or more than $1,000.00.

(4) The provisions of 61-5-205(2), 61-5-208(2), and 61-11-203(2)(d) related to revocation and suspension of driver's licenses shall apply to any conviction under 61-8-406.

(5) In addition to the punishment provided in this section, regardless of disposition, the defendant shall complete an alcohol information course at an alcohol treatment program approved by the department of institutions, which may include alcohol or drug treatment, or both, if considered necessary by the counselor conducting the program. Each counselor providing such education or

treatment shall, at the commencement of the education or treatment, notify the court that the defendant has been enrolled in a course or treatment program. If the defendant fails to attend the course or the treatment program, the counselor shall notify the court of the failure.

(6) For the purpose of determining the number of convictions under this section, "conviction" means a final conviction, as defined in 45-2-101, or a forfeiture of bail or collateral deposited to secure the defendant's appearance in court, which forfeiture has not been vacated. An offender is considered to have been previously convicted for the purposes of the section if less than 5 years have elapsed between the commission of the present offense and a previous conviction. If there has been no additional conviction for an offense under this section for a period of 5 years after a prior conviction hereunder, then such prior offense shall be expunged from the defendant's record.

(5) Section 46-8-113 - (1) Under the provisions of 46-18-201, the Court may require a convicted defendant to pay the costs of court-appointed counsel as part of or condition under his sentence.

(6) Section 46-8-112 - The court shall inform the defendant that:

(1) if he makes a false statement under oath regarding his financial inability to obtain counsel, he may be charged with the additional offense of false swearing;

(2) he may be required to pay all or a portion of the compensation and expenses incurred by his court-appointed counsel as a part of or a condition under his sentence should he be convicted of an offense.

(7) Section 46-12-201 - The arraignment in any court in this state must be conducted in the following manner:

(1) The arraignment must be in open court.

(2) The court must inquire of the defendant or his counsel the defendant's true name, and if the defendant's true name be given as any other than that used in the charge, the court must order the defendant's name to be substituted for the name under which he is charged. The subsequent proceedings must be conducted with the defendant charged under that name, but in the discretion of the court, the defendant may also be referred to by the name by which he was first charged.

(3) The court must determine whether the defendant is under any disability which would prevent the court in its discretion from proceeding with the arraignment. The arraignment may be continued until such time as the court determines the defendant is able to proceed.

Section 46-12-202 - (1) The defendant shall be advised by the court as follows:

(a) of the nature of the crime charged against him;

(b) of the punishment as set forth by statute for the crime

charged;

(c) if the defendant appears for arraignment without counsel, of his right to counsel and of his right to assigned counsel if he is unable to employ counsel. If counsel is or has been waived by the defendant, the court shall ascertain if the waiver is or was voluntary before proceeding;

(d) of the time prescribed by statute to enter a plea;

(e) of his right to secure bail to release him from custody.

(2) The court, or the clerk or county attorney under its direction, must;

(a) deliver to the defendant a true copy of the indictment, information, or complaint, including the endorsements thereon and the list of witnesses when required;

(b) read the indictment, information, or complaint to the defendant unless the defendant or his counsel waives such a reading; and

(c) ask him whether he pleads guilty or not guilty to the indictment, information, or complaint.

(8) Section 46-12-204(2) - The court may refuse to accept a plea of guilty and shall not accept the plea of guilty without first determining that the plea is voluntary with an understanding of the charge.

(9) Section 46-13-201(2) - The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed if a defendant whose trial has not been postponed upon his application is not brought to trial within 6 months after entry of plea upon a complaint, information, or indictment charging a misdemeanor.

(10) Section 61-8-404 (1) Upon the trial of any criminal action or other proceeding arising out of acts alleged to have been committed by any person in violation of 61-8-401 and 61-8-406;

(a) evidence of the amount of alcohol in the person's blood at the time of the act alleged, as shown by the chemical analysis of his blood, breath, or urine, is admissible; and

(b) a report of the facts and results of any chemical test of a person's blood, breath, or urine administered under 61-8-402 is admissible in evidence if:

(i) the breath analysis report was prepared and verified by the person who performed the test or the blood or urine test was a laboratory analysis and the analysis was done in a laboratory operated by the department of justice or by any other laboratory or facility certified or exempt from certification under the rules of the department; and

(ii) the report was prepared in accordance with any applicable rules of the department; and

(iii) if the test was on a blood sample, the person withdrawing the blood must have been competent to do so under 61-8-405(1).

(2) If the person under arrest refused to submit to the test

as hereinabove provided, proof of refusal shall be admissible in any 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 upon the ways of this state open to the public, while under the influence of alcohol.

(3) The provisions of this part do not limit the introduction of any other competent evidence bearing on the question of whether the person was under the influence of alcohol.

(11) See Statutory Reference Note (7) on Apprehension for test of Section 61-8-408, MCA.

(12) Section 46-17-101(2) - The complaint may be amended at any time before verdict or finding with leave of court.

SENTENCE AND TREATMENT

After entering a guilty plea or a finding of guilt, the judge must sentence the offender. The penalties for DUI and DUI Per Se are different. They are discussed separately.

On a first offense DUI the penalty provision is found at Section 61-8-714(1)[1] (See Appendix A for sample Sentencing Order). Offender must be fined a minimum of $100.00 to a maximum of $500.00. The offender must be sentenced to a minimum of 1 day (24 hours) in the County Jail to a maximum of 60 days. The one day is suspended only if the jail sentence will pose a risk to the offender's physical or mental well-being. A letter signed by a physician, psychiatrist or psychologist describing the risk is sufficient for a court to suspend the 1 day jail sentence.

In addition, the offender must attend an alcohol information course and alcohol or drug treatment if considered necessary by the counselor conducting the course. At this time, this course is called Court School. This program is going to be called an Assessment Course/Treatment (acronym: ACT) Program. This is to emphasize that the program includes treatment for alcohol or drug dependency, if necessary.

The offender must pay for the ACT Program. This includes the treatment aspect. But, the course and treatment must be provided at no or low cost if the offender cannot afford it.[2] Initially, the ACT Program should determine the offender's ability to pay. If an offender says he cannot afford to pay, the ACT

Program should require the offender to complete the Income and Financial Resources Form (Appendix B). The court may be required to resolve any disagreements between the offender and the ACT Program regarding ability to pay.

Finally, the Driver Improvement Bureau of the Motor Vehicle Division, State of Montana, (hereafter "Driver Improvement") suspends the offender's drivers license.[3] The judge may recommend that the offender receive a restricted probationary drivers license. The license will state "No Recreational Driving." A judge may include with his recommendation to Driver Improvement any additional specific, objective restrictions on the offender's driving privilege. For example, he may limit the offender to occupational driving or time of day restrictions. Further, a judge may refuse to recommend that a restricted probationary license be issued for part or all of the six months suspension period. If a judge recommends that a license be issued and the offender participates in an ACT Program, then Driver Improvement must issue a license.

A second offense DUI is one where the offense is committed within five years of the prior DUI conviction. A conviction is the day sentence is given. Section 45-2-101(15) or the day that bail is forfeited, Section 61-8-714(5).

An offender may be convicted of DUI, Second Offense, only if he was previously convicted of DUI. A prior conviction of DUI Per Se may not be used to enhance a DUI penalty. However, the administrative penalties set forth in Section 61-5-208, MCA, for a

first offense are identical whether the conviction is for DUI or Illegal Per Se. If the same person were convicted of two Illegal Per Se violations within a five-year period, unquestionably the one-year revocation penalty would apply. The result should be the same if one of the offenses is a DUI (considered a more serious offense for criminal purposes) and the other is an Illegal Per Se. The argument is strengthened by the fact that the legislature set the same administrative penalty for conviction of a first offense (six-month suspension), whether the conviction is for DUI or Illegal Per Se. (DV 84-2394)

On a second offense DUI the penalty provision is found at Section 61-8-714(2). The offender must be fined a minimum of $300.00 to a maximum of $500.00. The offender must be sentenced to a minimum of three days in the County Jail to a maximum of six months. Forty-eight hours of the jail time must be served consecutively. The three days in jail may be suspended only if the jail sentence will pose a risk to the offender's physical or mental well-being. A letter signed by a physician, psychiatrist or psychologist describing the risk to the offender is sufficient to suspend the jail sentence.

The offender convicted of second offense DUI must complete the ACT Program, also. This requirement is the same as described above under first offense.

Finally, Driver Improvement revokes the drivers license for one year of any person convicted of second offense DUI. The judge may not recommend that the offender receive a restricted

license.

The court may not defer imposition of sentence on a DUI conviction.[4] The court may defer imposition of sentence on a DUI Per Se conviction.

On a first offense DUI Per Se the penalty provision is found at Section 61-8-722(1).[5] The offender must be fined a minimum of $100.00 to a maximum of $500.00. He may be sentenced up to ten days in jail. Driver Improvement suspends his drivers license. The judge may recommend that Driver Improvement issue a restricted probationary license.

A second offense DUI Per Se is one where the offense is committed within five years of the prior DUI Per Se conviction. A conviction is the day sentence is given, Section 45-2-101(15) or the day that bail is forfeited, Section 61-8-722(6).

An offender may be convicted of DUI Per Se, Second Offense, only if he was previously convicted of DUI Per Se. A prior conviction of DUI may not be used to enhance a DUI Per Se penalty.

On a second offense DUI Per Se, the penalty provision is found at Section 61-8-722(2). The offender must be fined a minimum of $300.00 to a maximum of $500.00. He must be sentenced to a minimum of 48 hours in the County Jail to a maximum of 30 days. He must complete the ACT Program. Driver Improvement revokes the drivers license of the defendant for one year. The judge may not recommend that Driver Improvement issue a restricted probationary drivers license. Again it is important to realize that driver license suspension or revocation will be based upon the

state's official record maintained by the Motor Vehicle Division.

A judge should follow his standard procedures for the collection of the fine and imposition of the jail sentence. Time payment arrangements may be used if the offender requests. The remainder of this section is on the notices to Driver Improvement and the ACT Program. Following these procedures will assure that the offender's drivers license is suspended or revoked and that he completes the ACT Program.

To assure the suspension or revocation of the offender's drivers license the court must notify Driver Improvement. This is done by mailing notice to the Driver Improvement Bureau, 303 N. Roberts, Helena, Montana 59620. The notice may be made by one of the following: (1) completing the disposition copy of the Notice to Appear and Complaint; (2) completing an abstract of the court record; (3) a copy of the sentencing order or a letter describing the sentence and a copy of the complaint.

The court should mail the offender's drivers license to Driver Improvement along with the notice. This is whether it is the first or second offense. House Bill 246 enacted by the 1985 legislature and effective October 1, 1985, requires the court to seize the offender's drivers license.(6)

If it is a first offense, then the court may recommend that the offender receive a restricted probationary drivers license. Before making this recommendation a judge may want to ask the offender about his need to drive, his driving record and prior alcohol or drug related criminal convictions. Based upon that

information a court could: (1) withhold the recommendation for a restricted probationary drivers license for part or all of the six months suspension period; or (2) impose additional objective restrictions on the restricted probationary drivers license. If a court recommends that a restricted probationary drivers license be issued and the offender attends and completes an ACT Program, then Driver Improvement must issue a restricted probationary drivers license. Generally, Driver Improvement will issue the restricted probationary drivers license upon receipt of the recommendation of the court and a copy of the ACT Referral Form (see below). This would be prior to the offender completing the ACT Program. Further, if the court does not impose any additional restrictions on the restricted probationary drivers license, the restriction on the license will state, "No Recreational Driving."

If it is a second offense, the court may not recommend that the offender receive a restricted probationary drivers license. The offender's drivers license is revoked for one year.(7)

In addition, the offender must attend an Assessment Course/ Treatment Program (hereafter called "ACT;" formerly called "Court School"). The ACT Referral Form is Appendix C. It should be completed at the time of sentencing. An original and four copies are prepared. The ACT Referral Form contains the court's recommendation regarding a restricted probationary drivers license.

The original is the court's copy. It should be kept in the court's file with the original complaint.

The offender's copy is given to the offender at sentencing. The court should explain to the offender that he must enroll by the date specified in the sentencing order and ACT Referral. The enrollment date should be no later than 7 days after sentencing. The first session of the ACT Program may be after the enrollment date. But, the offender must enroll in the ACT Program by that date.

The Driver Improvement copy should be mailed to Driver Improvement. This is along with the notice of conviction and the drivers license. If the court imposed any additional, objective restrictions on the offender's driving privilege, these should be stated in a letter accompanying the form.

The ACT Program/Driver Improvement copy and the ACT Program/ Court copy should be delivered to the ACT Program. This should be within 3 days of sentencing.

The offender should enroll in and attend the ACT Program. During the program the offender will be evaluated for alcohol or drug dependency.

Upon completion of the evaluation a written summary of the treatment recommendations should be given to the offender (Appendix D). The ACT Treatment Recommendations Form should be completed. All blanks should be filled in. The standardized tests given, the results of each test and the conclusion which may be drawn should be stated. Based upon all this information the ACT counselor should check the blank stating whether the offender is chemically dependent or not.

If the offender is not chemically dependent, then no treatment recommendations are required. The sections of the form regarding Recommendations and next appointment need not be completed. A copy of the form should be given to the offender and a copy placed in the offender's file with the ACT Program.

If the offender is chemically dependent, then treatment recommendations should be outlined. The recommendations should specify what the offender is to do. For example, the counselor may write: (1) attend out-patient counseling once a week for 12 weeks; (2) attend Alcoholics Anonymous meeting once a week for 12 weeks; and (3) not use alcohol or drugs. The date, time and place of the offender's next appointment should be specified. The offender (client) should check whether or not he will accept the recommendations.

Both the counselor and the offender should sign the completed ACT Treatment Recommendations Form. A copy should be given to the offender. The original should be placed in the offender's file with the ACT Program.

If an offender does not believe that he is chemically dependent, then he may move the court for an order to not require him to attend treatment. The court should set a hearing on the motion. The defendant may present evidence of a second evaluation if he obtained one. The prosecutor may present evidence of the ACT counselor's evaluation. The court should outline the treatment needed or relieve the defendant from the treatment requirement.

The offender may fail to enroll or attend the ACT Program. Or, he may refuse or fail to follow the treatment recommendations of the ACT counselor. If he does, then the ACT Program should notify Driver Improvement and the court. The court's notice should be given through the City or County Attorney's office.

The ACT Program/Driver Improvement copy of the ACT Referral Form should be mailed directly to Driver Improvement if: (1) the offender does not enroll in the ACT Program by the specified date; (2) the offender misses one scheduled ACT Program session without excuse; (3) the offender refuses or fails to complete any recommended alcohol or drug treatment. A statement of the reason for notifying Driver Improvement should be made under "Comments."

The ACT Program/Driver Improvement copy should be mailed to Driver Improvement within 3 days of the offender's failure to enroll, missing scheduled session or refusal or failure to follow the recommended treatment. This is because the offender's drivers license is suspended for only six months. The longer the ACT Program waits to notify Driver Improvement, the shorter the suspension period will be.

Upon receipt of the ACT/Driver Improvement copy, Driver Improvement will reinstate the offender's original suspension. It will have the offender's restricted probationary drivers license picked up.

Most likely, the offender will correct the problem. He will enroll in the ACT Program, begin attending regularly or accept the treatment recommendations of the counselor. If he does, the

ACT Program should notify the court. The court may renew its recommendations that the offender receive a restricted probationary drivers license. Driver Improvement will re-issue the restricted probationary drivers license only if a court renews its recommendation.

At the same time the ACT Program/Driver Improvement copy is mailed, the court should be notified of the problem. The court is notified by completing the affidavit (Appendix E) and attaching the ACT Program/Court copy or the ACT Treatment Recommendations to the affidavit.

The affidavit should be completed by checking the proper blanks, signed by the ACT counselor and notarized. Then, it should be delivered to the city or county attorney for review.

The ACT Program may mail a copy of the affidavit with attachment to the offender. Receipt of a copy of the affidavit may be sufficient to encourage the offender to enroll in or attend the ACT Program or follow the treatment program.

The city or county attorney should review the affidavit with attachment. He may want to review the court file, also. Then he should check his recommendations on the affidavit and forward it to the court.

The city or county attorney may mail a copy of the affidavit with attachment to the offender. Receipt of a copy of the affidavit with the prosecutor's recommendations may be sufficient to encourage the offender to enroll in or attend the ACT Program.

If the court suspended part of a jail sentence and it receives

the affidavit during the period of suspension, then a Warrant of Arrest or Order to Show Cause may be issued. The court should hold a hearing on whether to revoke the suspended sentence.[8] If the court revokes the suspended sentence, it may impose any jail time or fine that is previously suspended.

If the court did not suspend part of a jail sentence or it does not receive the affidavit during the period of the suspended sentence, then a Warrant of Arrest or Order to Show Cause for contempt of court may be issued. The court should hold a hearing on whether the offender should be held in contempt, Section 3-10-401, see Attorney General's Memorandum of October 31, 1984, from J. McLean to M. Greely.

If the offender does not believe he needs treatment, he may raise that issue at the hearing to revoke the suspended sentence or to hold the offender in contempt. The offender may obtain another evaluation for chemical dependency. He may present evidence regarding this evaluation. The prosecutor may present evidence regarding the ACT counselor's evaluation. If that defense is raised, the court should decide whether the offender needs treatment for chemical dependency. If the offender needs treatment, then the court may revoke the suspended sentence or find the offender in contempt. If the offender does not need treatment, the court should deny the motion to revoke the suspended sentence or to hold the offender in contempt.

If the offender is under the age of 18, not all of the above penalties apply. The court must follow Section 61-12-601(2) and

(3).[9] The maximum fine is $50.00. No jail time may be imposed. The court may suspend or revoke the child's drivers license but this is unnecessary as Driver Improvement will suspend or revoke the drivers license under Section 61-5-208(2). The child must attend and ACT Program to receive a restricted probationary drivers license. The court should send a notice to Driver Improvement regarding the conviction, the ACT Referral Form and the child's drivers license to Driver Improvement as outlined above.

There is no Montana Supreme Court decision on whether a child may be ordered to attend an ACT Program as part of a court imposed sentence. Section 61-12-601 does not include attendance at an ACT Program as part of the sentence. For this reason, a court may not have that authority.

The offender (adult or child) may complete the ACT Program including treatment, if necessary. If he does so, the ACT/Court copy of the ACT Referral Form should be returned to the court noting that all requirements were completed. The ACT/Driver Improvement copy should be kept in the ACT Program's file on the offender.

During the offender's attendance at the ACT Program, disagreements between the ACT Program staff and the offender may arise. The offender may bring these disagreements to the attention of the court by stating in writing the problem and delivering that writing to the court. A copy should be given to the ACT Program and the responsible city or county attorney. The court should set a hearing on the complaint. After a hearing, the court should enter an appropriate order.

SENTENCE AND TREATMENT - STATUTORY REFERENCES

(1) See Adjudication statutory Reference Note 3 for text of Section 61-8-714(1).

(2) Section 53-24-108(5) - No person receiving funding under this section to support operation of a state-approved alcoholism program may refuse alcoholism treatment, rehabilitation, or prevention services to a person solely because of the that person's inability to pay for those services.

(3) Section 61-5-208(2) - Any person whose license or privilege to drive a motor vehicle on the public highways has been suspended or revoked is not entitled to have such license or privilege renewed or restored unless the revocation was for a cause which has been removed, except that after the expiration of the period of such revocation or suspension, the person may make application for a new license as provided by law but the division may not then issue a new license unless and until it is satisfied, after investigation of character habits and driving ability of the person, that it is safe to grant the privilege of driving a motor vehicle on the public highways. When any person is convicted or forfeits bail or collateral not vacated for the offense of operating or being in actual physical control of a motor vehicle while under the influence of alcohol or a narcotic drug or knowingly or willingly under the influence of any other drug to a degree which renders him incapable of safely driving a motor vehicle, or a combination thereof, or for the offense of operation of a motor vehicle by a person with alcohol concentration of 0.10% or more, the division shall, upon receiving a report of such conviction or forfeiture of bail or collateral not vacated, suspend the license or driving privilege of the person for a period of 6 months. Upon receiving a report of a conviction or forfeiture of bail or collateral for a second, third, or subsequent offense within 5 years of the first offense, the division shall revoke the license or driving privilege of the person for a period of 1 year.

Section 61-11-101(2) - Every court having jurisdiction over offenses committed under any act of this state or municipal ordinance regulating the operation of motor vehicles on highways shall forward within 5 days, to the division a record of the conviction or forfeiture of bail, not vacated, of any person in the court for a violation of any such laws, other than regulations governing standing or parking, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted. The court may also recommend that the division issue a restricted probationary license in lieu of the suspension required if 61-5-208(2) on the condition that the individual attend a driver improvement school or an alcohol treatment program if one is available. The division shall issue a restricted probationary license unless the person otherwise is not entitled to

a Montana operator's or chauffeur's license.

(4) Section 46-18-201 - (1) Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, the court may:

(a) defer imposition of sentence, excepting sentences for driving under the influence of alcohol or drugs, for a period, except as otherwise provided, not exceeding 1 year for any misdemeanor or for a period not exceeding 3 years for any felony.

(5) Section 61-8-722 - (1) A person convicted of a violation of 61-8-406 shall be punished by imprisonment for not more than 10 days and shall be punished by a fine of not less than $100.00 or more than $500.00.

(2) On a second conviction of a violation of 61-8-406, he shall be punished by imprisonment for not less than 48 consecutive hours or more than 30 days and by a fine of not less than $300.00 or more than $500.00.

(3) On a third or subsequent conviction of a violation of 61-8-406, he shall be punished by imprisonment for not less than 48 consecutive hours or more than 6 months and by a fine of not less than $500.00 or more than $1,000.00.

(4) The provisions of 61-5-205(2), 61-5-208(2), and 61-11-203(2)(d) relating to revocation and suspension of driver's licenses shall apply to any conviction under 61-8-406.

(5) In addition to the punishment provided in this section, regardless of disposition, the defendant shall complete an alcohol information course at an alcohol treatment program approved by the department of institutions, which may include alcohol or drug treatment, or both, if considered necessary by the counselor conducting the program. Each counselor providing such education or treatment shall, at the commencement of the education or treatment, notify the court that the defendant has been enrolled in a course or treatment program. If the defendant fails to attend the course or the treatment program, the counselor shall notify the court of the failure.

(6) For the purpose of determining the number of convictions under this section, "conviction" means a final conviction, as defined in 45-2-101, or a forfeiture of bail or collateral deposited to secure the defendant's appearance in court, which forfeiture has not been vacated. An offender is considered to have been previously convicted for the purposes of this section if less than 5 years have elapsed between the commission of the present offense and a previous conviction. If there has been no additional conviction for an offense under this section for a period of 5 years after a prior conviction hereunder, then such prior offense shall be expunged from the defendant's record.

(6) House Bill 246 - A bill for an act entitled: "An Act Permitting the Seizure of a Driver's License by the Court on Conviction Requiring Mandatory Suspension; Amending Section 61-11-101, M.C.A."

Be it enacted by the legislature of the State of Montana:

Section 1. Section 61-11-101, MCA, is amended to read:

"61-11-101. Report of convictions and suspension or revocation of driver's licenses--surrender of licenses. (1) Whenever any person is convicted of any offense for which chapter 5 makes mandatory the suspension or revocation of the operator's or chauffeur's license of such person by the division, the court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses then held by the person so convicted. The court shall thereupon, within 5 days, forward the license to the division and at the same time forward a record of such conviction to the division, providing that if such person does not possess a driver's license the court shall so indicate in its report to the division.

(7) See text of Section 61-5-208(2) in Sentencing and Treatment Statutory Reference Note (3).

(8) Section 46-18-203 - (1) A judge, magistrate, or justice of the peace who has suspended the execution of a sentence or deferred the imposition of a sentence of imprisonment under 46-18-201 or his successor is authorized in his discretion to revoke the suspension or impose sentence and order the person committed. He may also, in his discretion, order the prisoner placed under the jurisdiction of the department of institutions as provided by law or retain such jurisdiction with his court.

(9) Section 61-12-601 - (2) Whenever, after a hearing before the court, it shall be found that a child under the age of 18 years has unlawfully operated a motor vehicle, the court may:

(a) impose a fine, not exceeding $50.00, provided such child shall not be imprisoned for failure to pay such fine;

(b) revoke the driver's license of such child, or suspend the same for such time as may be fixed by the court; and

(c) order any motor vehicle owned or operated by such child to be impounded by the probation officer for such time, not exceeding 60 days, as shall be fixed by the court. However, if the court shall find that the operation of such motor vehicle was without the consent of the owner, then such vehicle shall not be impounded.

(3) Upon nonpayment of any fine herein provided for, the court may order that any motor vehicle owned by said child or operated by said child with the consent of the owner shall be impounded until the fine shall be paid, or may order that the driver's license of such child shall be taken up and held by the probation officer until payment of said fine, or may cause both said motor vehicle and said driver's license to be taken up and impounded until such fine shall be paid; but no child shall be committed to or held in any detention facility or jail by reason of nonpayment of such fine.

A P P E N D I X

APPENDIX A

IN THE JUSTICE COURT OF _____ COUNTY,

BEFORE _____,

JUSTICE OF THE PEACE

STATE OF MONTANA,
Plaintiff)

vs)

_____,)
Defendant

No._____

SENTENCING ORDER
(SAMPLE)

On _____ (date) the Defendant _____ appeared for sentencing on the offense of driving under the influence of alcohol, Section 61-8-401(1). After a hearing the Court imposed the following sentence:

1. Sixty days in the county jail with all but 24 consecutive hours suspended on the condition the defendant complies with paragraphs 2 and 3.*

2. Pays a $300.00 fine.*

3. Enroll in an Alcohol Course/Treatment (ACT) Program by _____ (date), complete the program, pay for all costs of the program and complete any alcohol or drug treatment or both considered necessary by the ACT Counselor.

Dated this ____ day of _____, 19 __.

_____
JUSTICE OF THE PEACE

*The Court may impose a shorter jail sentence than 60 days and may suspend less than 59.

*The Court may impose up to a $500.00 fine. It may suspend part of the fine on conditions similar to Paragraph 1. There is a minimum fine of $100.00

APPENDIX B

INDIGENCY DETERMINATION AFFIDAVIT

State of Montana)

County of _____)

_____, being first duly sworn on oath deposes and says:

That he is the Defendant in State v._____.

That he gives the following answers to the questions herein set forth:

FINANCIAL INQUIRY

1. Employment:
   a. Present employer:_____
   b. Address: _____
   c. Type of work:_____
   d. Monthly wages or salary:_____
   e. Length of employment with present employer:_____
   f. If unemployed, how long since employed:_____
   g. Prior employer_____Income:_____
   h. Income last year_____

2. Are you receiving public aid (unemployment compensation, welfare, social security)? Yes___ No___. If yes, from what agency?_____

3. Other income (from stocks, bonds, pensions, etc.)_____
   _____

4. Marital Status:
   a. Single__Married__Divorced__Separated__
   b. Spouse's name_____
      Address_____
      Place of Employment_____
      Type of work_____
      Monthly wages or salary_____
   c. Support or alimony payments_____
   d. Dependents:

Names	Relationship to Dependent	Age
_____	_____	____
_____	_____	____
_____	_____	____
_____	_____	____

5. Do you own or are you buying a home? Yes___ No___
   a. Estimate market value_____
   b. Amount of mortgage_____
   c. Monthly rent or house payment_____

6. Do you own an automobile? Yes___ No___
   Make_____ Year_____ Model_____
   Market value_____ Mortgage_____

7. Do you have a checking account? Yes___ No___
   a. Name and address of bank_____
   b. Present balance in account_____

8. Do you have a savings account? Yes___ No___
   a. Name and address of bank_____
   b. Present balance in account_____

9. Other assets: (Specify government bonds, savings certificates, cash or other property, including assets held in someone else's name which might be used to help you pay for the ACT Program).

_____
_____
_____
_____

10. Indebtedness: (List any current obligations, indicating amounts owed and to whom they are payable).

_____
_____
_____
_____

Dated this_____ day of _____, 19___.

_____

Subscribed and sworn to before me this _____ day of _____,

19___.

_____
Notary Public for the State of Montana
Residing at:_____
My Commission Expires:_____

MONTANA ALCOHOL COURSE/TREATMENT REFERAL

NOTICE TO APPEAR AND COMPLAINT NUMBER: _____

DRIVERS NAME FIRST MIDDLE LAST

STREET ADDRESS

CITY STATE ZIP

DATE OF BIRTH	MO	DAY	YEAR	D/L NUMBER	D/L STATE

DOCKET NUMBER: _____

BAC: _____

JUSTICE ☐ CITY ☐ DISTRICT ☐ _____

COURT OF _____ DEPT# _____

COUNTY OF _____

SENTENCE _____

I ☐ DO ☐ DO NOT RECOMMEND THAT THE MONTANA HIGHWAY PATROL BUREAU ISSUE A RESTRICTED PROBATIONARY LICENSE TO THIS INDIVIDUAL, UNLESS THE INDIVIDUAL OTHERWISE IS NOT ENTITLED TO SUCH A LICENSE.

_____ _____

JUDGE'S SIGNATURE DATE

This Driver is hereby ordered to attend the ALCOHOL COURSE/TREATMENT PROGRAM conducted by:

AGENCY NAME _____

LOCATED AT _____

CITY _____ STATE _____ ZIP _____

ENROLLMENT DATE: _____

And is required to pay the enrollment fee for this program to the above named agency.

TO BE COMPLETED BY AGENCY

FEE COLLECTED BY	DATE COLLECTED
REFERRED TO	DATE REFERRED

COMMENTS (include reason if program was not completed).

SUCCESSFUL COMPLETION DATE

_____ _____

COUNSELOR'S SIGNATURE DATE

APPENDIX C

APPENDIX D

ACT TREATMENT RECOMMENDATIONS

NAME: _____

ADDRESS: _____

_____

TELEPHONE NUMBER: _____

DOCKET NUMBER: _____

DATE OF CHARGE: _____

DATE COURSE BEGAN: _____

BLOOD ALCOHOL LEVEL: _____

DATE COURSE COMPLETED: _____

ATTITUDE: COOPERATIVE_____ COMPLACENT_____ UNCOOPERATIVE_____

PROBLEM INDICATORS:

_____ ALCOHOL RELATED ARRESTS/CHARGES

_____ BAC ABOVE .2%

_____ LOSS OF CONTROL OF DRINKING

_____ SELF ADMISSION OF PROBLEM DRINKING

_____ PRIOR DIAGNOSIS

_____ EMPLOYMENT PROBLEMS

_____ OTHER (SPECIFY)

_____ PASSES OUT DUE TO DRINKING

_____ SYMPTOMS OF PHYSICAL DEPENDENCY

_____ SYMPTOMS OF PSYCHOLOGICAL DEPENDENCY

_____ PERSONALITY CHANGES

_____ FAMILY OR SOCIAL PROBLEMS

_____

TEST	RESULT	CONCLUSION

APPENDIX E

A F F I D A V I T

State of Montana)
:ss
County of_____)

I,_____, ACT Counselor, after being first duly sworn, depose and say:

1. The attached ___ ACT Referral Form or ___ ACT Treatment recommendations are incorporated by reference (Check one).

2. The Defendant,_____ has done the following: (Check one)

_____ A. Failed to enroll in the ACT Program by _____ (Date)

_____ B. Refused to follow the treatment recommendations of the ACT Counselor.

_____ C. Failed to follow the treatment recommendations of the ACT Counselor by:_____

_____

_____
(specify)

Dated this ___ day of _____, 19__.

_____
ACT Counselor

Subscribed and sworn to before this ___ day of _____, 19__.

_____
Notary Public for the State of Montana
Residing At:
My Commission Expires:

Delivered to City/County Attorney:_____

IDENTIFICATION

( ) Misuser (no pattern)
( ) Abuser
( ) Chemically Dependent
( ) Unidentified

RECOMMENDATIONS: _____

_____

_____

_____

_____

Date, Time, Place of Client's Next Appointment/Appearance:

_____

_____

_____
Counselor Signature

Date: _____

Recommendations:

_____ Accepted

_____ Refusal

_____
Client's Signature

Date: _____

REASON FOR NONCOMPLIANCE
(To be sent to the Court)

_____

_____

_____

_____
Counselor Signature

Date: _____

COUNTY/CITY ATTORNEY

I reviewed the above Affidavit. I recommend the following to the Court: (Check appropriate blank.)

_____ 1. No action be taken.

_____ 2. Warrant of Arrest be issued for:

_____ A. Contempt of Court.

_____ B. Revocation of suspended sentence.

_____ 3. Order to Show Cause be issued for:

_____ A. Contempt of Court.

_____ B. Revocation of suspended sentence.

_____

Signature of City/County Attorney

Date: _____

Delivered to Justice/City Court on

_____. (Date)

D-48

PROCEDURE FOR HANDLING PERSONS CHARGED WITH DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS

Drivers impaired by alcohol and/or drugs present a serious threat to the life and safety of persons using the streets and highways of this state; consequently, a comprehensive, coordinated countermeasures program involving education, enforcement, adjudication, treatment, and public support is essential if the program is to have long-term success in combating the DUI problem.

Enforcement is one of the key elements in the DUI countermeasures program. If the Department does not detect and apprehend impaired drivers, the rest of the system cannot function. The detection and arrest of impaired drivers differs significantly from other traffic law violations. In most jurisdictions, specific statutes and regulations govern driving while under the influence of alcohol and/or drugs, implied consent, and chemical tests for intoxication. These statutes and regulations include many provisions which affect an officer's authority and establish procedures for conducting chemical tests and initiating the DUI sanction process.

The Department fully supports a comprehensive, cooperative DUI countermeasures program and has established DUI enforcement as one of its highest priorities.

Officers must be alert for signs of alcohol and/or drug impairment in all contacts with motorists and make every effort to detect and apprehend them. After conducting an initial examination at the scene of the traffic contact, and upon determining that probable cause to arrest is present, officers will effect a physical arrest of the subject.

Officers will not release a DUI suspect or arrange for alternate transportation in lieu of arrest.

Chemical test(s) will be offered in accordance with state statute and local procedures. Officers are reminded that chemical tests are supplemental tools only, and a refusal to submit to a chemical test shall not constitute cause to issue a citation for a lesser charge.

Procedure

1. Training.
   a. All sworn officers shall complete a Field Sobriety Training Seminar and receive appropriate in-service training as mandated by the Montana POST Council.
   b. All Department personnel conducting preliminary or evidential chemical tests for intoxication shall complete operator training programs and appropriate in-service recertification as prescribed by state requirements.

2. DUI detection and pre-arrest screening detection is the first

step in any DUI enforcement action. The officer's observations in this stage are crucial in establishing probable cause upon which the arrest decision is based. Officers should perform the following tasks:

a. Recognize and identify specific driving behaviors that have a high probability of signifying that the driver may be impaired by alcohol and/or drugs.
b. Recognize and identify specific driving behaviors occurring during vehicle stops that provide additional evidence/suspicion that the driver may be impaired.
c. Note all observations leading to the suspicion that the driver may be impaired.
d. Exercise due care and caution in pursuing impaired drivers and be prepared for unusual reactions from the driver.
e. Apprehension should be made as soon as possible in a safe location.
f. Notify dispatch of location, license number, and reason for the stop.
g. If needed, request assistance.
h. Once the vehicle has stopped and it has been determined that the driver is impaired, do not allow the driver to move the vehicle.
i. Approach the vehicle with caution but with minimal delay.
j. Obtain the driver's license and other appropriate documents (such as registration and insurance card).
k. Interview the driver and passengers.
l. Recognize and identify specific characteristics, attitudes, and actions commonly manifested by impaired drivers during face-to-face contact.
m. Note all observations leading to the suspicion that the driver may be impaired. If probable cause exists to support your suspicion, request the driver exit the vehicle for further investigation.
n. If the vehicle was not observed in motion, determine if probable cause exists to charge the driver with actual physical control.
o. Request the subject exit the vehicle and move to a safe location to conduct a Field Sobriety Test (not between the officer's and subject's vehicles).
p. Administer appropriate Field Sobriety Tests to assess impairment (walk-turn, horizontal gaze nystagmus test, one-leg stand test, etc.).

3. Arrest and processing.
   a. If all elements of the DUI violation have been clearly established, the officer shall effect a physical arrest of the subject.
   b. Search the subject and transport as per Policy D-32.

c. Secure the vehicle and property; arrange for transportation/safety of any passengers.
d. Transport the subject to a facility for evidential testing and processing.
e. Evidential chemical testing in accordance with state law MCA 61-8-402 and 61-8-405.
(1) Request subject to take a breath or blood test as per Implied Consent MCA 61-8-402.
(2) If the subject refuses to submit to a chemical test, complete the appropriate forms to invoke the Implied Consent sanction. (The subject is still entitled to obtain an independent chemical test at his own expense, even if he refuses the police designated test.)
f. Advise the subject of rights (Miranda), obtain physical dexterity tests, and record with video camera, if available.
g. Remand the subject to the custody of the county sheriff or:
(1) Department policy supports release to a responsible third party whenever possible and/or practical.
h. Complete arrest report and required forms.
(1) Departmental forms must be completed as required, documenting all evidence gathered during the investigation.
(2) A supplemental narrative report of the arrest will be prepared for court purposes.
(3) Have a copy of driver's license information indicating prior DUI convictions, within the last five years, attached to the arrest report.

4. Disposition of arrestee's vehicle.
a. This shall be handled as directed in Policy D-33.

DRIVERS RECOMMENDED FOR REEXAMINATION BY LICENSING AUTHORITIES

Officers of the Montana Highway Patrol will recommend to the Motor Vehicle Division the reexamination of those drivers whom the officer has reason to believe are physically or mentally unable to safely operate a motor vehicle.

1. Physical or mental disability.
   a. Epileptic seizure, blackout, poor eyesight, and stroke are just a few examples of disabilities that an officer encounters in the course of his duties.
   b. When an officer has reason to believe that a driver is a hazard to himself/herself and other highway users, the officer will complete form number DES-1004 and forward to the Motor Vehicle Division.