TRAFFIC RESOURCE CENTER for JUDGES

Statutory Limitations on Plea Bargaining of Impaired Driving Cases

Issue Brief 3: Statutory Limitations on Plea Bargaining of Impaired Driving Cases (March 2014)

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State legislatures in twenty-one states have crafted statutory components that limit the ability of the prosecution and/or the court to dispose of impaired driving cases by plea bargains, which either results in a dismissal or a reduction of the impaired driving charge. These statutes are clearly focused on increasing public safety. The scope of these statutes and the mechanisms they employ can vary considerably state by state. However, even the most restrictive of these statutes has been drafted to allow charges that are supported by an insufficient factual or legal basis to escape the scope of the statute and be handled appropriately. This issue brief will describe the statutes that are currently in place.

The most restrictive statutes prohibit the prosecutor and/or the court from engaging in or accepting the results of plea negotiated impaired driving cases which result in the dismissal or reduction in the impaired driving charge. Arizona, Arkansas, California, Colorado, Kentucky, Nevada and Wyoming all have this type of statute. However, these states allow the prosecution and/or the court some flexibility to resolve cases in which there is an insufficient legal or factual basis by a dismissal or reduction in charge. Florida has a similar statute, but it applies only to cases in which the driver's BAC was over .15 or cases that involve injury to person or property, or death. Kansas also has a similar statute except that it explicitly excludes diversion agreements from the statutory scope. New Mexico's version of the statute allows for plea negotiations as long as the resulting conviction includes at least one

DUI related offense.

There are a few other innovative statutory procedures that states have crafted to limit plea negotiations in impaired driving cases while still allowing the prosecution and/or Court to be flexible in handling individual cases. New Hampshire requires prosecutors to submit a written report to the attorney general describing the plea agreement anytime there is a reduction in charges or a plea to a non-impaired driving charge, and these reports are made available for public inspection. In New Jersey, a victim suffering a bodily injury due to impaired driving must be provided with the opportunity to meet with the prosecution prior to any dismissal or reduction of an impaired driving charge. Prosecutors in Connecticut must state on the record in open court their reasons for a reduction in charges or a dismissal. Similarly, North Carolina and South Dakota require an explanation in open court and a written statement by the prosecution for the file. Finally, the state of Utah has a statutory mechanism which requires the prosecution and the police to do a complete criminal history check and then assert to the court that the defendant is appropriately charged in light of that history.

A citation and the relevant statutory language for each relevant state are listed below. Cumulatively, the statutes demonstrate that state legislatures across the nation are concerned that some impaired drivers are escaping the punitive side of impaired driving convictions and the potential for enhancement of any subsequent convictions. This focus on reducing or eliminating prosecutorial and judicial discretion for miscreant behaviors is not unique in state codes, but it is highly unusual. However, it is indicative of how seriously state legislators take the problem of impaired driving.

Statutory Mechanisms by State:

State	Relevant Statutory Language
Arizona	A.R.S. § 28-1387(I), "Except for another violation of this article, the state shall not dismiss a charge of violating any provision of this article unless there is an insufficient legal or factual basis to pursue that charge."
Arkansas	A.C.A. § 5-65-107(a), "(a) A person arrested for violating § 5-65-103 [general impaired driving statute] shall be tried on those charges or plead to those charges, and no such charges shall be reduced."
California	Cal Pen Code § 1192.7(a)(2), "Plea bargaining in any case in which the indictment or information charges any serious felony, any felony in which it is alleged that a firearm was personally used by the defendant, or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence."

Colorado	C.R.S. 42-4-1301(4), "No court shall accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or guilty to the offense of UDD from a person charged with DUI or DUI per se; except that the court may accept a plea of guilty to a non-alcohol-related or non-drug-related traffic offense or to UDD upon a good faith representation by the prosecuting attorney that the attorney could not establish a prima facie case if the defendant were brought to trial on the original alcohol-related or drug-related offense."
Connecticut	Conn. Gen. Stat. § 14-227a(f), "If a person is charged with a violation of the provisions of subsection (a) of this section, the charge may not be reduced, nolled or dismissed unless the prosecuting authority states in open court such prosecutor's reasons for the reduction, nolle or dismissal."
Florida	Fla. Stat. § 316.656 "Mandatory adjudication; prohibition against accepting plea to lesser included offense (1) Notwithstanding the provisions of 948.01, no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of 316.193, for manslaughter resulting from the operation of a motor vehicle, or for vehicular homicide. (2) (a) No trial judge may accept a plea of guilty to a lesser offense from a person charged under the provisions of this act who has been given a breath or blood test to determine blood or breath alcohol content, the results of which show a blood or breath alcohol content by weight of 0.15 percent or more. (b) No trial judge may accept a plea of guilty to a lesser offense from a person charged with a violation of, manslaughter resulting from the operation of a motor vehicle, or vehicular homicide."
Kansas	K.S.A. § 8-1567(m), "No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section, or a violation of any ordinance of a city or resolution of any county in this state which prohibits the acts prohibited by this section, to avoid the mandatory penalties established by this section or by the ordinance. For the purpose of this subsection, entering into a diversion agreement pursuant to K.S.A. 12-4413 et seq. or 22-2906 et seq., and amendments thereto, shall not constitute plea bargaining."

Kentucky	KRS § 189A.120, "(1) When an alcohol concentration for a person twenty-one (21) years of age or older in a prosecution for violation of KRS 189A.010 is 0.08 or above, is 0.02 or above for a person under the age of twenty-one (21), or when the defendant, regardless of age, has refused to take an alcohol concentration or substance test, a prosecuting attorney shall not agree to the amendment of the charge to a lesser offense and shall oppose the amendment of the charge at trial, unless all prosecution witnesses are, and it is expected they will continue to be, unavailable for trial. (2) A prosecuting attorney shall not amend a blood alcohol concentration, and he or she shall oppose the amendment of the percentage, unless uncontroverted scientific evidence is presented that the test results were in error. In those cases, the prosecutor shall state his or her reasons for agreeing with the amendment, and the scientific data upon which the amendment was made shall be made a part of the record in this case."
Mississippi	Miss. Code Ann. § 63-11-39, "The court having jurisdiction or the prosecutor shall not reduce any charge under this chapter to a lesser charge."
Nevada	Nev. Rev. Stat. Ann. § 484C.420(1), "A prosecuting attorney shall not dismiss a charge of violating the provisions of NRS 484C.110 or 484C.120 in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for any other reason unless the attorney knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial."
New Hampshire	RSA 265-A:21(II), "Notwithstanding any other provision of law to the contrary, in any case in which a person is arrested for and charged with the offense of driving or attempting to drive a vehicle on any way or driving, operating, attempting to operate, or being in actual physical control of an OHRV or operating or attempting to operate a boat while under the influence of intoxicating liquor or drugs or while having an alcohol concentration of 0.08 or more and that charge is reduced from a second or subsequent offense to a first offense or in which the original charge is reduced to or in any manner substituted with another charge or a nolle prosequi entered in exchange for an agreement to plead guilty or nolo contendere to another charge, the prosecutor shall submit to the attorney general a written report describing such agreement. All such written reports shall be submitted to the attorney general on a monthly basis. The report shall contain such information as the attorney general shall prescribe; provided, however, that the attorney general shall not be subject to the provisions of RSA 541-A in prescribing such information. The report required by this paragraph shall be a public record and shall be available for public inspection as provided in RSA 91-A:4."

New Jersey	N.J. Stat. § 39:4-50.12, "A victim shall be provided with an opportunity to consult with the prosecutor prior to dismissal of the case or the filing of a proposed plea negotiation with the court, if the victim sustained bodily injury or serious bodily injury as defined in N.J.S. 2C:11-1."
New Mexico	N.M. Stat. Ann. § 66-8-102.1, "Where the complaint or information alleges a violation of Section 66-8-102 NMSA 1978, any plea of guilty thereafter entered in satisfaction of the charges shall include at least a plea of guilty to the violation of one of the subsections of Section 66-8-102 NMSA 1978, and no other disposition by plea of guilty to any other charge in satisfaction of the charge shall be authorized if the results of a test performed pursuant to the Implied Consent Act [66-8-105 NMSA 1978] disclose that the blood or breath of the person charged contains an alcohol concentration of: A. eight one hundredths or more; or B. four one hundredths or more if the person charged is driving a commercial motor vehicle."
New York	NY CLS Veh & Tr § 1192(10)(a), "(a) (i) In any case wherein the charge laid before the court alleges a violation of subdivision two, three [fig 1] , four or four-a of this section, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of one of the subdivisions of this section, other than subdivision five or six, and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized; provided, however, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of this section is not warranted, such district attorney may consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge; provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition. (ii) [Added, L 2006] In any case wherein the charge laid before the court alleges a violation of subdivision two, three, four or four-a of this section, no plea of guilty to subdivision one of this section shall be accepted by the court unless such plea includes as a condition thereof the requirement that the defendant attend and complete the alcohol and drug rehabilitation program established pursuant to section eleven hundred ninety-six of this article, including any assessment and treatment required thereby; provided, however, that such requirement may be waived by the court upon application of the district attorney or the defendant demonstrating that the defendant, as a condition of the plea, has been required to enter into and complete an alcohol or drug treatment program prescribed pursuant to an alcohol or

New York (cont.)	substance abuse screening or assessment conducted pursuant to section eleven hundred ninety-eight-a of this article or for other good cause shown. The provisions of this subparagraph shall apply, notwithstanding any bars to participation in the alcohol and drug rehabilitation program set forth in section eleven hundred ninety-six of this article; provided, however, that nothing in this paragraph shall authorize the issuance of a conditional license unless otherwise authorized by law. (iii) In any case wherein the charge laid before the court alleges a violation of subdivision one of this section and the operator was under the age of twenty-one at the time of such violation, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of such subdivision; provided, however, such charge may instead be satisfied as provided in paragraph (c) of this subdivision, and, provided further that, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of subdivision one of this section is not warranted, such district attorney may consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge; provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition."
North Carolina	N.C. Gen. Stat. § 20-138.4, "(a) Any prosecutor shall enter detailed facts in the record of any case subject to the implied-consent law or involving driving while license revoked for impaired driving as defined in G.S. 20-28.2 explaining orally in open court and in writing the reasons for his action if he: (1) Enters a voluntary dismissal; or (2) Accepts a plea of guilty or no contest to a lesser included offense; or (3) Substitutes another charge, by statement of charges or otherwise, if the substitute charge carries a lesser mandatory minimum punishment or is not a case subject to the implied-consent law; or (4) Otherwise takes a discretionary action that effectively dismisses or reduces the original charge in a case subject to the implied-consent law. General explanations such as "interests of justice" or "insufficient evidence" are not sufficiently detailed to meet the requirements of this section. (b) The written explanation shall be signed by the prosecutor taking the action on a form approved by the Administrative Office of the Courts and shall

North Carolina (cont.)	contain, at a minimum: (1) The alcohol concentration or the fact that the driver refused. (2) A list of all prior convictions of implied-consent offenses or driving while license revoked. (3) Whether the driver had a valid drivers license or privilege to drive in this State as indicated by the Division's records. (4) A statement that a check of the database of the Administrative Office of the Courts revealed whether any other charges against the defendant were pending. (5) The elements that the prosecutor believes in good faith can be proved, and a list of those elements that the prosecutor cannot prove and why. (6) The name and agency of the charging officer and whether the officer is available. (7) Any reason why the charges are dismissed. (c) (See Editor's note on effective date) A copy of the form required in subsection (b) of this section shall be sent to the head of the law enforcement agency that employed the charging officer, to the district attorney who employs the prosecutor, and filed in the court file. The Administrative Office of the Courts shall electronically record this data in its database and make it available upon request."
Oregon	ORS § 813.170, "(1) Notwithstanding ORS 135.405 to 135.445, a person charged with the offense of driving under the influence of intoxicants shall not be allowed to plead "guilty" or "no contest" to any other offense in exchange for a dismissal of the offense charged. No district attorney or city attorney shall make any motion and no judge shall enter any order in derogation of this section. This section does not prohibit diversion as provided under ORS 813.200. (2) Notwithstanding ORS 135.881 to 135.901, a person charged with the offense of driving under the influence of intoxicants shall not be allowed to enter into any program of supervised performance or diversion except as provided under ORS 813.200."

Pennsylvania	75 Pa.C.S. § 3812, "The presiding judicial officer at the preliminary hearing or preliminary arraignment relating to a charge of a violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock) shall not reduce or modify the original charges without the consent of the attorney for the Commonwealth."
South Dakota	S.D. Codified Laws § 32-23-1.3, "Any person arrested for driving or being in actual physical control of a vehicle while the weight of alcohol in the blood of the arrested person is 0.08 percent or greater, shall be charged with a violation of § 32-23-1. The charge may be reduced or dismissed only if the prosecuting attorney states the reasons for reduction or dismissal in writing and on the record and files the reasons with the clerk of courts."
Utah	Utah Code Ann. § 41-6a-513, "(1) A court may not accept a plea of guilty or no contest to a charge under Section 41-6a-502 unless: (a) the prosecutor agrees to the plea: (i) in open court; (ii) in writing; or (iii) by another means of communication which the court finds adequate to record the prosecutor's agreement; (b) the charge is filed by information as defined under Section 77-1-3; or (c) the court receives verification from a law enforcement agency that the defendant's driver license record contains no record of a conviction, arrest, or charge for: (i) more than one prior violation within the previous 10 years of any offense which, if the defendant were convicted, would qualify as a "conviction" as defined under Subsection 41-6a-501(2); (ii) a felony violation of Section 41-6a-502; or (iii) automobile homicide under Section 76-5-207. (2) A verification under Subsection (1)(c) may be made by:

Utah (cont.)	(a) a written indication on the citation; (b) a separate written document; or (c) any other means which the court finds adequate to record the law enforcement agency's verification. (3) (a) Prior to agreeing to a plea of guilty or no contest or to filing an information under Subsection (1), the prosecutor shall examine the criminal history or driver license record of the defendant. (b) If the defendant's record contains a conviction or unresolved arrest or charge for an offense listed in Subsections (1)(c)(i) through (iii), a plea may only be accepted if: (i) approved by: (A) a district attorney; (B) a deputy district attorney; (C) a county attorney; (D) a deputy county attorney; (E) the attorney general; or (F) an assistant attorney general; and (ii) the attorney giving approval under Subsection (3)(b)(i) has felony jurisdiction over the case. (4) A plea of guilty or no contest is not made invalid by the failure of the court, prosecutor, or law enforcement agency to comply with this section."
Wisconsin	Wis. Stat. § 967.055, "(a) Notwithstanding 971.29, if the prosecutor seeks to dismiss or amend a charge under 346.63 (1) or (5) or a local ordinance in conformity therewith, or 346.63 (2) or (6) or 940.25, or 940.09 where the offense involved the use of a vehicle or an improper refusal under 343.305, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor

Wisconsin (cont.)	vehicles by persons who are under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving, in deterring the operation of motor vehicles by persons with a detectable amount of a restricted controlled substance in his or her blood, or in deterring the operation of commercial motor vehicles by persons with an alcohol concentration of 0.04 or more. The court may not approve an application to amend the vehicle classification from a commercial motor vehicle to a noncommercial motor vehicle unless there is evidence in the record that the motor vehicle being operated by the defendant at the time of his or her arrest was not a commercial motor vehicle. (b) Notwithstanding 971.29, if the prosecutor seeks to dismiss or amend a charge under 30.681 (1) or a local ordinance in conformity therewith, a charge under 30.681 (2), a charge under 30.684 (5) or a local ordinance in conformity therewith or a charge under 940.09 or 940.25 if the offense involved the use of a motorboat, except a sailboat operating under sail alone, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motorboats by persons who are under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of operating a motorboat safely, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of operating a motorboat safely. (3) NO DEFERRED PROSECUTION. A prosecutor may not place a person in a deferred prosecution program if the person is accused of or charged with any of the following offenses: (a) A violation of 346.63 (1) or (5) or a local ordinance in conformity therewith.

Wisconsin (cont.)	(b) A violation of 346.63 (2) or (6). (c) A violation of 940.09 if the offense involved the use of a vehicle. (d) A violation of 940.25."
Wyoming	Wyo. Stat. § 31-5-233(j), "Any person charged under this section or a municipal ordinance which substantially conforms to the provisions of this section shall be prosecuted under this section or the ordinance and not under a reduced charge or dismissed unless the prosecuting attorney in open court moves or files a statement to reduce the charge or dismiss, with supporting facts, stating that there is insufficient evidence to sustain the charge."

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