NOTE: As provided in LFC policy, this report is intended only for use by the standing finance committees of the legislature. The Legislative Finance Committee does not assume responsibility for the accuracy of the information in this report when used for other purposes.

The most recent FIR version (in HTML & Adobe PDF formats) is available on the Legislative Website. The Adobe PDF version includes all attachments, whereas the HTML version does not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

F I S C A L I M P A C T R E P O R T

SPONSOR: Miera DATE TYPED: 03/10/03 HB 405/aHTC

SHORT TITLE: Chemical Test Time Frame For DWI Suspects SB

ANALYST: Fox-Young

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	**FY04**	**FY03**	**FY04**		
			$0.1 Significant	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

Responses Received From
Department of Health (DOH)
Attorney General (AG)
Administrative Office of the District Attorneys (AODA)
Public Defender Department (PDD)
Department of Public Safety (DPS)

SUMMARY

Synopsis of HTC Amendment

The House Transportation Committee Amendment to House Bill 405, providing that:

> "If the chemical test is administered more than three hours after the alleged driving while under the influence of intoxicating liquor, the test result is admissible as evidence of the alcohol concentration in the person's blood or breath at the time of the test ~~alleged driving~~ and the trier of fact shall determine what weight to give the test result."

The amendment makes this change in both §66-8-102 and §66-8-110.

Significant Issues

As amended, the bill purports to make blood or breath tests admissible in New Mexico courts as evidence of the alcohol concentration at the time of the test. It does not create a statutory inference that a 0.08 BAC within a specified time is prima facie evidence of a per se violation of Section 66-8-102(C) nor does it create a rebuttable presumption that an

individual was DWI based on test results taken at a given time after driving.

Synopsis of Original Bill

House Bill 405 amends §66-8-102 and §66-8-110, imposing a limitation of three hours during which time a chemical test must be administered to DWI suspects. If a test is administered after that period, the test result is admissible as evidence of the alcohol concentration at the time of driving and the trier of fact shall determine what weight to give the result.

The bill makes technical amendments to the language in both statutes.

Significant Issues

The Public Defender Department (PDD) indicates that although the bill purports to make test results admissible as evidence in New Mexico courts, only the New Mexico Supreme Court can determine admissibility of evidence. (Ammerman v. Hubbard Broadcasting, 89 N.M. 307, 551 P.2d 1359 (1779)).

The bill gives the prosecution the opportunity to present relation-back evidence (scientific evidence that demonstrates the intoxicating effects of alcohol at the time of driving) to prove cases, preventing courts from ruling such evidence inadmissible.

Currently, the burden to prove the validity of a blood alcohol concentration (BAC) test taken after the alleged driving under the influence lies on the state. The state must prove, beyond a reasonable doubt, that a defendant was above the legal limit at the time of driving. The bill shifts a portion of this burden to the defense, who must demonstrate that a BAC test taken at any point after the alleged incident does not indicate that a defendant was at or above .08% BAC while driving.

There are innumerable applications and circumstances in which the results of a BAC test taken significantly after an alleged DWI incident cannot alone demonstrate that the DWI occurred. For instance, in a situation where the defendant drank a significant amount just before driving, a BAC taken two hours after the alleged DWI is likely to be significantly higher than one taken immediately following the alleged incident. By identifying a large window in which BAC testing shall determine the alcohol concentration in a person's blood as well as expanding the time frame for admissibility of evidence indefinitely significantly, the bill significantly increases the likelihood that innocent individuals will be found guilty of DWI.

PDD notes that the bill responds to the analysis in the New Mexico Court of Appeals Opinion in State v. Baldwin. The Baldwin case reversed a DWI conviction where the blood alcohol test was taken over two hours after the alleged driving and there was insufficient corroborative evidence to support a finding of intoxication. In that case, the trial court had directed out the verdict under Section 66-8-102(A), which required proof of impairment to the slightest degree, because the defendant's conduct and performance on the field sobriety tests did not persuade the court he was intoxicated.

In State v. Baldwin, the Court of Appeals included the following in its opinion:

> "As a matter of sound public policy, our legislature could choose to create a statutory inference that a 0.08 BAC within a specified time, say two or three hours after driving, is prima facie evidence of a per se violation of Section 66-8-102(C),

> which a defendant could then try to rebut….We emphasize that although our legislature has the authority to make such a reasoned policy judgment, a lay jury does not. The duty of a jury is to apply the law, not to make it….
>
> …In other jurisdictions, the BAC creates a rebuttable presumption of DWI, with the relation-back question left to the weight, not the admissibility of the evidence, as long as the test is taken within a reasonable period of time….
>
> …Other states, like New Mexico, allow convictions based on a subsequent BAC, and without scientific relation-back evidence, if the BAC is sufficiently corroborated by additional evidence of aberrant behavior on the part of the accused….
>
> …New Mexico jurisprudence has already started down the path chosen in Cavanaugh, and we intend to stay the course. New Mexico has indicated that with sufficient, corroborative evidence a jury may reasonably infer that an excessive BAC reading relates back to the time of driving. That evidence is lacking in this case."

The bill does not identify a specific period in which BAC testing may be performed nor does it create a statutory inference that a 0.08 BAC within a specified time is prima facie evidence of a per se violation of Section 66-8-102(C). It does not create a rebuttable presumption of DWI nor does it require corroborative evidence of aberrant behavior in cases where scientific relation-back evidence is lacking. Rather, it opens the door for the use of relation-back evidence in all cases, regardless of the particular circumstances involved.

AG notes that recent cases from the New Mexico Court of Appeals have provided that the DWI statute requires a "nexus" between the positive blood alcohol test and the time of the alleged driving. AG refers to State v. Baldwin as well as to State v. Cavanaugh and State v. Martinez. (In the latter two cases, courts have upheld convictions because there was corroborating evidence of intoxication or more reliable relation-back evidence.)

AG also notes the bill could impact some of the more serious cases in which blood or breath cannot be taken immediately because of driver injuries, drivers who flee the scene, etc.

FISCAL IMPLICATIONS

PDD indicates that the bill will likely increase trial costs significantly, since both the prosecution and the defense will have to hire medical experts to explain the process of alcohol metabolism to the jury, laying out the factual inferences that can be drawn from a test result obtained so long after the fact.

AODA reports that in the short term, the bill will likely create more pre-trial motion work and post-conviction appeals to the district court until the parameters of the statutory amendments are more fully developed through litigation.

RELATES, CONFLICTS

Section 7.33.2.12 (2) of the regulations promulgated by the Scientific Laboratory Division of the Department of Health state that "blood samples should be collected within two hours of arrest."

TECHNICAL ISSUES

AODA notes that, if read broadly, the bill could be interpreted to say that any test performed within the three hours creates a presumption, rebuttable or otherwise, that the driver committed a *per se* violation. This interpretation is complicated by the lack of specific and explicit language creating such a presumption. AODA references Vallejos v. Barnhart, 120 N.M. 438, 440, 696 P.2d 121, 123 (1985) (Courts will not add words to a statute unless it is necessary to conform to obvious intent of the Legislature.)

If, as a matter of policy, it is the Legislature's intent that results from test performed within three hours of the driving create a presumption of a *per se* violation, AODA suggests the Legislature include specific language to this end. AODA references language from the corresponding California statute, Cal. Veh. Code § 23152 (B), which states:

"In any prosecution under this subdivision, it is a **rebuttable presumption** that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving." (emphasis added)

JCF/yr/njw